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A TREATISE

ON THE

# LAW OF AGENCY

INCLUDING

SPECIAL CLASSES OF AGENTS

ATTORNEYS, BROKERS AND FACTORS, AUCTIONEERS,  
MASTERS OF VESSELS, ETC., ETC.

BY

WILLIAM LAWRENCE CLARK

(Author of Clark and Marshall on Private Corporations)

AND

HENRY H. SKYLES

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IN TWO VOLUMES

VOL. I

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ST. PAUL, MINN.

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# VOLUME I.

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# LAW OF AGENCY.

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## BOOK I.

### NATURE, ESTABLISHMENT, AND TERMINATION OF THE RELATION.

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#### CHAPTER I.

##### DEFINITION AND NATURE OF THE RELATION IN GENERAL.

- § 1. Agency defined.
- 2. Creation and existence of the relation.
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##### § 1. Agency defined.

It has sometimes been said, in substance, that agency is the legal relation founded upon the express or implied contract of the parties, or created by law, whereby one party, called the agent, is employed and authorized to represent and act for the other, called the principal, in business dealings with

C. & S.—1.

third persons.<sup>1</sup> But this is not strictly true. The relation of principal and agent may exist without any contract whatever, either express or implied, between the parties, and at the same time without being created by law. An example is in the case of a gratuitous agency, in which one person authorizes another to act for him in a certain matter, without any agreement, either express or implied, or created by law, to compensate the other and without any undertaking on the part of the other to act as authorized. In such a case there is no contract whatever between the parties, and the relation of principal and agent is not created by law. Yet if the party authorized does act in the execution of his authority, the relation exists. The fact that no contract between the parties is necessary is also evident from the fact that a married woman,

<sup>1</sup> Mr. Mechem says: "Agency is a legal relation, founded upon the express or implied contract of the parties, or created by law, by virtue of which one party—the agent—is employed and authorized to represent and act for the other—the principal—in business dealings with third persons." Mechem, Ag. § 1. See, also, Webb v. Ward, 122 Ala. 355.

Chancellor Kent says: "Agency is founded upon a contract, either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name, or on his account, and by which the other assumes to do the business, and to render an account of it." 2 Kent, Comm. 612.

Mr. Justice Story says: "In the common language of life, he, who, being competent and sui juris, to do any act for his own benefit, or on his own account, employs another person to do it, is called the principal, constituent, or employer; and he who is thus employed, is called the agent, attorney, proxy, or delegate of the principal, constituent, or employer. The relation, thus created, between the parties, is termed an agency." Story, Ag. § 3.

Mr. Wharton says: "Agency is a contract by which one person, with greater or less discretionary powers, undertakes to represent another in certain business relations. It will be observed that this definition involves the following incidents:—1. There must be a contract. 2. This contract must have to it competent parties. 3. The agent must have more or less discretion. 4. The thing to be undertaken must be a matter of future business. 5. Agency will not be sustained as to an immoral or illegal act." Wharton, Ag. § 1.

even where her common-law incapacity to contract has not been removed, or an infant, although incapable of making a binding contract, may nevertheless act as agent for another.<sup>2</sup>

"Agency," therefore, may be more accurately defined simply as the legal relation which arises when one party, called the agent, is authorized to represent and act for another party, called the principal, in bringing or to aid in bringing such principal into contractual relations with a third person, however such authority may be conferred.<sup>3</sup> As we shall hereafter see, such authority may be conferred by the will of the principal, and may arise out of a contract between him and the agent, or without any such contract; or it may arise by reason of the conduct of the principal, clothing the agent with an ostensible or apparent authority, and estopping him to deny that such ostensible or apparent authority was real;<sup>4</sup> or it may arise or be created by operation of law, by reason of the relation of the parties.<sup>5</sup> We shall also see that the authority may be conferred either before or after the act of the agent. In the latter case it is called ratification.<sup>6</sup> "An agent," says Professor Huffcut, "is a representative vested with authority, real or ostensible, to create voluntary primary obligations for his principal, by making contracts with third persons, or by making promises or representations to third persons calculated to induce them to change their legal relations. 'Vested with authority' includes authority acquired

<sup>2</sup> See post, § 26.

<sup>3</sup> "An agent is one who represents another called the 'principal' in dealings with third persons. Such representation is called 'agency.'" Civ. Code Cal. § 2295. For other statutory definitions, see Dak. Code, § 1337; Mont. Code, § 3070; Ga. Code, § 2178; La. Code, arts. 2985, 2986; Cal. Civ. Code, § 2295; N. D. Rev. Code, § 4303.

"An agent is a person having express or implied authority to represent or act on behalf of another person, who is called his 'principal.'" Bowstead, Ag. art. 1.

One who is intrusted with money for the purpose of changing it or having it changed is an agent. *Eggleston v. State*, 129 Ala. 30, 37 Am. St. Rep. 17.

<sup>4</sup> Post, §§ 55-60.

<sup>5</sup> Post, §§ 73-96.

<sup>6</sup> Post, §§ 97-150.

through the will of the principal or by operation of law, and authority acquired either prior to or subsequent to the performance of the representative act."<sup>7</sup>

**§ 2. Creation and existence of the relation.**

(a) **In general.**—In theory, as we shall hereafter see more at length, the relation of principal and agent can arise only with the consent of the principal, express or implied. One person has no power to represent and bind another in dealings with third persons unless he has been authorized by the person for whom he acts to represent him. Except as hereafter shown, both of the parties, the principal and the agent, must assent to the relation. There must be an intent on the one part to confer the authority, and an intention of the other party to consummate the purpose contemplated by the appointment. In other words, the minds of both of the parties must meet, and the intention to establish the relation of the agency must find expression either in words or in conduct.<sup>8</sup>

(b) **Ostensible agency—Agency by estoppel.**—Though, in theory, the relation of principal and agent is based upon consent, it is not always necessary that there shall be agreement or consent in fact, or in other words that the agent shall be really employed by the principal. As we shall see in another chapter, if a person, either intentionally or by failure to exercise ordinary care, allows another to act for him in such a way as to lead third persons to reasonably believe that the other has actual authority to represent him in a particular business or transaction, he will be estopped to say that there was no authority in fact, as against persons dealing with the party thus clothed with ostensible authority. The agency under such circumstances is called an ostensible agency, or agency by estoppel.<sup>9</sup>

(c) **Agency of necessity.**—Agency may also arise, by operation of law, from necessity under certain circumstances. For example, as we shall hereafter see, there is authority,

<sup>7</sup> Hufcut, Ag. (2nd Ed.) § 6.

<sup>8</sup> Central Trust Co. v. Bridges, 16 U. S. App. 115, Hufcut, Cas. 12.

<sup>9</sup> See post, § 55 et seq.

from necessity, on the part of a carrier of goods or of the master of a vessel, to pledge the credit of his employer under some circumstances; and on the part of a consignee of goods not ordered, or not like sample, to sell the same on account of the consignor;<sup>10</sup> and on the part of a wife, who has been wrongfully abandoned by her husband without the means of subsistence, to supply her wants upon his credit.<sup>11</sup>

(d) **Authority of partner to bind firm.**—Another instance of agency, by operation of law upon a contract not expressly conferring authority, is in the case of a partnership. A partnership is the result of agreement, express or implied; but when an ordinary partnership is formed, each member has, as a matter of law, the power to represent and bind his co-partners in the ordinary course of the partnership business.<sup>12</sup>

(e) **Agency by ratification.**—An agency may also arise by reason of ratification or adoption of an act or contract. In other words, to render an act or contract done or made by one person for another binding upon the latter as his act or contract, it is not necessary that the act or contract shall have been authorized at the time. It becomes binding, to the same extent as if authorized at the time, if afterwards adopted or ratified by the party for whom it was done or entered into. This is agency by ratification.<sup>13</sup>

### § 3. The parties—Various kinds of agents.

Generally the person who employs another to represent him in business dealings with third persons is called the principal, but he is also called the employer, or the constituent. The person employed is generally called the agent, but he is also called the representative, delegate (because authority is delegated to him), or proxy. And according to the nature of the business for which he is employed, he is called an attorney, factor, broker, auctioneer, *del credere* agent, cashier of a bank, etc.<sup>14</sup> “The term agent is one of very wide application, and includes a great many classes of persons to which

<sup>10</sup> Post, § 61.

<sup>11</sup> Post, § 79.

<sup>12</sup> Post, § 90.

<sup>13</sup> Post, § 97 et seq.

<sup>14</sup> See *Adams v. Whittlesey*, 3 Conn. 560, 567.

distinctive appellations are given,—as, factors, brokers, attorneys, cashiers of banks, clerks, consignees, etc.; indeed, any one who undertakes to transact some business or to manage some affair, for another, by authority and account of the latter, is his agent.”<sup>15</sup>

In determining who is the principal and who the agent, in a case of doubt on this point, the controlling test is who received or is to receive the advantage or benefits, or the profits arising from the transactions with the third person, and which was the result of the agreement by which the agency was created? When ascertained, that person is the principal, and the other the agent.<sup>16</sup> The determination of this question is important when it becomes necessary to fix a liability growing out of the transaction.

As to kind, agents are usually divided into general and special or particular, and in rare instances a third kind, universal agents, have been held to exist. By a universal agent is meant an agent who has unqualified authority to act, in the place of his principal, in all things which the latter can delegate; and by a general agent is meant an agent who has unrestricted authority to act for his principal in respect to a particular kind of business, or a business at a particular place. A special or particular agent is an agent who has authority to do only special or particular acts for his principal.

<sup>15</sup> *Norfolk & W. R. Co. v. Cottrell*, 83 Va. 512.

The meaning of the term “agent” in a particular business, or the peculiar meaning it has acquired therein, may be shown when the intention with which the word was used becomes important. *Whittemore v. Weiss*, 33 Mich. 348, 351. See, also, *Ex parte White*, L. R. 6 Ch. 397; *Robinson v. Easton*, 93 Cal. 80, 82, 27 Am. St. Rep. 167.

The designation of agents by names denoting their calling will be referred to hereafter, in treating of the different kinds of agents. See post, § 196 et seq.

<sup>16</sup> *Adams v. Whittlesey*, 3 Conn. 560, 567; *Cox v. Hickman*, 8 H. L. Cas. 268, 312.

One who allows another to carry on trade for him, whether in his own name or not, and to buy and sell, paying over all the proceeds to him, is clearly the principal of the other. *Cox v. Hickman*, 8 H. L. Cas. 268, 312.



These different kinds of agents will be treated more fully hereafter, in treating of an agent's authority.<sup>17</sup>

**§ 4. Agency distinguished from other contracts and relations  
—In general.**

It is sometimes very difficult to determine whether a contract or relation is one of agency or whether it is something else, and it will be well, therefore, to consider this question at some length and point out the distinctions between agency and other relations. It may be stated at the outset that in determining whether or not a contract is one of agency its construction is not dependent upon any name given to it, nor necessarily upon any one of its provisions. The entire agreement must be considered and its legal effect as a whole determined.<sup>18</sup> Thus the designation of one party to the contract as "agent" is by no means conclusive as to the true relation existing between the parties interested.<sup>19</sup>

**§ 5. Agent or servant.**

The relation of principal and agent and that of master and servant are closely allied. The relation of principal and agent is but an outgrowth or expansion of the relation of master and servant, and it is often extremely difficult to make a distinction between them.<sup>20</sup> There is a distinction, however,

<sup>17</sup> See post, § 196 et seq.

<sup>18</sup> *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854. See, also, *Ex parte White*, L. R. 6 Ch. 397; *Robinson v. Easton*, 93 Cal. 80, 82, 27 Am. St. Rep. 167; *Cowan v. Singer Mfg. Co.*, 92 Tenn. 376; *Hartley v. Phillips*, 198 Pa. 9. An agreement between two parties, by which one agrees to ship to the other, for sale, the entire output of his factory for a certain season, does not make the latter a joint owner with the former of such output, but establishes between them merely the relation of principal and agent. *Elwell v. Coon* (N. J. Eq.) 46 Atl. 580.

<sup>19</sup> *Ex parte White*, L. R. 6 Ch. 397; *Texas Brew. Co. v. Anderson* (Tex. Civ. App.) 40 S. W. 737; *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854. See the illustrations in sections following.

<sup>20</sup> *Kingan v. Silvers*, 13 Ind. App. 80. In *Reg. v. Walker, Dears. & B. Cr. Cas.* 604, *Pollock, C. B.*, evidently recognizing the difficulty of distinguishing the relations on general principles, asked to have

and it is sometimes of the utmost importance in determining rights and liabilities. The terms "agent" and "servant" are so frequently used interchangeably in the adjudications that the reader is apt to conclude they mean the same thing. It is evident, however, that there is difference between them.

While it is perhaps true that all servants may be agents for some purposes, the converse of the proposition is not true. An agent is not necessarily the servant of his principal. The distinction which has generally been made is that the function of an agent is to enter into contract relations with third persons for and in behalf of his principal, and usually, in that connection, to determine the mode of effecting the desired purpose without being under the direct control of the principal. That is, an agent does some act, in a manner suggested more or less by his discretion or judgment, which has the effect to establish a contractual relation between his principal and a third person. On the other hand, servants are persons who are employed by, and are subject to the direction and control of, the master, usually for a definite period and at fixed wages or salary, and whose duties require them to perform some service which does not result in a contract between the master and another.<sup>21</sup>

the difference pointed out, saying: "What is the difference between a servant and an agent?"

<sup>21</sup> See *Huffcut*, Ag. § 4; *Wharton*, Ag. §§ 19, 20; *Wood, Mast. & Serv.* § 1; *Mechem*, Ag. § 2; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518; *Jones v. Avery*, 50 Mich. 326; *Flesh v. Lindsay*, 115 Mo. 1; *Hand v. Cole*, 88 Tenn. 400; *Reg. v. Walker*, *Dears. & B. Cr. Cas.* 600; *Kingan v. Silvers*, 13 Ind. App. 80; *Tete v. Lanaux*, 45 La. Ann. 1343; *McCroskey v. Hamilton*, 108 Ga. 640, 75 Am. St. Rep. 79.

Thus it has been said that the distinction seems to be that an agent is duly authorized to act on behalf of another or is one whose unauthorized act has been duly ratified, while a servant renders voluntary or involuntary service, or is employed for menial service or labor, and is subject to the command of his employer. *Flesh v. Lindsay*, 115 Mo. 1.

In a case in the supreme court of the United States it was said that the relation of master and servant exists whenever the employer retains the right to direct the manner in which the contemplated business shall be done, as well as the result to be accomplished, or, in other words, "not only what shall be done, but how it shall be done." *Singer Mfg. Co. v. Rahn*, 132 U. S. 518.

A servant may be expressly authorized to enter into contracts for and on behalf of his master, or the nature of his employment may be such as to render it necessary for him to make such contracts as an incident to the performance of the services required of him as servant. In such a case, however, in the making of the contract, he acts as agent and not as servant. Pro hac vice the relation between him and his master is that of principal and agent, and is governed by all the principles of law which apply to agency. Such would be the case for example, if a man should hire a cook and authorize him to buy provisions or hire assistants. In his capacity as cook he is a mere servant, but in buying provisions and hiring assistants he is an agent.<sup>22</sup>

The distinction between an agent and a servant does not rest solely on the ground that an agent is vested with a dis-

And see *New Orleans, M. & C. R. Co. v. Hanning*, 15 Wall. (U. S.) 649.

In some jurisdictions agents and servants are distinguished by statute. Thus, in California it is declared that "an agent is one who represents another called the 'principal' in dealings with third persons;" and that "a servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter who is called his 'master.'" Civ. Code Cal. §§ 2009, 2295.

<sup>22</sup> See *Huffcut*, Ag. §§ 4, 6, and the cases above cited. Blackstone says: "The first sort of servants, acknowledged by the laws of England, are menial servants, so called from being *intra moenia* or domestics. \* \* \* Another species of servants are called apprentices. \* \* \* A third species of servants are laborers, who are only hired by the day or the week, and do not live *intra moenia*, as part of the family." He also says: "There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as stewards, factors, and bailiffs; whom, however, the law considers as servants pro tempore, with regard to such of their acts as affect their master's or employer's property." 1 Bl. Comm. 425-427.

There are also early English cases in which factors were called servants. *Mors v. Slew*, 2 Keb. 866; *Southcote's Case*, 4 Coke, 83b, 84a; *Holiday v. Hicks*, Cro. Eliz. 638; *Southern v. How*, Cro. Jac. 468.

It is now settled, however, that factors are not servants at all, but agents. See post, § 821 et seq.

cretion while a servant is not, for in some cases no discretion whatever is allowed to an agent, while the nature of a servant's duties may sometimes require the exercise of discretion by him in performing them. A person may be employed to buy a particular piece of property for a specified price, and yet he is an agent. A cook may be allowed to use his own discretion as to what he will cook, and the manner in which he will cook, or a farm hand may be allowed to use his own discretion as to what fields he will cultivate and what grain he will sow, and yet they are mere servants. "The fundamental distinction between an agent and a servant lies in the nature of the act which each is authorized to perform. An agent represents the principal in the performance of an act resulting in a contractual obligation, or an obligation springing from contract relations. A servant represents the master in the performance of an act not resulting in a contractual obligation."<sup>23</sup> "To put the whole matter shortly, an agent is one really or ostensibly authorized to create voluntary antecedent or primary obligations for his principal in favor of third persons, or to acquire such obligations for his principal as against third persons; while a servant is one authorized to perform operative acts not creating primary obligations, but which may result in the breach of antecedent primary obligations, voluntary or involuntary."<sup>24</sup>

It was at one time doubted whether a person could be the servant of several persons at the same time, and it was suggested that such service would rather be in the nature of an agency.<sup>25</sup> It is now settled, however, that an employe may be in the service of several at one time, and that the relationship of master and servant will exist between them.<sup>26</sup>

— **Particular cases.**—Where, to convict for embezzlement, it was necessary to establish that the offense charged was committed by a servant, so as to bring the case within the statute, proof that the defendant was to be paid a nomi-

<sup>23</sup> *Huffcut*, Ag. (1st Ed.) § 4. See, also, *Mechem*, Ag. § 2.

<sup>24</sup> *Huffcut*, Ag. (2nd Ed.) § 6, p. 18.

<sup>25</sup> *Reg. v. Goodbody*, 8 Car. & P. 665, referring to the fact of but one decision on this point,—perhaps *Rex v. Carr*, Russ. & R. 198.

<sup>26</sup> *Reg. v. Bayley*, Dears. & B. Cr. Cas. 121.

nal salary and a commission; that the arrangement as to salary was merely colorable, and made for the purpose of procuring security from a guaranty company; that he was required to procure orders for merchandise to be supplied by his employers, and that he was to collect and pay over the purchase price, and render accounts,—was held insufficient to show that the defendant was the servant of the prosecutors, as distinguished from an agent.<sup>27</sup> And where a statute imposed upon stockholders of corporations personal liability “for all labor performed” for the corporation, it was held that it did not render shareholders liable for the annual salary of a traveling salesman of the company whose duties consisted in exhibiting samples and so executing orders, as he was an agent, and not a servant.<sup>28</sup> A commercial traveler receiving a fixed monthly compensation, and who was subject to the direction and control of a general manager, was held to be a “clerk” within a statute imposing liability on the shareholders of insolvent corporations for money due and owing to its clerks and other employees.<sup>29</sup> But the general rule seems to be that statutes authorizing a preferential payment out of the assets of an insolvent’s estate to his laborers, servants, or employees, apply only to laborers, servants, or other employees, who perform manual or menial labor or services, not requiring special knowledge or skill, and do not apply to traveling salesmen, bookkeepers, or others who perform services of a like nature.<sup>30</sup>

A person who had contracted to sell machines under an agreement by which he was to receive a commission on the sales and also a commission for collecting, and whose contract could be terminated at any time by the other contracting party, but by himself only on notice, and who furnished a part of the outfit used in his business, the other part being

<sup>27</sup> *Reg. v. Walker*, Dears. & B. Cr. Cas. 600.

<sup>28</sup> *Jones v. Avery*, 50 Mich. 326.

<sup>29</sup> *Hand v. Cole*, 88 Tenn. 400.

<sup>30</sup> *Epps v. Epps*, 17 Ill. App. 196; *Eppstein v. Webb*, 44 Ill. App. 341; *Signor v. Webb*, 44 Ill. App. 338; *Mulholland v. Wood*, 166 Pa. 486. A “timekeeper” and a “superintendent” are not laborers within the meaning of such a statute, *M. K. & T. R. Co. v. Baker*, 14 Kan. 563; nor a secretary, *Coffin v. Reynolds*, 37 N. Y. 640.

supplied by the other party, and who agreed "to give his exclusive time and best energies" to the business, and to act under the direction of the other party "and under such rules and instructions as it or its manager should prescribe," was held to be a servant of the other party to the contract.<sup>31</sup>

#### § 6. Agency or partnership.

Cases sometimes arise which present the question whether action by a party was taken by him as the agent of another, who alone is entitled to the benefits accruing from the transaction, or whether he acted on his own behalf and also on behalf of others jointly interested with him as co-partners in the result of the action taken. The law of partnership is undoubtedly a branch of the law of principal and agent, and the whole authority of one partner to act for his co-partners is founded upon that doctrine. Each member of a firm is an agent of the other members, in the transaction of the business of the partnership, and his rights, powers, duties, and obligations are in many respects governed by the same rules and principles which govern those of principal and agent generally. A partner virtually embraces the character of both principal and agent.<sup>32</sup> Thus if two or more agree to carry on a trade and share the profits and losses, each is a principal, and each is an agent for the other, and each is bound by the other's contracts in carrying on the business as much as a single principal would be bound by the act of an agent, who is to give the whole of the profits to his employer.<sup>33</sup> The same questions as to implied general and special authority arise between partners, as arise between principal and agent.<sup>34</sup>

The fundamental distinction between partnership and agency is that each of the partners not only acts for others, his co-partners, but also acts for himself, in the dual capacity

<sup>31</sup> *Singer Mfg. Co. v. Rahn*, 132 U. S. 518.

<sup>32</sup> *Story*, Partn. § 1; *Worrall v. Munn*, 5 N. Y. 229, 239, 55 Am. Dec. 330; *Gram v. Seton*, 1 Super. Ct. (N. Y.) 262; *Cox v. Hickman*, 8 H. L. Cas. 268, 311.

<sup>33</sup> *Cox v. Hickman*, 8 H. L. Cas. 268, 312.

<sup>34</sup> See *Gram v. Seton*, 1 Super. Ct. (N. Y.) 262; *Worrall v. Munn*, 5 N. Y. (1 Seld.) 229, 240, 55 Am. Dec. 330.

of principal as to himself, and as agent for the other members of the firm. Then, too, when he acts for the firm, he shares in the benefits which are the outcome of his action. On the other hand, an agent acts for his principal, and not for himself, and in the absence of special agreement, he has no pecuniary interest in the resultant benefits. Participation in and receipt of a share of the profits as such is very strong evidence of a partnership,<sup>35</sup> but is not conclusive.<sup>36</sup> A division or sharing of the proceeds or benefits of a transaction in which one party acts on behalf of another will not stamp the transaction as a partnership, where the active party receives a proportionate share in return for the services rendered by him, as an agent, and the share is not retained by him at the time of its receipt, but is paid over to him by the principal, when ascertained, and at stated times, and the agent likewise receives percentages on moneys collected by him.<sup>37</sup>

As with some other relations, it is extremely difficult, if not impossible, to formulate a rule that will be applicable to every case which may arise, where features exist which are compatible with the existence of either relation, and wherein the real form of the transaction is not clearly apparent. In such cases, in addition to construing the contract, the intention of the parties must be inquired into, and the nature of the relation determined in the light of such intent.<sup>38</sup>

### § 7. Agent or independent contractor.

Liability for the consequences of tortious conduct of one engaged in the performance of some work of which another receives or is to receive the principal benefit often depends upon the relation of the active party to the person upon whom it is sought to fasten the liability,—that is, upon whether the injury complained of was the result of the negligence or wrongful conduct of one acting independently and for him-

<sup>35</sup> *Wright v. Davidson*, 13 Minn. 449 (Gil. 415).

<sup>36</sup> *Huffcut*, Ag. § 6 (4); *Grinton v. Strong*, 148 Ill. 587.

<sup>37</sup> *Grinton v. Strong*, 148 Ill. 587, where the duties of the party were to collect moneys on commission, and to make investments, and he was to receive for the services in that connection one fifth of the net income realized.

<sup>38</sup> *Grinton v. Strong*, 148 Ill. 587.

self, or of an agent performing services.<sup>39</sup> The question may also arise in other ways, as where it involves the liability for work done at the instance of the person whose representative capacity is sought to be established,<sup>40</sup> or where the settlement of the rights and obligations of parties between themselves depends upon the actual relation which existed between them.<sup>41</sup> The rule which is fairly deducible from the authorities is that an independent contractor agrees to procure a specified result by any means not inhibited by his contract, and is not subject to the advice, direction, or control of the other party; and further that by the performance of his contract, the business originally contemplated is at an end, no new contractual relations between the other party and third persons being brought into existence, thus differing from an agent whose relation to his principal involves, more or less, the features mentioned.<sup>42</sup>

<sup>39</sup> *Lawrence v. Shipman*, 39 Conn. 586; *Woodman v. Metropolitan R. Co.*, 149 Mass. 335, 14 Am. St. Rep. 427, and cases there cited; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Casement v. Brown*, 148 U. S. 615; *Harrison v. Collins*, 86 Pa. 153, 27 Am. Rep. 699. See, also, *Gray v. Pullen*, 5 Best & S. 970.

<sup>40</sup> *Central Trust Co. v. Bridges*, 16 U. S. App. 115.

<sup>41</sup> *Johnston v. Dahlgren*, 48 App. Div. (N. Y.) 537.

<sup>42</sup> *Encyclop. Laws of England*, "Agency;" *Casement v. Brown*, 148 U. S. 615; *Central Trust Co. v. Bridges*, 16 U. S. App. 115; *Lawrence v. Shipman*, 39 Conn. 586; *McCarthy v. Second Parish*, 71 Me. 323, 36 Am. Rep. 320; *Woodman v. Metropolitan R. Co.*, 149 Mass. 335, 14 Am. St. Rep. 427; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Barg v. Bousfield*, 65 Minn. 355; *Vosbeck v. Kellogg*, 78 Minn. 176, and cases cited; *Burns v. McDonald*, 57 Mo. App. 599; *Jensen v. Barbour*, 15 Mont. 582; *Sullivan v. Dunham*, 35 App. Div. (N. Y.) 342; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703; *Simonds v. Wrightman*, 36 Or. 120; *Powell v. Virginia Construction Co.*, 88 Tenn. 692, 17 Am. St. Rep. 925; *Bibb's Adm'r v. Norfolk & W. R. Co.*, 87 Va. 711.

In *Casement v. Brown*, 148 U. S. 615, the defendants had contracted to construct a railroad bridge in accordance with plans prepared by the railroad company. They selected their own servants and employees, and agreed to furnish all of the materials and do all the work, and by the use of such material and work, they were to accomplish the intended result, the will of the company being represented only in the result of the work. It was held that they were not employees of the company, but independent contractors,



The distinction between an agent and an independent contractor, then, may be said to be this: An independent contractor, in accomplishing the result for which he is employed, may usually use any means or methods he may see fit, and is not subject to the directions or orders of his employer; whereas an agent, although he has powers of discretion, is nevertheless subject to his principal's directions or orders. And again an independent contractor, as such, has no authority to bring his employer into contractual relations with third persons, whereas, as has been seen, this is the primary purpose for which an agent is employed. Again an employer is not liable for the wrongful acts of an independent contractor committed by the latter in the course of his employment, unless the purpose for which he was employed is in itself unlawful; whereas a principal is personally liable for all wrongful acts committed by his agent in the course of his employment.

In this connection some confusion may arise as to the distinction between a servant and an independent contractor, although there is really no ground for such confusion, for the distinction between the two is very clear. An independent contractor is employed to produce a certain result, usually by whatever means or methods he may desire, and in so doing is not subject to the directions or control of the employer; a

and as such liable for an injury sustained by reason of their negligence.

Where the principal shareholder of a corporation contracted with it, and did work under the contract, it was held that he did not act as the agent of the corporation in subcontracting part of the work to another, where there was no evidence of the existence of the relation of agency between him and the company, but that his relation to the subcontractor was that of an independent contractor. *Central Trust Co. v. Bridges*, 16 U. S. App. 115.

One who has contracted to employ persons to work on the property of another, and who deals with them independently of such other person, and in his own name assumes responsibility for their payment, all with the knowledge and without dissent of such other person, is an independent contractor, and not an agent, and a charge by him of commissions and profits upon such workman's services is not a fraud against the other contracting party. *Johnston v. Dahlgren*, 48 App. Div. (N. Y.) 537.

servant on the other hand is always subject to his master's directions or orders as to the manner of doing whatever he is directed to do. Again, an employer is not liable for the wrongful acts of an independent contractor in accomplishing the desired result, unless the thing to be done is in itself unlawful; whereas a master is responsible for his servant's wrongful acts in the course of carrying out his master's orders. Again, an independent contractor may enter into contractual relations with third persons in accomplishing the desired result, whereas a servant does not.

**§ 8. Sale of goods or contract of agency to sell.**

(a) **In general.**—When the possession of goods is delivered by one person to another, to be disposed of by the latter, it is often as difficult as it is important to determine whether the relation of the parties is that of principal and agent or that of seller and buyer, or in other words, whether there is merely an agency on the part of the person receiving the goods to sell them for the other, or a sale of the goods to him, absolute or conditional. The question may arise, not only between the parties themselves, but also between them and third persons.<sup>43</sup> The question, of course, depends upon a construction of the contract and the intention of the parties. The question is: Did the consignor intend to sell the goods to the consignee, and the consignee intend to buy them himself, or did the parties intend that the consignee should take possession of the goods merely as the agent of the consignor, and sell them on his account?<sup>44</sup>

<sup>43</sup> See *Nutter v. Wheeler*, 2 Low. 346, Fed. Cas. No. 10,384.

As to the doctrine of ostensible agency to sell where an agent has possession of the goods, see post, § 236.

<sup>44</sup> See *Ex parte White*, L. R. 6 Ch. 397; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518; *Wilcox & G. Sewing Mach. Co. v. Ewing*, 141 U. S. 627; *Sturm v. Boker*, 150 U. S. 312; *Lenz v. Harrison*, 148 Ill. 598; *Norton v. Melick*, 97 Iowa, 564; *Curtis v. Gibney*, 59 Md. 131; *Gibney v. Curtis*, 61 Md. 192; *Eldridge v. Benson*, 7 Cush. (Mass.) 484; *Richardson Drug Co. v. Oberfelder*, 58 Neb. 322; *National Cordage Co. v. Sims*, 44 Neb. 148; *C. H. Childs & Co. v. Waterloo Wagon Co.*, 37 App. Div. (N. Y.) 242; *Balderston v. National Rubber Co.*, 18 R. I. 338, 49 Am. St. Rep. 772; *Arbuckle v. Kirkpatrick*, 98 Tenn.

Some provisions or stipulations in the contract between a consignor and consignee of goods may be decisive in indicating the relation existing between the parties, so that it will be unnecessary and improper to look beyond the contract to ascertain the intention of the parties. Others, though they may be suggestive of the existence of one relation or the other, may not be conclusive, but may be controlled by other provisions or by extraneous evidence of the intention of the parties. Often some of the provisions and stipulations in such a contract may be suggestive of the existence of one relation, and some may be suggestive of the other. In such a case it is sometimes very difficult to determine the true relation. The intention of the parties to the contract will have a very important bearing on its construction. This is a well established rule as to the construction of contracts generally. If the language of the contract is unambiguous, the relation is to be ascertained from the contract itself, but if the real meaning of the agreement is obscured by its terms, the understanding of the parties, and their action based on such understanding, will control the determination. In other words, the construction which the parties themselves, in good faith, put upon the contract, will be sustained by the court. These observations apply of course to oral agreements.<sup>45</sup>

If the question as to whether the relation between the consignor and consignee of goods to be sold by the latter is a contract of agency, or a contract of sale, arises between the consignor and consignee, or one of them, and third per-

221, 60 Am. St. Rep. 854; *Chezum v. Kreighbaum*, 4 Wash. 680; *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 45 Am. St. Rep. 846; *Williams Mower & Reaper Co. v. Raynor*, 38 Wis. 119; *Monitor Mfg. Co. v. Jones*, 96 Wis. 619. In *Seymour v. Pychlau*, 1 Barn. & Ald. 14, vendors dealing with a person employed to purchase, and aware of the nature of his employment, made out invoices to him and took his acceptances, but there was held to be no sale to him.

<sup>45</sup> *Norton v. Mellick*, 97 Iowa, 564; *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854; *Monitor Mfg. Co. v. Jones*, 96 Wis. 619; *Williams Mower & Reaper Co. v. Raynor*, 38 Wis. 119; *Metro-politan Nat. Bank v. Benedict Co.*, 36 U. S. App. 604; *Arbuckle Bros. v. Gates*, 95 Va. 802. And see *Grinton v. Strong*, 148 Ill. 587.

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sons, it seems that the court should take into consideration all the surrounding circumstances as well as the terms of the contract, and, if possible, give the contract such a construction as will best comport with the interests of all concerned, although it may thereby recognize the existence of a relation negatived by some of the conditions of the contract. Thus where an agreement, denominated a "special selling factor's appointment," contained provisions imposing upon the consignee every risk, obligation, and duty that ordinarily rests upon a purchaser, and securing to him every right that an owner could have, it was construed, as to third persons, as a contract of sale, although there were conditions and stipulations therein,—a requirement to maintain prices fixed, the allowance of commissions on sales, and the retention of ownership,—which negatived the idea of a sale.<sup>46</sup>

(b) **Contracts of agency to sell.**—When the business undertaken by one party, with respect to handling and selling goods, is solely for the interest and benefit of the other, the original owner, as where it is agreed that one party shall buy and ship goods for the sole account of another, the relation is clearly that of principal and agent.<sup>47</sup> Among other features which have been held to be repugnant to the idea of an absolute sale, and to show the existence of the relation of principal and agent, are, the retention of the title and the right to possession of the goods by the consignor or original possessor;<sup>48</sup> the reservation by the consignor of the right to

<sup>46</sup> *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854; *Arbuckle Bros. v. Gates*, 95 Va. 802. And see *Williams v. Drummond Tobacco Co.*, 17 Tex. Civ. App. 635; *Richardson Drug Co. v. Oberfelder*, 58 Neb. 822.

<sup>47</sup> *Rice v. Longfellow Bros. Co.*, 78 Minn. 394.

<sup>48</sup> *National Bank of Augusta v. Goodyear*, 90 Ga. 711; *Holleman v. Bradley Fertilizer Co.*, 106 Ga. 156; *Lenz v. Harrison*, 148 Ill. 598; *Martin v. Stratton-White Co.*, 1 Ind. T. 394; *Norton v. Mellick*, 97 Iowa, 564; *Moline Plow Co. v. Rodgers*, 53 Kan. 743; *Eldridge v. Benson*, 7 Cush. (Mass.) 484; *Pierce v. Lees*, 17 App. Div. (N. Y.) 346; *Gilman v. Gilby*, 8 N. D. 627, 73 Am. St. Rep. 791; *Keystone Watch-Case Co. v. Fourth St. Nat. Bank*, 194 Pa. 535; *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 45 Am. St. Rep. 846; *Williams Mower & Reaper Co. v. Raynor*, 38 Wis. 119.

have the goods which may remain unsold returned to him,<sup>49</sup> or a reservation by the consignee of the corresponding right to return the goods remaining unsold, or to purchase them outright;<sup>50</sup> stipulations or provisions for the payment by the consignor to the consignee of percentages and commissions on sales made, which are of such a character as to negative the idea that such sales were made for the direct benefit of the consignee;<sup>51</sup> requirements that the goods shall be sold

But see *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854, wherein a stipulation that the title to the goods should remain in the consignor was held to be controlled by other provisions of the contract which, as to third persons, was one of sale and purchase. And to the same effect, see *Williams v. Drummond Tobacco Co.*, 17 Tex. Civ. App. 635; *Henney Buggy Co. v. Cathels*, 110 Iowa, 24.

<sup>49</sup> *Holleman v. Bradley Fertilizer Co.*, 106 Ga. 156; *Martin v. Stratton-White Co.*, 1 Ind. T. 394; *Eldridge v. Benson*, 7 Cush. (Mass.) 484; *Moline Plow Co. v. Rodgers*, 53 Kan. 743; *Sturm v. Boker*, 150 U. S. 312; *Keystone Watch Case Co. v. Fourth St. Nat. Bank*, 194 Pa. 535; *Lenz v. Harrison*, 148 Ill. 598 (distinguishing *Chickering v. Bastress*, 130 Ill. 206, 17 Am. St. Rep. 309, in which case upon payment of a note given for one invoice, title to that consignment vested in the consignee.)

<sup>50</sup> *Martin v. Stratton-White Co.*, 1 Ind. T. 394; *Norton v. Melick*, 97 Iowa, 564.

That the consignees made themselves liable to pay ultimately for the goods, whether sold or unsold when the term of consignment expired, entitles the consignors to exact payment for the unsold goods, and thus force the consignees to become purchasers. In *re Linforth*, 4 Sawy. 370, Fed. Cas. No. 8,369.

<sup>51</sup> *Burton v. Goodspeed*, 69 Ill. 237; *National Cordage Co. v. Sims*, 44 Neb. 148; *Pierce v. Lees*, 17 App. Div. (N. Y.) 346; *Balderston v. National Rubber Co.*, 18 R. I. 338, 49 Am. St. Rep. 772; *Metro-politan Nat. Bank v. Benedict Co.*, 36 U. S. App. 604, 74 Fed. 182; *C. H. Childs & Co. v. Waterloo Wagon Co.*, 37 App. Div. (N. Y.) 242; *Gilman v. Gilby Tp.*, 8 N. D. 627, 73 Am. St. Rep. 791; *Banister v. Weber Gas & Gasoline Engine Co.*, 82 Mo. App. 528; *Keystone Watch-Case Co. v. Fourth St. Nat. Bank*, 194 Pa. 535.

See *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854, where the contract contained a provision that commissions were to be allowed whether sales were made or not, but in view of other conditions and stipulations, the agreement was construed, as to third persons, to be one of sale.

In *Ex parte Flannagans*, 2 Hughes, 264, Fed. Cas. No. 4,855, under

at prices fixed by the consignor, and that settlements shall be made on that basis;<sup>52</sup> provisions that payment for the goods sold shall be guaranteed by the consignee;<sup>53</sup> provisions limiting the time within which the goods shall be sold,<sup>54</sup> or

a contract, by the terms of which the consignee became primarily responsible, goods were shipped to be disposed of by him. He was to have a commission for selling and guaranteeing the sales, the prices of the goods being fixed, and accounts were to be rendered and settlements made after the selling season. Goods left over and not sold were to be at the risk and on account of the consignor. The contract was held to be a contract for a consignment on sale.

In *Aetna Powder Co. v. Hildebrand*, 137 Ind. 462, the freight was to be paid by the consignor, and the consignee agreed to sell as agent at prices not less than those fixed by the consignor. The consignee was entitled to a percentum allowance for selling and guaranteeing sales, and he agreed to report and make payments by his own notes every sixty days. It was held that on default he became a simple debtor of the consignor for the amount due for goods at catalogue prices. Compare *Yoder v. Haworth*, 57 Neb. 150, 73 Am. St. Rep. 496.

<sup>52</sup> *Monitor Mfg. Co. v. Jones*, 96 Wis. 619; *Burton v. Goodspeed*, 69 Ill. 237; *Norton v. Melick*, 97 Iowa, 564; *Walker v. Butterick*, 105 Mass. 237; *Aetna Powder Co. v. Hildebrand*, 137 Ind. 462; *National Cordage Co. v. Sims*, 44 Neb. 148; *C. H. Childs & Co. v. Waterloo Wagon Co.*, 37 App. Div. (N. Y.) 242; *Balderston v. National Rubber Co.*, 18 R. I. 338, 49 Am. St. Rep. 772; *Metropolitan Nat. Bank v. Benedict Co.*, 36 U. S. App. 604, 74 Fed. 182; *Keystone Watch-Case Co. v. Fourth St. Nat. Bank*, 194 Pa. 535.

See, also, *In re Linforth*, 4 Sawy. 370, Fed. Cas. No. 8,369; *Nutter v. Wheeler*, 2 Lowell, 346, Fed. Cas. No. 10,384; *Ex parte Flannagans*, 2 Hughes, 264, Fed. Cas. No. 4,855.

In *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854, the contract which was construed to be one of purchase and sale, contained a provision that payment for the goods was to be made at a stipulated price, the consignee to profit by enhancement of the price and to bear all losses resulting from declines therein.

<sup>53</sup> *National Cordage Co. v. Sims*, 44 Neb. 148; *Balderston v. National Rubber Co.*, 18 R. I. 338, 49 Am. St. Rep. 772; *Holleman v. Bradley Fertilizer Co.*, 106 Ga. 156. See *Lenz v. Harrison*, 148 Ill. 598; *Arbuckle v. Gates*, 95 Va. 802.

<sup>54</sup> *Metropolitan Nat. Bank v. Benedict Co.*, 36 U. S. App. 604, 74 Fed. 182; *Holleman v. Bradley Fertilizer Co.*, 106 Ga. 156.

the credit which shall be extended to purchasers,<sup>55</sup> or prescribing the mode of payment, whether in cash, or by evidences of debt, requiring the making of contracts or the taking of notes in the name of the consignor;<sup>56</sup> requirements that the consignee shall keep the goods safely<sup>57</sup> or keep them covered by insurance;<sup>58</sup> or any other stipulations or conditions which the consignee is bound to observe, and which indicate that the consignor did not intend to transfer the property in the goods to the consignee or relinquish control of them.<sup>59</sup>

It is perhaps unusual, but it is not incompatible with the notion of an agency, that the compensation of an agent to sell goods shall be the difference between the amount of purchase

<sup>55</sup> *Williams Mower & Reaper Co. v. Raynor*, 38 Wis. 119. And see *Lenz v. Harrison*, 148 Ill. 598.

<sup>56</sup> *Holleman v. Bradley Fertilizer Co.*, 106 Ga. 156; *C. H. Childs & Co. v. Waterloo Wagon Co.*, 37 App. Div. (N. Y.) 242; *Williams Mower & Reaper Co. v. Raynor*, 38 Wis. 119; *Bayliss v. Davis*, 47 Iowa, 340.

In the case last cited an agency was held to have been established, where the proof showed that the consignee was to pay for machines received by him in cash and by his notes, and, as he made sales, to receive from the proceeds prior cash payments made by him, and to take notes made payable to the consignor, taking back his own notes given when the goods were delivered to him.

<sup>57</sup> *Lenz v. Harrison*, 148 Ill. 598; *Burton v. Goodspeed*, 69 Ill. 237; *Norton v. Melick*, 97 Iowa, 564; *C. H. Childs & Co. v. Waterloo Wagon Co.*, 37 App. Div. (N. Y.) 242.

<sup>58</sup> *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 45 Am. St. Rep. 846; *Metropolitan Nat. Bank v. Benedict Co.*, 36 U. S. App. 604, 74 Fed. 182; *Williams Mower & Reaper Co. v. Raynor*, 38 Wis. 119; *Sturm v. Boker*, 150 U. S. 312; *Lenz v. Harrison*, 148 Ill. 598.

See *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854, where a contract which contained a provision that the consignee should bear any loss caused by fire, wind, or water, but left insurance and storage optional with him, was held a contract of sale.

<sup>59</sup> *Williams Mower & Reaper Co. v. Raynor*, 38 Wis. 119; *C. H. Childs & Co. v. Waterloo Wagon Co.*, 37 App. Div. (N. Y.) 242; *Holleman v. Bradley Fertilizer Co.*, 106 Ga. 156; *Banister v. Weber Gas & Gasoline Engine Co.*, 82 Mo. App. 528.

money received by him for goods sold and the price fixed by the principal, or that he shall have for his services all money received by him in excess of the invoice price. He may as well be compensated in this way as by the allowance of a commission upon the gross proceeds.<sup>60</sup>

The breach of a contract to sell goods, and account for the same within a specified time and at fixed prices, will not convert a contract of bailment and agency into a contract of sale.<sup>61</sup>

(c) **Contracts of sale.**—As was said in a leading English case,<sup>62</sup> referred to with approval in this country,<sup>63</sup> if the consignee of goods is at liberty, according to the contract between him and the consignor, to sell the goods at any price he likes, but is bound, if he sells the goods, to pay the consignor for them at a fixed price and time, the relation is not that of principal and agent, but the contract is one of sale. If, in addition to this, the consignee is allowed to change the character of the goods by altering their condition, and to sell the goods so changed on any terms and at any price he pleases, it is still clearer that he is not selling on account of a principal, but on his own account.<sup>64</sup> It follows from this that a contract of sale by the consignee, whereby the purchaser is to pay a different price, and at a different time, from the price and time with respect to which the consignee is obligated to the consignor, is not a contract made by the consignee as agent of the consignor.<sup>65</sup> Where one takes

<sup>60</sup> *McCullough v. Porter*, 4 Watts & S. (Pa.) 177; *National Bank of Augusta v. Goodyear*, 90 Ga. 717, 726; *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 45 Am. St. Rep. 846. See *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854.

<sup>61</sup> *Metropolitan Nat. Bank v. Benedict Co.*, 36 U. S. App. 604, 74 Fed. 182. Citing *Sturm v. Boker*, 150 U. S. 312; *Hunt v. Wyman*, 100 Mass. 198; *Walker v. Butterick*, 105 Mass. 237; *Middletown v. Stone*, 111 Pa. 589.

<sup>62</sup> *Mellish, L. J.*, in *Ex parte White*, L. R. 6 Ch. 397.

<sup>63</sup> *Curtis v. Gibney*, 59 Md. 131, 154; *Gibney v. Curtis*, 61 Md. 192.

<sup>64</sup> *Mellish, L. J.*, in *Ex parte White*, L. R. 6 Ch. 397, 404; *Arbuckle Bros. v. Gates*, 95 Va. 802; *Henney Buggy Co. v. Cathels*, 110 Iowa, 24; *De Krulff v. Fleman*, 130 Mich. 12; *Vosbury v. Mallory*, 70 App. Div. (N. Y.) 247; *Roosevelt v. Nusbaum*, 75 App. Div. (N. Y.) 117.

<sup>65</sup> *Ex parte White*, L. R. 6 Ch. 397; *Peoria Mfg. Co. v. Lyons*,



goods to be sold on commission and it is doubtful whether or not he has become the purchaser or mere agent to sell, one of the main tests is, if he is given an option to pay for the goods and keep them, then it is a sale of the goods and the title passes to such person absolutely, as a matter of law.<sup>66</sup>

Furnishing merchandise at stipulated prices with a requirement that acceptances be given therefor,<sup>67</sup> or that a bond be given reciting possible liability on account of the receipt thereof, and conditioned for the payment of all indebtedness to accrue,<sup>68</sup> clearly establishes a contract of sale. So a complete sale, and not an agency, is established, if one party is absolutely bound to pay in full for every shipment of property made to him by the other, and has no right to return the property under any circumstances, the other party reserving no right to retake the same, notwithstanding that the contract is denominated an agency and expressly provides that the title of the property is to remain in the shipper until sold by the consignee.<sup>69</sup>

A contract by which one of the parties is to purchase from the other a specified quantity of a commodity annually, and by which the other grants him the exclusive right to sell such commodity in a certain locality, is not inconsistent with the relation of buyer and seller, especially where the latter is in no way bound to protect the former or to promote his business or interests, and it has been held to be a contract of sale.<sup>70</sup>

153 Ill. 427; *Mack v. Drummond Tobacco Co.*, 48 Neb. 397, 58 Am. St. Rep. 691; *Richardson Drug Co. v. Oberfelder*, 58 Neb. 822; *Kellam v. Brown*, 112 N. C. 451. And see *Braun v. Keally*, 146 Pa. 519, 28 Am. St. Rep. 811.

<sup>66</sup> *Fleet v. Hertz*, 98 Ill. App. 564.

<sup>67</sup> *Texas Brewing Co. v. Templeman*, 90 Tex. 277 (distinguishing *Milburn Mfg. Co. v. Peak*, 89 Tex. 209); *Mack v. Drummond Tobacco Co.*, 48 Neb. 397, 58 Am. St. Rep. 691; *Fish v. Benedict*, 74 N. Y. 613.

<sup>68</sup> *Texas Brewing Co. v. Anderson* (Tex. Civ. App.) 40 S. W. 737.

<sup>69</sup> *Williams v. Drummond Tobacco Co.*, 17 Tex. Civ. App. 635; *Henney Buggy Co. v. Cathels*, 110 Iowa, 24.

<sup>70</sup> *Saxlehner v. Eisner*, 88 Fed. 61; *Aspinwall Mfg. Co. v. Johnson*,

A contract providing that a person shall sell goods manufactured for him, on commission for the manufacturer's account, is held an absolute sale where the price of the goods is fixed by the contract with terms of discount, and it also provides that cash received on sales shall be remitted to the manufacturer and credited on the indebtedness, and that notes taken shall be held as collateral security therefor, and that goods remaining unsold on a certain date are to be held subject to the manufacturer's order.<sup>71</sup>

(d) **Intention of the parties controlling particular provisions of contract.**—As was stated in a preceding section, whenever the meaning of the contract is obscure, the court may and should ascertain the intention of the parties by examining the agreement as a whole, and by considering the surrounding circumstances, including conduct of the parties showing their understanding of the agreement, and the real intention of the parties thus ascertained may often control particular stipulations in the contract. Provisions of a contract which, without explanation, might indicate or import a purchase and sale, will not be conclusive of that fact, if they are not inconsistent with an agency, and an agency is made out by other parts of the contract, or by extraneous evidence of the understanding of the parties.<sup>72</sup> For example, an obligation on the part of the consignee of goods to pay freight and like charges is more consistent with the idea of an absolute sale than an agency, but a stipulation therefor will not of itself transform the transaction into a sale, if it is evident that it was the intention of the parties to establish the

97 Mich. 531; *Roosevelt v. Nusbaum*, 75 App. Div. (N. Y.) 117; *Kellam v. Brown*, 112 N. C. 451.

An instrument signed by the general agents of a particular brand of wine and delivered by them to a wholesale liquor dealer, stating "we have sold and will sell in the future" such brand of wine at certain specified prices, and that the dealer named "will have the sole agency for our wine in" in a certain city, "provided he continues to handle the wine in fair quantities," does not create an agency, but is a simple contract of purchase and sale. *Roosevelt v. Nusbaum*, 75 App. Div. (N. Y.) 117.

<sup>71</sup> *Yoder v. Haworth*, 57 Neb. 150, 73 Am. St. Rep. 496.

<sup>72</sup> *Bayliss v. Davis*, 47 Iowa, 340; and cases in the notes following

relation of principal and agent.<sup>73</sup> So, statements in invoices implying that the consigned goods were "sold," "terms contract," "terms spot cash," "terms when sold" and "terms \_\_\_\_\_" have been disregarded, when the written contract unquestionably showed the establishment of an agency.<sup>74</sup>

On the other hand, if the contract by its terms really constitutes a purchase and sale, or if such otherwise appears to have been the intention of the parties, the use of language designating one party as the agent of the other, or otherwise implying the creation of an agency will not change the real fact, nor be conclusive of the nature of the relation so as to determine the construction of the instrument.<sup>75</sup> Thus, where the relation of debtor and creditor is established, the fact that notes, termed "advances," were given at stated periods for the price of goods received since the preceding period, will not negative the theory of a sale.<sup>76</sup> Where a contract appointed a person as "exclusive vendor" within a certain territory, and granted peculiar privileges, and imposed peculiar restrictions, thus indicating the existence of the relation of principal and agent, it was held a contract of sale because the whole contract and the surrounding circumstances showed that the parties so intended.<sup>77</sup> There are many other provisions or stipulations which are rather indicative of an agency, but which are not incompatible with a contract of sale, or conditional sale, and which, therefore,

<sup>73</sup> *In re Linforth*, 4 Sawy. 370, Fed. Cas. No. 8,369; *Norton v. Melick*, 97 Iowa, 564; *Lenz v. Harrison*, 148 Ill. 598; *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 45 Am. St. Rep. 846; *Sturm v. Boker*, 150 U. S. 312. See *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854.

<sup>74</sup> *National Bank of Augusta v. Goodyear*, 90 Ga. 711.

<sup>75</sup> *Ex parte Flannagans*, 2 Hughes, 264, Fed. Cas. No. 4,855; *Norton v. Melick*, 97 Iowa, 564; *Aetna Powder Co. v. Hildebrand*, 137 Ind. 462; *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854; *Texas Brewing Co. v. Anderson* (Tex. Civ. App.) 40 S. W. 737; *Mack v. Drummond Tobacco Co.*, 48 Neb. 397, 58 Am. St. Rep. 691; *Aspinwall Mfg. Co. v. Johnson*, 97 Mich. 531; *Richardson Drug Co. v. Oberfelder*, 58 Neb. 822.

<sup>76</sup> *Bastress v. Chickering*, 18 Ill. App. 198.

<sup>77</sup> *Wilcox & G. Sewing Mach. Co. v. Ewing*, 141 U. S. 627. See, also, *Saxlehner v. Elsner*, 88 Fed. 61.

will not prevent a construction of the contract as one of sale if such appears to have been the understanding. Among these may be mentioned stipulations for the rendition of accounts of sales, statements, and the like, either at the time the sales are made,<sup>78</sup> or periodically,<sup>79</sup> and stipulations for periodical remittances for sales made, either in cash or in notes of the consignee.<sup>80</sup>

**§ 9. Sale of goods or contract of agency to purchase.**

The question whether there is a contract of agency or for the sale of goods also arises where a person is to buy goods and deliver them to another who is to pay the purchase price. A contract by which one of the parties agrees to purchase goods for the other at a certain price, and the other agrees to receive them and pay the price on delivery, is a contract of agency for the purchase of goods, and not a contract for the sale of goods.<sup>81</sup> But it is otherwise, of course, where a person agrees to buy goods on his own account and sell them to the other party to the agreement for a certain price.

**§ 10. Sale of land or contract of agency to sell or purchase.**

A question sometimes arises as to whether a contract be-

<sup>78</sup> *National Bank of Augusta v. Goodyear*, 90 Ga. 711; *Lenz v. Harrison*, 148 Ill. 598; *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 45 Am. St. Rep. 846; *Williams Mower & Reaper v. Raynor*, 38 Wis. 119. See *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854.

<sup>79</sup> *Burton v. Goodspeed*, 69 Ill. 237; *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 45 Am. St. Rep. 846; *Lenz v. Harrison*, 148 Ill. 598; *Norton v. Mellick*, 97 Iowa, 564; *National Bank of Augusta v. Goodyear*, 90 Ga. 711; *Walker v. Butterick*, 105 Mass. 237; *National Cordage Co. v. Sims*, 44 Neb. 148; *Balderston v. National Rubber Co.*, 18 R. I. 338, 49 Am. St. Rep. 772; *Metropolitan Nat. Bank v. Benedict Co.*, 36 U. S. App. 604, 74 Fed. 182.

<sup>80</sup> *Pierce v. Lees*, 17 App. Div. (N. Y.) 346; *Moline Plow Co. v. Rodgers*, 53 Kan. 743; *Norton v. Mellick*, 97 Iowa, 564; *Williams Mower & Reaper v. Raynor*, 38 Wis. 119; *Fish v. Benedict*, 74 N. Y. 613; *Aspinwall Mfg. Co. v. Johnson*, 97 Mich. 531; *Peoria Mfg. Co. v. Lyons*, 153 Ill. 427; and see *Braunn v. Keally*, 146 Pa. 519, 28 Am. St. Rep. 811, and cases cited in the notes preceding.

<sup>81</sup> *Hatch v. O'Brien*, 83 Mich. 159; *Keswick v. Rafter*, 35 App. Div. (N. Y.) 508, 165 N. Y. 653.

tween the owner of land and another makes the latter the agent of the owner to sell the land for him, or whether it is a contract of sale between the parties. The question depends, of course, upon the terms of the contract and the intention of the parties. It was held in a late Washington case that a contract between the owner of land and another by which the latter was given the exclusive authority to sell the land within a fixed time, and at not less than a certain price, and by which he was to receive as commission for making a sale, all he might obtain for the land above that price, created an exclusive agency for the sale of the property within the time specified, and at not less than the price specified, and did not give an option to purchase at the price fixed.<sup>82</sup> In a California case, however, where the owner of land authorized another to sell it at not less than a certain sum, and agreed that the other should have all he might receive above that sum, it was held that the agreement was in the nature of an option, and created the relation of vendor and purchaser, rather than that of principal and agent.<sup>83</sup> And where one obtains an option on property, agreeing that they are to be transferred to the grantee or his assigns on payment of the consideration, it was held that on the face of the contract the relation of the parties was that of possible vendor and vendee.<sup>84</sup>

The question may also arise, as in a case in which the statute of frauds is set up as against an oral contract, whether a particular contract is a contract by one of the parties to purchase and sell land to the other, or a contract of agency to purchase. Where the party making the purchase is acting for the other and not for himself, the contract is one of agency. An agreement by which one of the parties thereto is to purchase land for the other, although in his own name,

<sup>82</sup> *Chezum v. Kreighbaum*, 4 Wash. 680.

<sup>83</sup> *Robinson v. Easton*, 93 Cal. 80, 27 Am. St. Rep. 167. As to the distinction between a contract by which one of the parties agrees to buy land as agent for the other and a contract by which he agrees to buy land himself and sell the whole or a part to the other, see *Wright v. Calhoun*, 19 Tex. 412.

<sup>84</sup> *Keene v. Demelman*, 172 Mass. 17.

and the other is to pay the purchase money, is a contract of agency.<sup>85</sup>

**§ 11. Agency or lease.**

A question also arises sometimes as to whether a person in possession of land under a contract with the owner is his agent or his lessee, or in other words whether the relation is that of principal and agent or landlord and tenant. This depends as in other cases upon the construction of the contract and the intention of the parties. The question may arise when it is sought to charge one or the other of the parties for repairs, improvements, and the like, made at the instance of the party in possession, and in many other cases.<sup>86</sup>

Where a person occupied land under an agreement with the owner for a fixed period, and had the right to receive and dispose of the rents and profits as he saw fit, it was held that the relation was that of landlord and tenant, though no rent was reserved, and that the holding was not consistent with a contention that an indebtedness incurred by the party in possession for repairs, etc., was incurred by him as agent of the landowner.<sup>87</sup> In a Mississippi case, it appeared that a person claiming to be the agent of the lessee of certain land and fixtures had charge of the property at first under a power of attorney; that he remained in control of the property after the lessee had become financially embarrassed, and successfully resisted the attempt of creditors to secure possession; that he proved a claim for advances made under the rent contract against the estate of the lessor; that as compensation he received a portion of the profits derived from the business carried on upon the property; that he designated himself and the original lessee in various instruments as lessees; that on the purchase of a claim of the original lessee

<sup>85</sup> *Baker v. Wainwright*, 36 Md. 336, 11 Am. Rep. 495.

An agreement by which a person promises to pay another a certain sum per acre for all the land the latter shall examine and advise him to buy is a contract of agency, and not a contract for the sale of land. *Wilson v. Morton*, 85 Cal. 598.

<sup>86</sup> *Hawley v. Curry*, 74 Ill. App. 309; *Ragsdale v. Meridian Land & Industrial Co.*, 71 Miss. 284.

<sup>87</sup> *Hawley v. Curry*, 74 Ill. App. 309.

he was vested with authority by the latter to sue thereon in his name, and it was stipulated that the assignee should be saved harmless for the costs and damages. It was held that the relation of principal and agent did not exist, but that the alleged agent was a lessee or assignee of the term.<sup>88</sup>

### § 12. Agency or license.

Ordinarily it cannot be difficult to determine whether a person is an agent or a mere licensee, but the question has been raised. If a person appoints or authorizes another to carry on a business for him, without liability for losses sustained therein, reserving the right to revoke the appointment at any time, the other being required to render accounts of his management at stated periods, the appointment is not a mere license, but creates an agency.<sup>89</sup>

### § 13. Agency or loan.

A question may arise as to whether parties occupy the relation of principal and agent or that of borrower and lender. Where a person advanced money to another for the purchase of goods by the latter, and it was agreed that the title of the goods should be in the former, and that the latter should sell them and retain from the proceeds what might remain after repayment of the advance with interest and a certain porportion of the sum realized on the sale, it was held that the contract created the relation of principal and agent and not that of lender and borrower.<sup>90</sup>

### § 14. Agency or trust.

The question may also arise as to whether a person is acting as an agent in a certain matter, or whether he occupies the position of a trustee; and this question may be of much im-

<sup>88</sup> *Ragsdale v. Meridian Land & Industrial Co.*, 71 Miss. 284.

<sup>89</sup> *Bingaman v. Hickman*, 115 Pa. 424; *Hickman v. Bingaman* (Pa.) 17 Atl. 20. In this case the creditors of a mine owner appointed a committee to operate the mine and manage the business, and it was contended that the committee was a mere licensee. It was held, however, that it was an agent.

<sup>90</sup> *Van Sandt v. Dows*, 63 Iowa, 594, 50 Am. Rep. 759. And see *Dows v. Morse*, 62 Iowa, 231.

portance in some cases in determining such person's rights and liabilities in the particular case. There are a number of differences between an agency and a trust, the most important of which may be enumerated as follows: (1) A trust is irrevocable,<sup>91</sup> except by the consent of the beneficiaries or by a reservation of a power to revoke,<sup>92</sup> whereas an agency is revocable at the will of the principal, except where it is coupled with interest;<sup>93</sup> (2) a trust is not terminated by the death of either party, while an agency usually is, except where it is coupled with an interest;<sup>94</sup> (3) in a trust, the legal title to the subject-matter is in the trustee, but in case of an agency it remains in the principal;<sup>95</sup> (4) a trustee represents the beneficiary, while an agent represents his principal;<sup>96</sup> (5) an agent is employed to enter into negotiations or contracts with third parties, but a trustee is not.<sup>97</sup> Thus where money was placed in the hands of a certain person for certain purposes, and suit was brought to recover the balance from him by the person who placed it in his hands, it was contended that he was a trustee and the balance of the money could not be recovered from him, but it was held that as the evidence to prove the trust was not clear and convincing, the relation was that of agency, which could be revoked, and the balance remaining in his hands could be recovered by his principal.<sup>98</sup> So where one person employs another as an agent, loans money or sells property on credit, a confidence and trust is imposed, to a greater or less extent, yet such transactions have never been regarded by courts as falling within any recognized class of trusts.<sup>99</sup>

<sup>91</sup> *Kraft v. Neuffer*, 202 Pa. 558. And see note on this subject in 2 Mich. Law Rev. 139.

<sup>92</sup> *Van Cott v. Prentice*, 104 N. Y. 45.

<sup>93</sup> See post, § 157 et seq.

<sup>94</sup> *Lyle v. Burke*, 40 Mich. 499. And see post, §§ 185, 186.

<sup>95</sup> *Sibley v. Ober*, 87 Ga. 55.

<sup>96</sup> *Whittle v. Vanderbilt Min. & Mill. Co.*, 83 Fed. 48.

<sup>97</sup> *Hartley v. Phillips*, 198 Pa. 9.

<sup>98</sup> *Flaherty v. O'Connor* (R. I.) 54 Atl. 376.

<sup>99</sup> *Weer v. Gand*, 88 Ill. 493.



**§ 15. Acts in the presence and by direction of another not the acts of an agent.**

An act done by a person in the presence of another, and by his direction or with his consent, as the signing or execution of a sealed or written instrument, for example, is not regarded as the act of an agent, but is the direct act of the person by whose direction it is done.<sup>100</sup> "The name," said Chief Justice Shaw, speaking of a deed, "being written by another hand, in the presence of the grantor and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers, and she merely uses the hand of another, \* \* \* instead of her own, to do the physical act of making a written sign."<sup>101</sup> This doctrine has been applied even where the person signing or executing the instrument for another was not in the latter's immediate presence and view, where

<sup>100</sup> *England*: *Ball v. Dunsterville*, 4 Term R. 313; *Rex v. Longnor*, 4 Barn. & Adol. 647; *Hudson v. Revett*, 5 Bing. 368; *Hibblewhite v. McMorine*, 6 Mees. & W. 200.

*Alabama*: *Lewis v. Watson*, 98 Ala. 479, 39 Am. St. Rep. 82.

*California*: *Jansen v. McCahill*, 22 Cal. 563, 83 Am. Dec. 84; *Los Angeles Lighting Co. v. Los Angeles*, 106 Cal. 156.

*Georgia*: *Reinhart v. Miller*, 22 Ga. 402, 68 Am. Dec. 506.

*Illinois*: *People v. Organ*, 27 Ill. 27, 79 Am. Dec. 391.

*Massachusetts*: *Gardner v. Gardner*, 5 Cush. 483, 52 Am. Dec. 740; *Burns v. Lynde*, 6 Allen, 305; *Wood v. Goodridge*, 6 Cush. 117, 52 Am. Dec. 771.

*Michigan*: *Fox v. Norton*, 9 Mich. 207.

*New Hampshire*: *Kidder v. Prescott*, 24 N. H. 263; *Hanson v. Rowe*, 26 N. H. 327; *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565.

*New Jersey*: *Mutual Ben. Life Ins. Co. v. Brown*, 30 N. J. Eq. 202.

*New York*: *Mackay v. Bloodgood*, 9 Johns. 285; *People v. Smith*, 20 Johns. 63; *Blood v. Goodrich*, 9 Wend. 68, 24 Am. Dec. 121.

*Pennsylvania*: *Hart v. Withers*, 1 Pen. & W. 285, 21 Am. Dec. 382; *Fitchthorn v. Boyer*, 5 Watts, 159, 30 Am. Dec. 300; *Fitzpatrick v. Engard*, 175 Pa. 393.

*South Carolina*: *Kennedy v. Gramling*, 33 S. C. 367, 26 Am. St. Rep. 676. That the fact that an instrument signed by a person for another was so signed in the presence and by direction of the latter may be presumed from circumstances. See *Kennedy v. Gramling*, 33 S. C. 367, 26 Am. St. Rep. 676.

<sup>101</sup> *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740.

he was near by and the act was done by his direction immediately before.<sup>102</sup>

The doctrine that an act done for another in his presence and by his direction is not regarded as the act of an agent, but as the direct act of the person for whom it is done, has been applied in a variety of cases. Thus it has repeatedly been applied, as we shall hereafter see, to the signing and sealing of a deed, which, if regarded as the act of an agent, would require authority under seal;<sup>103</sup> to the execution of an instrument under seal by a partner in the presence of his co-partners;<sup>104</sup> to the filling of blanks in a deed;<sup>105</sup> to the signing of a contract required by the statute of frauds to be in writing, and for the signing of which by an agent authority in writing is required by the statute;<sup>106</sup> to the signing of another's name to a written protest;<sup>107</sup> and to the signing by another of the name of a witness to the execution of a will.<sup>108</sup>

#### § 16. Transfer of services.

A principal or master cannot transfer the services of his agent or servant, without the latter's consent, so as to make him the agent or servant of the transferee and subject him to the latter's control.<sup>109</sup> But a principal or master may temporarily transfer the services of his agent or servant, with his consent, for a particular employment, so as to make him *pro hac vice* the agent or servant of the transferee, as where a person hires property to another and furnishes an employee to manage it under the direction and control of the other.<sup>110</sup> In such a case the agent or servant, for anything done in that particular employment, must be considered as the agent or

<sup>102</sup> *Reinhart v. Miller*, 22 Ga. 402, 68 Am. Dec. 506.

<sup>103</sup> See post, § 52.

<sup>104</sup> See post, § 52.

<sup>105</sup> See post, § 53.

<sup>106</sup> *Fitzpatrick v. Engard*, 175 Pa. 393. And see post, § 48.

<sup>107</sup> *Los Angeles Lighting Co. v. Los Angeles*, 106 Cal. 156.

<sup>108</sup> *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565.

<sup>109</sup> *Chitty*, Cont. 739; *Hayes v. Willio*, 4 Daly (N. Y.) 259.

<sup>110</sup> *Johnson v. Lindsay* [1891] App. Cas. 371; and cases cited in the notes following.

servant of the transferee, if he exercises exclusive control over him and directs his work, although he may remain for other purposes the agent or servant of the transferer, and he will be liable for injuries resulting from his tortious conduct in such employment.<sup>111</sup> Whether the transfer is for a consideration or not is immaterial.<sup>112</sup> The transferee is not liable if the injury was caused by the violation of a duty owing by the agent or servant to the transferer, and as to which the transferee had no right of control.<sup>113</sup>

<sup>111</sup> *Johnson v. Lindsay* [1891] App. Cas. 371; *Donovan v. Laing, W. & D. Const. Syndicate* [1893] 1 Q. B. Div. 629; *Rourke v. White Moss Colliery Co.*, 2 C. P. Div. 205.

<sup>112</sup> *Donovan v. Laing, W. & D. Const. Syndicate* [1893] 1 Q. B. Div. 629.

<sup>113</sup> *Huff v. Ford*, 126 Mass. 24, 30 Am. Rep. 645; *Quinn v. Complete Elec. Const. Co.*, 46 Fed. 506; *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304; *Michael v. Stanton*, 3 Hun (N. Y.) 462; *Laugher v. Pointer*, 5 Barn. & C. 560; *Quarman v. Burnett*, 6 Mees. & W. 499; *Jones v. Liverpool*, 14 Q. B. Div. 890.

Where one is neither the servant nor agent of another, but an independent contractor, those employed by him are his servants or agents. *Quinn v. Complete Elec. Const. Co.*, 46 Fed. 507; *Reedie v. London & N. W. Co.*, 4 Exch. 244; *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304; *Hilliard v. Richardson*, 3 Gray (Mass.) 349, 63 Am. Dec. 743; *Allen v. Willard*, 57 Pa. 374; *Scammon v. Chicago*, 25 Ill. 424, 79 Am. Dec. 334.

C. & S.—3.

## CHAPTER II.

### PARTIES TO THE RELATION.

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#### I. WHO MAY BE PRINCIPALS.

##### § 17. In general.

With respect to the competency of the parties to the relation of principal and agent, the contract of agency, as between the parties themselves, is governed by substantially the same rules as any other contract. Any person who is *sui juris*, and capable of entering into a binding contract, is capable, as a general rule, of entering into a binding contract of agency, and on the other hand, a person who is under an in-

capacity or disability to contract is under the same disability or incapacity to bind himself by a contract of agency.

It may also be laid down as a general rule, subject to exceptions hereafter noted, that any person who is capable of entering into a contract or doing any other act himself is capable of contracting or doing such other act through an agent, for the act of an agent is the act of his principal, according to the maxim, *qui facit per alium, facit per se*.<sup>1</sup> And, e converso, a person who is incapable of binding himself by a contract or other act is incapable of doing so by authorizing another to act as his agent.<sup>2</sup>

As a necessary corollary to this proposition, persons who are not *sui juris* are incapable of conferring power to perform such action as to which they themselves have no power.<sup>3</sup> Such persons may be divided into two classes, (1) natural incompetents, and (2) legal incompetents. The incompetency of the first class is due to mental deficiencies. It includes idiots, persons of unsound mind, and drunkards. The second class includes infants, married women, aliens, convicts, outlaws, and others.<sup>4</sup> This general statement is subject to qualification, for, as we shall presently see more fully, all aliens are not necessarily incompetent, and lunatics and infants are not absolutely powerless to appoint agents; on the contrary, under some circumstances their appointments are treated as voidable only, and even binding, where the result of the agent's action has been beneficial, or fairness requires that the transaction of the agent should be upheld on equitable principles.<sup>5</sup>

<sup>1</sup> *Combes's Case*, 9 Coke, 75b; *Furnivall v. Hudson* [1893] 1 Ch. 335, 62 Law J. Ch. 178; *Tharsis Sulphur & Copper Co. v. La Societe des Metaux*, 58 Law J. Q. B. 435; *Lyon v. Kent*, 45 Ala. 656, *Huffcut, Cas.* 30; *Ferguson v. Morris*, 67 Ala. 389; *Davis v. Lane*, 10 N. H. 156; *Bozmore v. Mountain*, 121 N. C. 59; *Story, Ag.* §§ 6, 440; *Evans, Ag.* (2d Ed.) 11; *Civ. Code Cal.* § 2304. And see the cases in the notes following.

<sup>2</sup> *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199.

<sup>3</sup> *Story, Ag.* § 5; *Evans, Ag.* (2d Ed.) 11.

<sup>4</sup> *Snyder v. Sponable*, 1 Hill (N. Y.) 567; *Oulds v. Sansom*, 3 Taunt. 261; *Story, Ag.* § 6 et seq.; *Evans, Ag.* 12.

<sup>5</sup> See following sections.

The capacity of a guardian, trustee, executor, administrator, assignee for the benefit of creditors, or other fiduciary, to employ an agent, is not properly a question of his capacity to act as a principal, but rather of his power to employ an agent in the discharge of his official duties, and for that reason a full consideration of such question is not properly included within the scope of this work, and therefore will be excluded. It may be stated generally, however, that such officers or fiduciaries may employ agents in so far as they are necessary or expedient in carrying out their official or fiduciary duties, and may be considered as within the powers of their official or fiduciary position.

### § 18. Infants as principals.

As a general rule the contracts of an infant, except contracts for necessities which are binding, are voidable at his option. They are not void, but are binding upon the other party. They are simply voidable at the option of the infant. He may repudiate them on attaining his majority or before, or he may affirm or ratify them on attaining his majority, and thereby render them binding *ab initio*.<sup>6</sup> By the overwhelming weight of authority, the same rule applies to the deeds of an infant.<sup>7</sup> Whether the rule applies to a contract of agency by an infant as principal, and to con-

<sup>6</sup> See Hammon, *Cont.* § 155; and other works on the law of contracts.

<sup>7</sup> *Irvine v. Irvine*, 9 Wall. (U. S.) 617; *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732; *Rogers v. Hurd*, 4 Day (Conn.) 57, 4 Am. Dec. 182; *Keil v. Healey*, 84 Ill. 104, 25 Am. Rep. 434; *Green v. Wilding*, 59 Iowa, 679, 44 Am. Rep. 696; *Phillips v. Green*, 3 A. K. Marsh. (Ky.) 7, 13 Am. Dec. 124; *Hoffert v. Miller*, 86 Ky. 572; *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Youse v. Norcoms*, 12 Mo. 549, 51 Am. Dec. 175; *Bostwick v. Atkins*, 3 N. Y. 53; *Logan v. Gardner*, 136 Pa. 588, 20 Am. St. Rep. 939; *Dolph v. Hand*, 156 Pa. 91, 36 Am. St. Rep. 25; *Wheaton v. East*, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837; *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381. It has been held, however, that if an infant's deed is without consideration, or for a nominal consideration, it is absolutely void. *Robinson v. Coulter*, 90 Tenn. 705, 25 Am. St. Rep. 708. See, also, *Wade v. Love*, 69 Tex. 522; *Bloomington v. Chittenden*, 74 Mich. 698.

tracts or deeds made by a person as agent for an infant, is not so clear, and the authorities on the question are conflicting.

It has repeatedly been held from a very early day that a formal power or warrant of attorney by an infant, to convey land, confess judgment, or do any other act not clearly for his benefit, is not merely voidable, but absolutely void, and in most jurisdictions, perhaps, this doctrine is firmly established.<sup>8</sup> But the rule does not apply where the appointment is clearly for the infant's benefit, as in the case of a power of attorney to receive livery of seizin,<sup>9</sup> or in the case of a power of attorney to sell, where a trust is created for the benefit and security of the infant.<sup>10</sup> An infant cannot appoint an attorney to sue in his name.<sup>11</sup>

In a number of cases, the courts have gone further than this, and have said that any appointment of an agent by an infant is absolutely void, so that acts done or contracts made by the agent are void and incapable of ratification. In a

<sup>8</sup> Whittingham's Case, 8 Coke, 42b; Combes's Case, 9 Coke, 75; Saunderson v. Marr, 1 H. Bl. 75; Philpot v. Bingham, 55 Ala. 435; Waples v. Hastings, 3 Har. (Del.) 403; Hiestand v. Kuns, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481; Pyle v. Cravens, 4 Litt. (Ky.) 17; Dana v. Coombs, 6 Me. 89; Bennett v. Davis, 6 Cow. (N. Y.) 393; Lawrence's Lessee v. McArter, 10 Ohio, 37; Knox v. Flack, 22 Pa. 337; Rocks v. Cornell, 21 R. I. 532. This rule has been applied, in a late Rhode Island case, to a power of sale in a mortgage executed by an infant. Rocks v. Cornell, 21 R. I. 532.

See, also, Ferguson v. Houston East & West Texas R. Co., 73 Tex. 344, where this question was undecided, but the court was "unable to discover any substantial reason why the same rule should not apply to a power of attorney" to convey as to a deed by the infant himself, that is voidable and not void.

<sup>9</sup> Rames v. Machin, Noy, 130.

<sup>10</sup> Duvall v. Graves, 7 Bush (Ky.) 461.

<sup>11</sup> Bartholomew v. Dighton, Cro. Eliz. 424; Clark v. Turner, 1 Root (Conn.) 200; Nicholson v. Wilborn, 13 Ga. 467; Timmons v. Timmons, 6 Ind. 8; Wetherhill v. Harris, 67 Ind. 452; Cavender v. Smith's Heirs, 5 Iowa, 157; Deford v. State, 30 Md. 179; Wainwright v. Wilkinson, 62 Md. 146; Miles v. Boyden, 3 Pick. (Mass.) 213; Gamache v. Provost, 71 Mo. 84; Creech v. Creech, 10 Mo. App. 586; Mockey v. Grey, 2 Johns. (N. Y.) 192; Moore v. McEwen, 5 Serg. & R. (Pa.) 373; Somers v. Rogers, 26 Vt. 585.

few cases there have been actual decisions to this effect.<sup>12</sup> In most of the cases, however, in which such *dictum* occurs, the question was not involved at all, or else the only question was as to the effect of a formal power of attorney, so that they are not authority for the broader rule.<sup>13</sup> By the weight of authority, the rule, in so far as it exists at all, is confined to a formal power of attorney, and other appointments of an agent by an infant, as by parol, and acts done or contracts made by the agent in pursuance thereof, are, like ordinary contracts, merely voidable at the option of the infant, and capable of ratification by him.<sup>14</sup> In accordance with this view it has been held, for example, that a note made for a partnership debt and in the firm name by an adult partner is not void as to his infant copartner, but merely voidable, so that it may be ratified by the latter on attaining his majority;<sup>15</sup> and that an indorsement and transfer of a note by the agent of an infant under parol authority is merely voidable, and not void.<sup>16</sup>

<sup>12</sup> Doe d. Thomas v. Roberts, 16 Mees. & W. 778; Trueblood v. Trueblood, 8 Ind. 195, 65 Am. Dec. 756; Tapley v. McGee, 6 Ind. 56; Armitage v. Widoie, 36 Mich. 124; Semple v. Morrison, 7 T. B. Mon. (Ky.) 298; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Robbins v. Mount, 27 Super. Ct. (N. Y.) 553; Turner v. Bondallier, 31 Mo. App. 582. In some states there are statutes expressly declaring void appointment of an agent by an infant. See Wambole v. Foote, 2 Dak. 1. And see 18 Am. St. Rep. 580, 581.

<sup>13</sup> See Dexter v. Hall, 15 Wall. (U. S.) 9; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209; Cole v. Pennoyer, 14 Ill. 158; Harner v. Dipple, 31 Ohio St. 72, 27 Am. Rep. 496; Fetrow v. Wiseman, 40 Ind. 155; Flexner v. Dickerson, 72 Ala. 318; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

<sup>14</sup> Hastings v. Dollarhide, 24 Cal. 195; Hardy v. Waters, 38 Me. 450; Towle v. Dresser, 73 Me. 252; Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229; Stiff v. Keith, 143 Mass. 224; Patterson v. Lippincott, 47 N. J. Law, 457, 54 Am. Rep. 178; Cummings v. Powell, 8 Tex. 80. See, also, Hall v. Jones, 21 Md. 439; Alsworth v. Cordtz, 31 Miss. 32; Alexander v. Heriot, Bailey, Eq. (S. C.) 223; Belton v. Briggs, 4 Desaus. (S. C.) 465.

<sup>15</sup> Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229. See, also, Miller v. Sims, 2 Hill (S. C.) 479; Sadler v. Robinson's Heirs, 2 Stew. (Ala.) 520.

<sup>16</sup> Hardy v. Waters, 38 Me. 450; Hastings v. Dollarhide, 24 Cal. 195.



At least one court has gone even further than this and repudiated the generally accepted doctrine as to the invalidity of an infant's formal power of attorney. The question arose in a late Minnesota case, and it was held that an infant's power of attorney to sell and convey land, and a conveyance by the attorney thereunder, were not absolutely void, but merely voidable, and that they might be ratified by the infant on attaining his majority.<sup>17</sup>

<sup>17</sup> *Coursolle v. Weyerhauser*, 69 Minn. 328. It was said by Judge Mitchell in this case: "Formerly the acts and contracts of infants were held either void, or merely voidable, depending on whether they were necessarily prejudicial to their interests, or were or might be beneficial to them. This threw upon the courts the burden of deciding in each particular case whether the act in question was necessarily prejudicial to the infant. Latterly the courts have refused to take this responsibility, on the ground that, if the infant wishes to determine the question for himself on arriving at his majority, he should be allowed to do so, and that he is sufficiently protected by his right of avoidance. Hence the almost universal modern doctrine is that all the acts and contracts of an infant are merely voidable. Upon this rule there seems to have been ingrafted the exception that the act of an infant in appointing an agent or attorney, and consequently all acts and contracts of the agent or attorney under such appointment, are absolutely void. This exception does not seem to be founded on any sound principle, and all the text writers and courts who have discussed the subject have, so far as we can discover, conceded such to be the fact.

"On principle, we think the power of attorney of an infant, and the acts and contracts made under it, should stand on the same footing as any other act or contract, and should be considered voidable in the same manner as his personal acts and contracts are considered voidable. If the conveyance of land by an infant personally, who is of imperfect capacity, is only voidable, as is the law, it is difficult to see why his conveyance made through an attorney of perfect capacity should be held absolutely void. It is a noticeable fact that nearly all the old cases cited in support of this exception to the general rule are cases of technical warrants of attorney to appear in court and confess judgment. In these cases the courts hold that they would always set aside the judgment at the instance of the infant, but we do not find that any of them go as far as to hold that the judgment is good for no purpose and at no time.

"The courts have from time to time made so many exceptions to the exception itself that there seems to be very little left of it,

Of course it is thoroughly well-settled that an infant is bound by his contracts for necessities furnished to himself or to his wife and children, at least to the extent of their value, and it is immaterial whether the contract was made personally or through the intervention of an agent.<sup>18</sup> The defense of criminal prosecutions and proceedings of a quasi criminal nature are considered to come within the definition of a necessary so as to render an infant liable for the reasonable charges for the services of an attorney employed by him to take care of his interests. His power to select an attorney under such circumstances is put upon the ground that it would be unreasonable to deny to him the right to secure the means of defending his life, liberty, or reputation.<sup>19</sup> The Connecticut court has gone so far as to hold that a female infant who has been seduced, abandoned, and left suffering and destitute, may employ an attorney to prosecute an action for breach of promise of marriage.<sup>20</sup>

When an infant authorizes an agent to contract for him, and the contract is not for necessities, so as to be binding, and is not absolutely void according to what has been shown above as to the state of the law on this subject, the contract is voidable at the option of the infant. It may be disaffirmed by him upon attaining his majority or before,<sup>21</sup> or it may be ratified on attaining his majority, and thereby become binding upon him.<sup>22</sup> But if in the particular jurisdiction the appointment of an agent by an infant is absolutely void,

unless it be in cases of powers of attorney required to be under seal, and warrants of attorney to appear and confess judgment in court." See, also, dictum by Acker, J., in *Ferguson v. Houston East & West Tex. R. Co.*, 73 Tex. 344.

<sup>18</sup> *Cantine v. Phillips' Adm'r*, 5 Har. (Del.) 428. And see *McCarty v. Murray*, 3 Gray (Mass.) 578.

<sup>19</sup> *Askey v. Williams*, 74 Tex. 294; *Barker v. Hibbard*, 54 N. H. 539. But not in defending a suit against his property. *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665; *Phelps v. Worcester*, 11 N. H. 51.

<sup>20</sup> See, also, *Cobbey v. Buchanan*, 48 Neb. 391. And see post, § 77.

<sup>21</sup> *Munson v. Washband*, 31 Conn. 303.

<sup>22</sup> *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489.

<sup>23</sup> *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Hardy v. Waters*, 38 Me. 450; and other cases in note 6, supra.

the contract made by the agent is necessarily void and cannot be ratified.<sup>23</sup> If the contract is merely voidable, the other party cannot avoid it on the ground of the principal's infancy;<sup>24</sup> as to him it is valid and enforceable.

### § 19. Insane persons as principals.

An insane person has no greater capacity to contract through the intervention of an agent than he has to contract directly, and as we shall presently see, the better opinion is that in so far as he can be bound by contracts made directly, he may be bound by contracts made through an agent. It is necessary, therefore, to state at the outset the general principles of law which determine the effect of contracts of an insane person. The subject is not free from difficulty, and on some points the authorities are conflicting.

In a few states it has been held that the contracts of an insane person, because of his inability to give a consent, are absolutely void, whether they are executory or executed, and whether he has been judicially declared insane and placed under guardianship or not.<sup>25</sup> This view, however, is contrary to the overwhelming weight of authority. The general rule, subject to the exceptions which will be presently noted, is that a contract by a person not an adjudged lunatic and under guardianship, is voidable at his option if at the time he entered into it he was so incapacitated by reason of idiocy, lunacy, or other mental defect or disease, as to be unable to understand its nature and effect,<sup>26</sup> but it is not void and cannot be avoided by the other party.<sup>27</sup> This rule applies and renders a contract voidable, although it has been executed in whole or in part, if the other party knew of the insane

<sup>23</sup> *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *Armitage v. Widoe*, 36 Mich. 129; and other cases in notes 6 and 7, *supra*.

<sup>24</sup> *Patterson v. Lippincott*, 47 N. J. Law, 457, 54 Am. Rep. 178.

<sup>25</sup> 1 *Daniel*, Neg. Inst. § 209; *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167; *Hanley v. National Loan & Inv. Co.*, 44 W. Va. 450. Compare, however, *Bunn v. Postell*, 107 Ga. 490.

<sup>26</sup> See the cases in the notes following.

<sup>27</sup> *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309; *Atwell v. Jenkins*, 163 Mass. 362, 47 Am. St. Rep. 463.

party's incapacity,<sup>28</sup> or although he may not have known of it, if the contract is wholly executory, or if the insane person has received no consideration, as in the case of an accommodation indorsement, or if the parties can be placed in statu quo by return of consideration received.<sup>29</sup> Some courts hold that the rule applies even though the other party may have acted in good faith and in ignorance of the party's insanity, and although the parties cannot be placed in statu quo.<sup>30</sup> Most courts, however, on the ground that the insane person's infirmity should not be made an instrument of fraud, hold that an insane person cannot avoid his contract after it has been executed in part, if he has received a benefit and the parties cannot be placed in statu quo, and if the other party acted in good faith and ignorance of his condition.<sup>31</sup>

Some of the courts have held that the deed of an insane person is not merely voidable, but absolutely void.<sup>32</sup> In most

<sup>28</sup> *Crawford v. Scovell*, 94 Pa. 48, 39 Am. Rep. 766; *Hilbreg v. Schumann*, 150 Ill. 12, 41 Am. St. Rep. 339; *Merritt v. Merritt*, 27 App. Div. (N. Y.) 208, 43 App. Div. (N. Y.) 68; *Alexander v. Haskins*, 68 Iowa, 73.

<sup>29</sup> *Burnham v. Kidwell*, 113 Ill. 425; *Wirebach's Ex'r v. First Nat. Bank*, 97 Pa. 543, 39 Am. Rep. 821; *Northwestern Mut. Fire Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185; *Hosler v. Beard*, 54 Ohio St. 398, 56 Am. St. Rep. 720.

<sup>30</sup> *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Seaver v. Phelps*, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; *Gibson v. Soper*, 6 Gray (Mass.) 279, 66 Am. Dec. 414; *Rogers v. Blackwell*, 49 Mich. 192; *Henry v. Fine*, 23 Ark. 417; *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167.

<sup>31</sup> *Molton v. Camroux*, 2 Exch. 489, 4 Exch. 17; *Imperial Loan Co. v. Stone* [1892] 1 Q. B. 599; *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Northwestern Mut. Fire Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185; *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Gribben v. Maxwell*, 34 Kan. 8, 55 Am. Rep. 233; *Rusk v. Fenton*, 14 Bush (Ky.) 490, 29 Am. Rep. 413; *Flach v. Gottschalk Co.*, 88 Md. 368, 71 Am. St. Rep. 418; *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592, 2 Am. Rep. 202; *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Beals v. See*, 10 Pa. 56, 49 Am. Dec. 573; *Lancaster County Nat. Bank v. Moore*, 78 Pa. 407, 21 Am. Rep. 24; *Bank v. Sneed*, 97 Tenn. 120, 56 Am. St. Rep. 788.

<sup>32</sup> *In re Desilver's Estate*, 5 Rawle (Pa.) 111, 28 Am. Dec. 645; *Van Deusen v. Sweet*, 51 N. Y. 378; *Brown v. Miles*, 61 Hun (N. Y.)

jurisdictions, however, it is held that the deed of an insane person, when he is not under guardianship, is merely voidable at his option, or not voidable at all, like other contracts and in accordance with the rules above stated.<sup>33</sup>

In some jurisdictions the fact that a person has been judicially declared insane and placed under guardianship merely raises a presumption of incapacity to contract, which may be rebutted by clear proof that the contract was made in a lucid interval.<sup>34</sup> In other jurisdictions the adjudication of insanity and guardianship render him absolutely and conclusively incapable of contracting, except for necessities, and his contracts and deeds are, not merely voidable, but absolutely void.<sup>35</sup>

453; *Rogers v. Blackwell*, 49 Mich. 192; *Elder v. Schumacher*, 18 Colo. 433; *Farley v. Parker*, 6 Or. 105, 25 Am. Rep. 504.

<sup>33</sup> *Castro v. Gell*, 110 Cal. 292, 52 Am. St. Rep. 84; *Burnham v. Kidwell*, 113 Ill. 425; *Boyer v. Berryman*, 123 Ind. 451; *Copenrath v. Klenby*, 83 Ind. 18; *Cribben v. Maxwell*, 34 Kan. 8, 55 Am. Rep. 233; *Rusk v. Fenton*, 14 Bush (Ky.) 490, 29 Am. Rep. 413; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Key's Lessee v. Davis*, 1 Md. 32; *Evans v. Horan*, 52 Md. 602; *Walt v. Maxwell*, 5 Pick. (Mass.) 217, 16 Am. Dec. 391; *Allis v. Billings*, 6 Metc. (Mass.) 415, 39 Am. Dec. 744; *Gibson v. Soper*, 6 Gray (Mass.) 279, 66 Am. Dec. 414; *Rhoades v. Fuller*, 139 Mo. 179; *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Odum v. Riddick*, 104 N. C. 515, 17 Am. St. Rep. 686; *Pearson v. Cox*, 71 Tex. 246, 10 Am. St. Rep. 740; *French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856.

<sup>34</sup> *Snook v. Watts*, 11 Beav. 105; *Hutchinson v. Sandt*, 4 Rawle (Pa.) 234, 26 Am. Dec. 127; *In re Gangwere's Estate*, 14 Pa. 417, 53 Am. Dec. 554; *Den d. Aber v. Clark*, 10 N. J. Law, 217, 18 Am. Dec. 417; *Hart v. Deamer*, 6 Wend. (N. Y.) 497; *Mott v. Mott*, 49 N. J. Eq. 192.

<sup>35</sup> *Redden v. Baker*, 86 Ind. 191; *Copenrath v. Klenby*, 83 Ind. 18; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Flach v. Gottschalk Co.*, 88 Md. 368, 71 Am. St. Rep. 418; *Walt v. Maxwell*, 5 Pick. (Mass.) 217, 16 Am. Dec. 391; *Rogers v. Blackwell*, 49 Mich. 192; *Knox v. Haug*, 48 Minn. 58; *Rannells v. Gerner*, 80 Mo. 474; *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499; *Van Deusen v. Sweet*, 51 N. Y. 378; *Hughes v. Jones*, 116 N. Y. 67, 15 Am. St. Rep. 386; *Carter v. Beckwith*, 128 N. Y. 312. This is so by express statutory provision in some states. Civ. Code Cal. §§ 38-40; Civ. Code Ga. § 3652; Gen. St. Minn. 1878, c. 59, § 11. This rule does

No doubt all courts hold that an insane person, like an infant, is liable on a contract for necessities furnished to himself, or to his wife and children, to the extent of the reasonable value of the same.<sup>36</sup> This is true of one who has been judicially declared insane and placed under guardianship.<sup>37</sup>

A contract or deed entered into or executed by an insane person, and which is merely voidable according to the rules above stated, may be ratified or repudiated by him after becoming sane or during a lucid interval,<sup>38</sup> or by his guardian, conservator, or committee,<sup>39</sup> or by his executor or administrator or heirs, as the case may be, after his death.<sup>40</sup>

If an insane person can enter into a contract of agency at all, or appoint an agent at all, the rules above stated apply, not only to contracts of agency as between the parties, but also to contracts made by a person as agent of an insane person with third parties. As to this, however, there is a conflict in the authorities. Some of the courts have held that a power of attorney executed by an insane person is absolutely void, and that a deed or contract executed or made

not apply, although there may have been an adjudication of lunacy, where no conservator or guardian has been appointed, and the insane person is in the control and management of his estate. *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610.

<sup>36</sup> *Baxter v. Earl of Portsmouth*, 5 Barn. & C. 170, 2 Car. & P. 178; *Read v. Legard*, 6 Exch. 636; *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610; *Reando v. Misplay*, 90 Mo. 251, 59 Am. Rep. 13; *La Rue v. Gilkyson*, 4 Pa. 375, 45 Am. Dec. 700; *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592, 2 Am. Rep. 202; *Sceva v. True*, 53 N. H. 627; *Shaw v. Thompson*, 16 Pick. (Mass.) 198, 26 Am. Dec. 655; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; *Van Horn v. Hann*, 39 N. J. Law, 207.

<sup>37</sup> *McCrillis v. Bartlett*, 8 N. H. 569; *Reando v. Misplay*, 90 Mo. 251, 59 Am. Rep. 13.

<sup>38</sup> *Allis v. Billings*, 6 Metc. (Mass.) 415, 39 Am. Dec. 744; *Gibson v. Soper*, 6 Gray (Mass.) 279, 66 Am. Dec. 414; *McClain v. Davis*, 77 Ind. 419; *Schuff v. Ransom*, 79 Ind. 458; *Turner v. Rusk*, 53 Md. 65.

<sup>39</sup> *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309; *Moore v. Hershey*, 90 Pa. 196; *McClain v. Davis*, 77 Ind. 419.

<sup>40</sup> *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Schuff v. Ransom*, 79 Ind. 458; *Bunn v. Postell*, 107 Ga. 490.

by the agent under the power is void.<sup>41</sup> And it has further been said that any appointment of an agent by an insane person is void.<sup>42</sup> The latter proposition, however, is certainly not supported by the weight of authority, but on the contrary, the actual decisions show that where an insane person appoints or holds out a person as his agent, otherwise than by a formal power of attorney, and in pursuance of such appointment or holding out the agent enters into a contract with third persons, the effect of the contract is the same as if it had been made by the insane person directly, without the intervention of an agent.<sup>43</sup> There is no reason for making any distinction in this respect between insane persons and infants.<sup>44</sup> In some of the cases the same rule has been applied to contracts and deeds made or executed by an agent under a formal power of attorney from an insane person. Thus in an Iowa case it was held that a contract to convey land, executed by the attorney in fact of an insane person, was not void, but at the most voidable merely at the option of the insane person, and that the purchaser could not set up the principal's insanity to avoid his obligation.<sup>45</sup> And in a late New York case, in the appellate division of the supreme court, it was held that where a person executes a mortgage under a power of attorney from one who is insane at the time, the mortgage is valid if the mortgagee has no knowledge of the principal's insanity and acts in good faith, but it is otherwise if he has knowledge.<sup>46</sup> An insane

<sup>41</sup> *Dexter v. Hall*, 15 Wall. (U. S.) 9; *Plaster v. Rigney*, 97 Fed. 12, 38 C. C. A. 25; *Elias v. Enterprise Bldg. & Loan Ass'n*, 46 S. C. 188. Compare *Blinn v. Schwartz*, 63 App. Div. (N. Y.) 25.

<sup>42</sup> *Story*, Ag. § 6; *Mechem*, Ag. § 47. See *Stead v. Thornton*, 3 Barn. & Adol. 357, note.

<sup>43</sup> See *Drew v. Nunn*, 4 Q. B. Div. 661; *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309; *Merritt v. Merritt*, 27 App. Div. (N. Y.) 208, 43 App. Div. (N. Y.) 68; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199.

<sup>44</sup> See ante, § 18.

<sup>45</sup> *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309. And the same has been held in a recent Texas case: *Williams v. Sapleha*, 94 Tex. 430, and see the opinion in this case for a review of the cases on a power of attorney by a lunatic or infant.

<sup>46</sup> *Merritt v. Merritt*, 27 App. Div. (N. Y.) 208, 43 App. Div. (N. Y.) 68.

person is liable on a contract for necessities purchased by his wife as his agent.<sup>47</sup>

If a person while sane appoints an agent to contract for him, either by a formal instrument or by a holding out, and then becomes insane to the agent's knowledge, the agency is terminated as between themselves, and as against persons who may deal with the agent with knowledge of the facts.<sup>48</sup> But if the agent afterwards enters into a contract with a third person, and the latter acts in good faith and in ignorance of the principal's insanity, and cannot be placed in statu quo on avoidance of the contract by the principal, the contract is binding, and this notwithstanding the principal's condition was known to the agent.<sup>49</sup> "This is put on the ground that the principal when sane represents the agent as having authority, and third persons may act on the representation until they have notice of its withdrawal. It is a case where one of two innocent parties must suffer by the wrongful act of the agent, and the loss should fall on the one whose representation is the proximate cause of the injury."<sup>50</sup> This rule does not apply, of course, where a person deals with an agent with knowledge of the principal's insanity.<sup>51</sup>

#### § 20. Drunken persons as principals.

If a person, at the time of entering into a contract, executing a deed, or appointing an agent, is so drunk as to be incapable of understanding the nature and effect of his act, the effect of his act is the same as if he were insane from any other cause, and therefore the appointment of an agent by a drunken person, where his drunkenness is as excessive as is indicated above, and acts done or contracts made by the agent in pursuance of such appointment, are governed by the rules stated in the preceding section.<sup>52</sup> Thus the fact that

<sup>47</sup> *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199.

<sup>48</sup> *Post*, § 187.

<sup>49</sup> *Drew v. Nunn*, 4 Q. B. Div. 661; *Merritt v. Merritt*, 43 App. Div. (N. Y.) 68; *Matthiessen & W. Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536; *Davis v. Lane*, 10 N. H. 156.

<sup>50</sup> *Huffcut, Agency*, § 16; *Drew v. Nunn*, 4 Q. B. Div. 661.

<sup>51</sup> *Merritt v. Merritt*, 27 App. Div. (N. Y.) 208, 43 App. Div. (N. Y.) 68.

<sup>52</sup> *Bush v. Breinig*, 113 Pa. 310, 57 Am. Rep. 469; *Carpenter v. Rodgers*, 61 Mich. 384, 1 Am. St. Rep. 595.



the principal was intoxicated when he made such a contract does not make the contract void, but voidable only, and he may repudiate or ratify the same when he becomes sober,<sup>53</sup> or it may be ratified by his guardian, committee, or representative.<sup>54</sup>

### § 21. Married women as principals.

At common law, a married woman, with very few exceptions, is incapable of entering into a binding contract, even when she is living separate and apart from her husband, and even though there may have been a divorce a mensa et thoro, and she is incapable of appointing an agent or attorney. Except, therefore, in so far as her common-law disabilities have been removed by statute, all contracts of agency or appointments of an attorney by a married woman, and all contracts or acts which she undertakes to make or do through the intervention of an agent or attorney are absolutely void.<sup>55</sup> In

<sup>53</sup> *Mansfield v. Watson*, 2 Iowa, 111; *Carpenter v. Rodgers*, 61 Mich. 384, 1 Am. St. Rep. 595; *Reinicker v. Smith*, 2 Har. & J. (Md.) 421; *Matthews v. Baxter*, L. R. 8 Exch. 132.

<sup>54</sup> *Broadwater v. Darne*, 10 Mo. 277.

<sup>55</sup> *England*: *Oulds v. Sansom*, 3 Taunt. 261; *Marshall v. Rutton*, 8 Term R. 545; *Roberts v. Pierson*, 2 Wils. 3.

*United States*: *Holladay v. Daily*, 19 Wall. 606.

*Arkansas*: *Holland v. Moon*, 39 Ark. 120; *Batte v. McCaa*, 44 Ark. 398.

*California*: *Dow v. Gould & C. Silver Min. Co.*, 31 Cal. 629; *Dentzel v. Waldie*, 30 Cal. 138.

*Connecticut*: *Freeman's Appeal*, 68 Conn. 533.

*Delaware*: *Henchman v. Roberts*, 2 Har. 74.

*Indiana*: *Dawson v. Shirley*, 6 Blackf. 531; *Patton v. Stewart*, 19 Ind. 233.

*Kentucky*: *Fetter v. Wilson*, 12 B. Mon. 90; *Steele v. Lewis*, 1 T. B. Mon. 48; *Swafford v. Herd's Adm'r*, 23 Ky. L. R. 1556, 65 S. W. 803; *Jenkins v. Crofton's Adm'r*, 10 Ky. L. R. 456, 9 S. W. 406.

*Maryland*: *Wallingsford v. Wallingsford*, 6 Har. & J. 485.

*Michigan*: *Kenton Ins. Co. v. McClellan*, 43 Mich. 564.

*Mississippi*: *Toulmin v. Heidelberg*, 32 Miss. 268.

*New Jersey*: *Earle's Adm'r's v. Earle*, 20 N. J. Law, 347, 350; *Kearney v. Macomb*, 16 N. J. Eq. 189.

*New York*: *Nash v. Mitchell*, 71 N. Y. 199, 27 Am. Rep. 38;

most jurisdictions, however, this common-law disability of a married woman to bind herself by contract or appointment of an attorney has been removed to a greater or less extent by statute. In some states she may now contract as freely and with the same effect as a feme sole. In other jurisdictions her disability is only partly removed.

It may be laid down as a general rule that, in so far as these statutes give a married woman the power to contract, convey, or do other acts, she may contract, convey, or do such other acts through the intervention of an agent as well as directly. What she may do herself she may authorize another to do for her as if she were a feme sole.<sup>56</sup> To the statu-

*Phillips v. Burr*, 4 Duer, 113; *Hardenburgh v. Lakin*, 47 N. Y. 109.

*North Carolina*: *Brown v. Brown*, 121 N. C. 8.

*Pennsylvania*: *Dorrance v. Scott*, 3 Whart. 309, 31 Am. Dec. 509; *Caldwell v. Walters*, 18 Pa. 79, 55 Am. Dec. 592.

*Tennessee*: *Gillespie v. Worford*, 2 Cold. 638; *Collier v. Struby*, 99 Tenn. 241; *McCreary v. McCorkle* (Tenn. Ch. App.) 54 S. W. 53.

*Texas*: *Halbert v. Brown*, 9 Tex. Civ. App. 335.

*Vermont*: *Sumner v. Conant*, 10 Vt. 9.

*Virginia*: *Hirth v. Hirth*, 98 Va. 121.

*Wisconsin*: *Weisbrod v. Chicago & N. W. R. Co.*, 18 Wis. 35, 86 Am. Dec. 743.

And see the other cases hereinafter cited.

<sup>56</sup> *Williams v. Paine*, 169 U. S. 55, 7 App. D. C. 116; *Linton v. National Life Ins. Co.*, 104 Fed. 584; *Patten v. Patten*, 75 Ill. 446; *Rowell v. Klein*, 44 Ind. 290; *Vail v. Meyer*, 71 Ind. 159; *McLaren v. Hall*, 26 Iowa, 297; *Wilkinson v. Elliott*, 43 Kan. 590, 19 Am. St. Rep. 158; *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273; *Porter v. Haley*, 55 Miss. 66, 30 Am. Rep. 502; *Hall v. Callahan*, 66 Mo. 316; *Long v. Martin*, 71 Mo. App. 569; *Hord v. Taubman*, 79 Mo. 101; *Flesh v. Lindsay*, 115 Mo. 1; *Knapp v. Smith*, 27 N. Y. 277; *Woodworth v. Sweet*, 51 N. Y. 8; *Bodine v. Killeen*, 53 N. Y. 93; *Wood v. Wood*, 83 N. Y. 575; *Bazemore v. Mountain*, 121 N. C. 59; *Harrisburg Nat. Bank v. Bradshaw*, 178 Pa. 180; *Weisbrod v. Chicago & N. W. R. Co.*, 18 Wis. 35, 86 Am. Dec. 743; *Conway v. Smith*, 13 Wis. 125; *Beard v. Dedolph*, 29 Wis. 136; *Meyers v. Rahte*, 46 Wis. 655. In some jurisdictions it is expressly provided that a married woman shall have the same power as if unmarried to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do. 44 & 45 Vict. c. 41.

A married woman may lease, mortgage, convey, manage and

tory right of a married woman to take and hold real and personal property to her sole and separate use and to engage in business, as a feme sole, there necessarily attaches as an incident to the exercise of those privileges, the power to employ others to act on her behalf, in order that she may fully enjoy the privileges so conferred. Thus, when a statute gives a married woman the power to sell and convey her lands, and does not expressly or by clear implication require that she shall execute the conveyance in person, she may execute a power of attorney to sell and convey, for the power to convey includes by implication the power to appoint an agent or attorney to convey.<sup>57</sup> So when empowered herself she may delegate authority to others, and through her selected agent acquire real estate by purchase,<sup>58</sup> or manage the same,<sup>59</sup> deliver conveyances therefor,<sup>60</sup> release her inchoate right of dower,<sup>61</sup> conduct farming operations,<sup>62</sup> improve land by

control her real estate in the state of Nebraska, by means of an attorney in fact. *Linton v. National Life Ins. Co.*, 104 Fed. 584.

<sup>57</sup> *Linton v. National Life Ins. Co.*, 104 Fed. 584; *Munger v. Baldridge*, 41 Kan. 236, 13 Am. St. Rep. 273; *Wilkinson v. Elliott*, 43 Kan. 590, 19 Am. St. Rep. 158; *McMurtry v. Brown*, 6 Neb. 368; *Wronkow v. Oakley*, 133 N. Y. 505, 28 Am. St. Rep. 661; *Baum v. Mullen*, 47 N. Y. 577; *Weisbrod v. Chicago & N. W. R. Co.*, 18 Wis. 35, 86 Am. Dec. 743. *Williams v. Paine*, 169 U. S. 55, 7 App. D. C. 116. It was said in this case: "We do not think the aid of a statute is necessary. Where the power is given her by law to convey directly, she can by the same ceremonies authorize another to do the act for her. The reasoning which would prevent it is, as we think, entirely too technical, fragile, and refined for constant use."

<sup>58</sup> *Jones v. Read*, 1 La. Ann. 200; *Bray v. Booker*, 8 N. D. 347; *Hill v. Hooper*, 47 Neb. 111; *Ready v. Bragg*, 1 Head (Tenn.) 511; see *Coolidge v. Smith*, 129 Mass. 654.

<sup>59</sup> *Richards v. John Spry Lumber Co.*, 169 Ill. 238; *Pool v. Phillips*, 167 Ill. 432; *Walker v. Carrington*, 74 Ill. 446; *Linton v. National Life Ins. Co.*, 104 Fed. 584; *Wortman v. Price*, 47 Ill. 22; see *Shane v. Lyons*, 172 Mass. 199, 70 Am. St. Rep. 526.

<sup>60</sup> *Harper v. Dall*, 92 N. C. 394; *Sims v. Smith*, 99 Ind. 469, 50 Am. Rep. 99.

<sup>61</sup> *Wronkow v. Oakley*, 133 N. Y. 505, 28 Am. St. Rep. 661; *Wilkinson v. Elliott*, 43 Kan. 590, 19 Am. St. Rep. 158; *Munger v. Baldridge*, 41 Kan. 236, 13 Am. St. Rep. 273; *Bertschy v. Bank of Sheboygan*, 89 Wis. 473; *Hull v. Glover*, 126 Ill. 122. Compare *Lewis v. Coxe*, 5 Har. (Del.) 401; *Steele v. Lewis*, 1 T. B. Mon. (Ky.) 48.

the erection or repair of buildings,<sup>63</sup> deal with, sell or exchange personal property,<sup>64</sup> conduct and carry on a mercantile or other business,<sup>65</sup> including representation in a co-partnership,<sup>66</sup> retain attorneys and counsel to protect her property rights or represent her in litigation,<sup>67</sup> and generally by her duly constituted representative do any acts or make any contracts which it is competent for her to perform or enter upon personally.<sup>68</sup>

When the statutes remove the common law disability of married women to contract, make conveyances, etc., not entirely, but partially only, she has no greater capacity to contract or convey through an agent under the statute than she

<sup>62</sup> *Bennett v. Stout*, 98 Ill. 47; *Nigh v. Dovel*, 84 Ill. App. 229; *Bazemore v. Mountain*, 121 N. C. 59; *Martin v. Rector*, 101 N. Y. 77; *Knapp v. Smith*, 27 N. Y. 277; *Gage v. Dauchy*, 34 N. Y. 293; *Feller v. Alden*, 23 Wis. 301; *Martin v. Suber*, 39 S. C. 525; *Foster v. Jones*, 78 Ga. 150. See *Cookson v. Toole*, 59 Ill. 516.

<sup>63</sup> *Arnold v. Spurr*, 130 Mass. 347; *Bodey v. Thackara*, 143 Pa. 171, 24 Am. St. Rep. 526; *McLaren v. Hall*, 26 Iowa, 297; *Vail v. Meyer*, 71 Ind. 159; *Hoffman v. McFadden*, 56 Ark. 217, 35 Am. St. Rep. 101; *Farley v. Stroeh*, 68 Mo. App. 85; *Maxcy Mfg. Co. v. Burnham*, 89 Me. 538; *Richards v. John Spry Lumber Co.*, 169 Ill. 238.

<sup>64</sup> *Martin v. Rector*, 101 N. Y. 77; *American Exp. Co. v. Lankford*, 2 Ind. T. 18; *Griffin v. Ransdell*, 71 Ind. 440; *Lichtenberger v. Graham*, 50 Ind. 288. See *Wortman v. Price*, 47 Ill. 22; *Austin v. Austin*, 45 Wis. 523.

<sup>65</sup> *Louisville Coffin Co. v. Stokes*, 78 Ala. 372; *Jones v. Chenault*, 124 Ala. 610; *Cubberly v. Scott*, 98 Ill. 38; *Haight v. McVeagh*, 69 Ill. 624; *First Nat. Bank v. Gatton*, 71 Ill. App. 323; *Hamilton v. Hooper*, 46 Iowa, 515; *First Commercial Bank of Pontiac v. Newton*, 117 Mich. 433; *McBain v. Seligman*, 58 Mich. 294; *Rankin v. West*, 25 Mich. 200; *Harris v. Weir-Shugart Co.*, 51 Neb. 483; *Buckley v. Wells*, 33 N. Y. 518; *Woodworth v. Sweet*, 51 N. Y. 8; *Abbey v. Deyo*, 44 N. Y. 344; *Frecking v. Rolland*, 53 N. Y. 422; *Frelberg v. Branigan*, 18 Hun (N. Y.) 344; *Osborne v. Wilkes*, 108 N. C. 651; *Baxter v. Maxwell*, 115 Pa. 469.

<sup>66</sup> *Louisiana Nat. Bank v. Scott*, 42 La. Ann. 785; *Noel v. Kinney*, 106 N. Y. 74, 60 Am. Rep. 423; *Taylor v. Minigus*, 66 Ill. App. 70.

<sup>67</sup> *Leonard v. Rogan*, 20 Wis. 540; *Porter v. Haley*, 55 Miss. 66, 30 Am. Rep. 502; *Williams v. Simmons*, 79 Ga. 649. But see *Putnam v. Tennyson*, 50 Ind. 459.

<sup>68</sup> *Rowell v. Klein*, 44 Ind. 290. See *Gleaton v. Tyler*, 43 S. C. 474; *Putnam v. Tennyson*, 50 Ind. 459.

has to contract or convey directly.<sup>69</sup> And the provisions of the statute may be such that she will not have as great capacity to act through an agent as she has to act directly.<sup>70</sup> When the statute requires that she shall execute contracts or deeds in a certain way, or that she shall first comply with certain conditions, as that she shall file a certificate before she can conduct business as a feme sole, or that she shall procure her husband's consent to the making of contracts, etc., she can exercise the powers conferred upon her only in accordance with the statute, and contracts made or deeds executed through an agent, without compliance with the statutory requirements, will not bind her.<sup>71</sup> Where a statute allows a married woman to convey her land, but requires that she shall do so by the deed of herself and husband, to be separately acknowledged by her, she cannot execute a deed by an agent by joining with her husband in, and separately

<sup>69</sup> *Holladay v. Daily*, 19 Wall. (U. S.) 606; *Freeman's Appeal*, 68 Conn. 533; *Rowell v. Klein*, 44 Ind. 290; *McLaren v. Hall*, 26 Iowa, 297; *Fetter v. Wilson*, 12 B. Mon. (Ky.) 90; *Kenton Ins. Co. v. McClellan*, 43 Mich. 564; *Nash v. Mitchell*, 71 N. Y. 199, 27 Am. Rep. 38; *Woodworth v. Sweet*, 51 N. Y. 8; *Knapp v. Smith*, 27 N. Y. 277; *Brown v. Brown*, 121 N. C. 8; *Gillespie v. Worford*, 2 Cold. (Tenn.) 632, 639; *Weisbrod v. Chicago & N. W. R. Co.*, 18 Wis. 35, 86 Am. Dec. 743; and other cases cited in note 55, supra.

A statute or deed empowering a married woman to execute a power of attorney to sell and convey her separate estate gives her no power to make a bond and warrant of attorney to confess judgment. *Dorrance v. Scott*, 3 Whart. (Pa.) 309, 31 Am. Dec. 509; *Caldwell v. Walters*, 18 Pa. 79, 55 Am. Dec. 592.

<sup>70</sup> *Sumner v. Conant*, 10 Vt. 9.

<sup>71</sup> Filing certificate to do business as a feme sole. *Merrill v. Parker*, 112 Mass. 250.

Failure to obtain husband's consent. *First Nat. Bank v. Leland*, 122 Ala. 289; *Troy Fertilizer Co. v. Zachry*, 114 Ala. 177. In *Taylor v. Minigus*, 66 Ill. App. 70, it was held that the conduct by a husband of his wife's business in a co-partnership of which she was a member, was a sufficient consent, within the statute, to her engagement in the partnership business.

In *Wright v. Blackwood*, 57 Tex. 644, it was held that where a husband had left his wife and it was necessary to appoint an agent or attorney to manage her separate property, the signature and consent of the husband to the power of attorney were not necessary.

acknowledging, a power of attorney to convey.<sup>72</sup> In a late case, however, it has been held that the fact that a statute authorizing a conveyance by a married woman requires that she shall acknowledge her deed separate and apart from her husband does not exclude by implication power on her part to appoint an attorney to convey for her, whether her husband or a third person, but in such a case if she appoints an attorney to convey for her, the power of attorney to convey must be acknowledged by her as would be required if she executed the deed.<sup>73</sup>

If a statute empowering a married woman to execute a power of attorney to contract or to convey land requires that her husband shall join in the execution of the instrument, a power of attorney by a married woman in which her husband does not join by affixing his signature is a nullity.<sup>74</sup> It is not necessary, however, in a power of attorney by a wife, to convey her separate estate, in which the husband has joined by affixing his signature, that his name should also be mentioned in the body of the instrument as a joint constituent or principal.<sup>75</sup>

It has been held that a statute validating invalid powers of attorney previously executed by a married woman, and conveyances previously executed under such invalid powers, is constitutional.<sup>76</sup> Such a statute applies, however, only to such invalid powers of attorney as come strictly within its provisions. Thus a statute validating powers of attorney previously executed by a married woman, in the execution of which her husband joined, and validating conveyances executed under such powers, does not validate powers of attorney by a married woman, or conveyances thereunder, where the husband did not join in the power by affixing his signature to the instrument.<sup>77</sup>

<sup>72</sup> Sumner v. Conant, 10 Vt. 9. And see Lewis v. Cox, 5 Har. (Del.) 401.

<sup>73</sup> Williams v. Paine, 169 U. S. 55, 7 App. D. C. 116.

<sup>74</sup> Dow v. Gould & C. Silver Min. Co., 31 Cal. 629.

<sup>75</sup> Dentzel v. Waldie, 30 Cal. 138.

<sup>76</sup> Dentzel v. Waldie, 30 Cal. 138.

<sup>77</sup> Dow v. Gould & C. Silver Min. Co., 31 Cal. 629.

A statute simply declaring that no claim to any real estate where-

In those jurisdictions in which a married woman's power to contract is confined to matters concerning her existent separate estate, her right to appoint an agent is limited to appointments concerning that estate. In other words, she cannot appoint an agent if she has no separate estate, or create an agency in connection with an estate vested in her, but as to which her common-law disabilities still exist, or which is not a separate estate within the contemplation of the statutes.<sup>78</sup>

In so far as a married woman is capable of contracting, and of doing so through an agent, she is, to precisely the same extent as a feme sole, subject to all the duties and liabilities which are imposed by the rules of law governing the relation of principal and agent.<sup>79</sup> Thus, she may become liable, by estoppel, to the same extent as any other person, for the contracts and acts of her husband or another by reason of having held him out or allowed him to appear as having author-

of any person was then actually possessed, shall be deemed to be void upon the pretense that the feme covert granting the same was not privily examined before a proper officer, does not validate deeds executed by an agent under an invalid power of attorney by a married woman. *Hardenburgh v. Lakin*, 47 N. Y. 109, 113.

<sup>78</sup> *Flesh v. Lindsay*, 115 Mo. 1; *Henry v. Sneed*, 99 Mo. 407; *Hord v. Taubman*, 79 Mo. 101; *Hall v. Callahan*, 66 Mo. 316; *Mueller v. Kaessmann*, 84 Mo. 318; *Farley v. Stroeh*, 68 Mo. App. 85, following *McFarland v. Helm*, 127 Mo. 327, which overrules *Mead v. Spaulding*, 94 Mo. 43; *Nash v. Mitchell*, 71 N. Y. 199, 27 Am. Rep. 38; *Hirth v. Hirth*, 98 Va. 121; *Wright v. Blackwood*, 57 Tex. 644.

A married woman vested with an interest which is not her separate estate and of which she can only be divested by a deed executed conjointly with her husband and duly acknowledged cannot authorize an agent to fill blanks left in the deed, because the estate is one as to which she cannot appoint an agent. *Hord v. Taubman*, 79 Mo. 101.

In *Collier v. Struby*, 99 Tenn. 241, which was an action against a married woman for personal injuries sustained in a building transferred to her as security, while the building was in charge of her agent, it was held that, as the building was neither her general nor separate estate, but a mere security, she had no power to appoint an agent, and was not responsible for the acts of those through whose negligence the injuries were caused.

<sup>79</sup> *Bodine v. Killeen*, 53 N. Y. 93; *Shane v. Lyons*, 172 Mass. 199, 70 Am. St. Rep. 261.

ity to act as her agent.<sup>80</sup> She may become liable, like any other principal, for the fraud, negligence, assaults, and other torts committed by her agent in the course of his employment.<sup>81</sup> She will be subject to the rule that notice to an agent or knowledge acquired by him in the course of his employment is notice to or knowledge of his principal.<sup>82</sup> And her estate may be subjected to a mechanic's lien by reason of the act of her agent.<sup>83</sup>

As we shall hereafter see, in so far as a married woman is capable of appointing an agent, she may appoint her husband as her agent, and the effect of the appointment, at least in so far as third persons are concerned, will be the same as if she had appointed a stranger.<sup>84</sup>

## § 22. Aliens as principals.

As a general rule, in times of peace, aliens are as competent as citizens to create an agency, but this rule does not apply to alien enemies. The general rule, based on the ground that intercourse between a citizen and an alien enemy in time of war is contrary to public policy, is that an alien enemy cannot make or enforce any contract here during the continuance of hostilities, either with a citizen or with a

<sup>80</sup> *Bodine v. Killeen*, 53 N. Y. 93; *Horne v. Pollak*, 118 Ala. 617, 72 Am. St. Rep. 189.

<sup>81</sup> *Flesh v. Lindsay*, 115 Mo. 1; *Shane v. Lyons*, 172 Mass. 199, 70 Am. St. Rep. 261; *Baum v. Mullen*, 47 N. Y. 577; *Vanneman v. Powers*, 56 N. Y. 39; *Krumm v. Beach*, 96 N. Y. 398; *Graves v. Spier*, 58 Barb. (N. Y.) 349; *Chisholm v. Eisenhuth*, 69 App. Div. (N. Y.) 134; *Freiberg v. Branigan*, 18 Hun (N. Y.) 344; *Schmidt v. Keehn*, 57 Hun (N. Y.) 585; *Ferguson v. Brooks*, 67 Me. 251. Compare *Collier v. Struby*, 99 Tenn. 241, referred to in note 78, *supra*. She is liable for her agent's exaction of usurious interest, of which she has received the benefit. *McNeely v. Ford*, 103 Iowa, 508, 64 Am. St. Rep. 195.

<sup>82</sup> *Bray v. Booker*, 8 N. D. 347; *Cox v. Cayan*, 117 Mich. 599, 72 Am. St. Rep. 585.

<sup>83</sup> *Farley v. Stroeh*, 68 Mo. App. 85, and cases cited; *Tucker v. Gest*, 46 Mo. 339; *Burgwald v. Weippert*, 49 Mo. 60; *Hoffman v. McFadden*, 56 Ark. 217, 35 Am. St. Rep. 101; *Bodey v. Thackara*, 143 Pa. 171, 24 Am. St. Rep. 526; *Wright v. Blackwood*, 57 Tex. 644.

<sup>84</sup> See post, § 30.



resident alien, if the contract or its enforcement involves any intercourse or communication with the hostile country or state;<sup>85</sup> and, except as hereinafter shown, he cannot create an agency here during the continuance of hostilities, or contract or do other acts through an agent.<sup>86</sup> This principle has been applied in many cases to intercourse and contracts between citizens of the Northern and Southern states during the Civil War.<sup>87</sup> The rule, however, does not apply to "contracts of ransom and other matters of absolute necessity."<sup>88</sup> An alien enemy may be sued notwithstanding the existence of a state of war, and his property may be attached if he is a nonresident, and it must follow from this that he may defend, and may appoint an attorney for such purpose.<sup>89</sup>

If a state of war arises after the creation of an agency here by a citizen or subject of the hostile state or power, and the agency is of such a character as to involve intercourse or communication across the lines, either between the principal and the agent, or between the agent and third persons, it is terminated or suspended by the commencement of hostilities.<sup>90</sup> It is otherwise, however, where the agency does

<sup>85</sup> *O'Mealey v. Wilson*, 1 Camp. 482; *Scholefield v. Elchelberger*, 7 Pet. (U. S.) 586; *Masterson v. Howard*, 18 Wall. (U. S.) 99; *Phillips v. Hatch*, 1 Dill. 571, Fed. Cas. No. 11,094; *Habricht v. Alexander*, 1 Woods, 413, Fed. Cas. No. 5,886; *United States v. Lapene*, 17 Wall. (U. S.) 601; *Semmes v. City Fire Ins. Co.*, 36 Conn. 543; *Brooke v. Filer*, 35 Ind. 402; *Hill v. Baker*, 32 Iowa, 302, 7 Am. Rep. 193; *Kershaw v. Kelsey*, 100 Mass. 561, 1 Am. Rep. 142; *De Jarnette v. De Giverville*, 56 Mo. 440; *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. L. 444, 18 Am. Rep. 741; *Blackwell v. Willard*, 65 N. C. 555, 6 Am. Rep. 749; *Wright v. Graham*, 4 W. Va. 430.

<sup>86</sup> *United States v. Grossmayer*, 9 Wall. (U. S.) 72; *Blackwell v. Willard*, 65 N. C. 555, 6 Am. Rep. 749; *Buford v. Speed*, 11 Bush (Ky.) 341.

<sup>87</sup> See the cases above cited.

<sup>88</sup> *New York Life Ins. Co. v. Davis*, 95 U. S. 425.

<sup>89</sup> *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617; *McNair v. Toler*, 21 Minn. 175; *McVeigh v. United States*, 11 Wall. (U. S.) 259.

<sup>90</sup> *New York L. Ins. Co. v. Davis*, 95 U. S. 425; *Montgomery v. United States*, 15 Wall. (U. S.) 395; *Stoddart v. United States*, 4 Ct. Cl. 511; *Howell v. Gordon*, 40 Ga. 302; *Conley v. Burson*, 1 Heisk. (Tenn.) 145. See post, § 192. An agency created during a state of war by parties so situated may be legally consummated

not involve such intercourse or communication, and the parties expressly or impliedly assent to its continuance.<sup>91</sup> Thus an agent of an alien enemy, appointed before the commencement of hostilities, may continue to act with the consent of his principal, expressly given or shown by the circumstances, for the mere purpose of receiving, collecting and preserving the money or property of his principal,<sup>92</sup> of conveying prop-

after the cessation of hostilities, if its purpose is legal. *Lyon v. Kent*, 45 Ala. 656. A partnership between a citizen and an alien is determined, or at the least suspended, by the commencement of war, and one of the partners, therefore, cannot bind the other during the continuance of hostilities. *Griswold v. Waddington*, 15 Johns. (N. Y.) 57; *Bank of New Orleans v. Matthews*, 49 N. Y. 12.

<sup>91</sup> *Ward v. Smith*, 7 Wall. (U. S.) 447; *Williams v. Paine*, 7 App. D. C. 116; *Monseaux v. Urquhart*, 19 La. Ann. 482; *Sands v. New York L. Ins. Co.*, 50 N. Y. 626, 10 Am. Rep. 535; *Buford v. Speed*, 11 Bush (Ky.) 341; and other cases in the notes following. See, also, *Cohen v. New York M. L. Ins. Co.*, 50 N. Y. 610, 10 Am. Rep. 523.

<sup>92</sup> *Denniston v. Imbrie*, 3 Wash. C. C. 396, Fed. Cas. No. 3,802; *United States v. Grossmayer*, 9 Wall. (U. S.) 72; *Anderson v. Bank, Chase*, 535, Fed. Cas. No. 354; *Botts v. Crenshaw, Chase*, 224, Fed. Cas. No. 1,690; *Douglas v. United States*, 14 Ct. Cl. 1; *New York L. Ins. Co. v. Davis*, 95 U. S. 425, 431; *Montgomery v. United States*, 15 Wall. (U. S.) 395; *Lash v. Lambert*, 15 Minn. 416; *Sands v. New York L. Ins. Co.*, 59 Barb. 556, 50 N. Y. 626, 10 Am. Rep. 535; *Robinson v. International L. Assur. Soc.*, 42 N. Y. 54, 1 Am. Rep. 490; *Clarke v. Morey*, 10 Johns. (N. Y.) 73; *Griswold v. Waddington*, 15 Johns. (N. Y.) 64, 68, 16 Johns. 438; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; *Hale v. Wall*, 22 Grat. (Va.) 424. It was said by Chancellor Kent in *Clarke v. Morey*, 10 Johns. (N. Y.) 69, 73, that if alien enemies are ordered from the country in consequence of war, they may leave a power of attorney to collect their debts, citing *Emerigon, Traite des Assurances*, tom. 1,567.

In *Sands v. New York L. Ins. Co.*, 50 N. Y. 626, 10 Am. Rep. 535, where a New York life insurance company, which had issued a policy to a resident of Alabama, and had a general agent residing at Mobile, prior to the president's proclamation of August 16, 1861, forbidding commercial intercourse between the Confederate states and other states, recognized such agent's authority to receive premiums after such proclamation, it was held that payment of a premium on the policy to such agent in January, 1862, was a good payment. See, also, *Robinson v. International L. Assur. Soc.*, 42

erty under a power of attorney,<sup>93</sup> of receiving notice of the dishonor of a note so as to charge the principal as an indorser,<sup>94</sup> of accepting or receiving service of process,<sup>95</sup> or of employing counsel to resist confiscation proceedings,<sup>96</sup> etc.

An agency under such circumstances, however, is not compulsory, and cannot be made so on either side to subserve the ends of third parties. If the agent continues to act as such, and his action is subsequently ratified by the principal, or if the principal's assent is evinced by any other circumstances, then third parties may safely pay money for the use of the principal, into the agent's hands;<sup>97</sup> but not otherwise. It is not enough that there was an agency prior to the war.<sup>98</sup> And the agency cannot continue, even with the consent of the principal, where there is an intent to transmit funds to the principal during the continuance of the war,

N. Y. 54, 1 Am. Rep. 490; *Manhattan L. Ins. Co. v. Warwick*, 20 Grat. (Va.) 614, 3 Am. Rep. 218; *Mutual Ben. L. Ins. Co. v. Atwood's Adm'r*, 24 Grat. (Va.) 497; *New York L. Ins. Co. v. Clopton*, 7 Bush (Ky.) 179, 3 Am. Rep. 290. Contra, *Dillard v. Manhattan L. Ins. Co.*, 44 Ga. 119, 9 Am. Rep. 167.

<sup>93</sup> In *Williams v. Paine*, 169 U. S. 55, 7 App. D. C. 116, it was held that where a power of attorney to sell the land of a married woman in the District of Columbia, executed in 1859, could be properly executed by the attorney without any communication or intercourse with the principals, who resided in one of the Southern states, the existence of the war between the states did not prevent the execution of the power by a conveyance during the continuance of hostilities. *University v. Finch*, 18 Wall. (U. S.) 106.

<sup>94</sup> *Hubbard v. Matthews*, 54 N. Y. 43, 13 Am. Rep. 563.

<sup>95</sup> *Cocks v. Izard*, 4 Am. Law T. Rep. 68, Fed. Cas. No. 2,934.

<sup>96</sup> *Buford v. Speed*, 11 Bush (Ky.) 341.

<sup>97</sup> *Sands v. New York Life Ins. Co.*, 50 N. Y. 626, 10 Am. Rep. 535, and other cases in note 85, *supra*.

<sup>98</sup> *New York Life Ins. Co. v. Davis*, 95 U. S. 425; *Blackwell v. Willard*, 65 N. C. 555, 6 Am. Rep. 749. "In order to the subsistence of the agency during the war, it must have the assent of the parties thereto—the principal and the agent. \* \* \* It is not enough that there was an agency prior to the war. It would be contrary to reason that a man, without his consent, should continue to be bound by the acts of one whose relations to him have undergone such a fundamental alteration as that produced by a war between two countries to which they respectively belong." *New York Life Ins. Co. v. Davis*, *supra*.

though if so transmitted without the debtor's connivance he will not be responsible for it.<sup>99</sup> This rule is based upon the ground that it is contrary to public policy that, during a state of war, money or other resources should be transferred so as to aid, comfort, or strengthen the enemy. It prevents the exporting of the money or property, but it does not prevent the delivery of it to an alien enemy or his agent residing under the control of the government within whose territory the transaction takes place.<sup>100</sup>

A citizen of a neutral country may create or have an agency to the same extent and with the same effect as if a state of war did not exist.<sup>101</sup>

### § 23. Corporations as principals.

(a) **After incorporation.**—Corporations aggregate, by reason of their impersonal nature, must necessarily make their contracts, convey their property, and otherwise transact their business through agents, and it is well settled, therefore, that every corporation has the implied power, when it is not granted in its charter in express terms, to appoint necessary officers and agents to do any act or make any contract which is within the powers expressly or impliedly conferred upon it by its charter.<sup>102</sup> But a corporation has no power to appoint or employ an agent in a business or for a purpose which is beyond the powers conferred upon it by its charter.<sup>103</sup>

It does not follow, however, that no rights or liabilities can arise out of an ultra vires contract of agency as between the parties. Whether they can or not depends upon the

<sup>99</sup> Washington, J., in *Conn v. Penn*, 1 Pet. C. C. 496, Fed. Cas. No. 3,104, and see *Buchanan v. Curry*, 19 Johns. (N. Y.) 141; *New York L. Ins. Co. v. Davis*, 95 U. S. 425; *Small's Adm'r v. Lumpkin's Ex'r*, 28 Grat. (Va.) 832.

<sup>100</sup> *Buchanan v. Curry*, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200.

<sup>101</sup> *Robinson v. International Life Assur. Soc.*, 42 N. Y. 54.

<sup>102</sup> *St. Andrew's Bay Land Co. v. Mitchell*, 4 Fla. 192, 54 Am. Dec. 340; *Washburn v. Nashville & C. R. Co.*, 3 Head (Tenn.) 638, 75 Am. Dec. 784; *Protection Life Ins. Co. v. Foote*, 79 Ill. 361; *Hurlbut v. Marshall*, 62 Wis. 590; *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436; *McWilliams v. Detroit Cent. Mills Co.*, 31 Mich. 275. And see *Clark & M. Corp.* 506, 2027.

<sup>103</sup> *Slater Woolen Co. v. Lamb*, 143 Mass. 420.

general principles in relation to ultra vires transactions, for a full treatment of which the reader must consult works on the law of corporations.<sup>104</sup> The following summary of the law on this subject may be given here: If a contract has been fully executed on both sides, it will stand, and neither party can sue to undo what has been done on the ground that the transaction was ultra vires on the part of the corporation.<sup>105</sup> But so long as the contract is wholly executory on both sides, or in so far as it is executory on both sides, although it has been partly performed, it is void, and neither party can enforce it against the other.<sup>106</sup> Where the contract has been executed on one side, so that the other party has received the consideration, some of the courts hold that the party who has thus received the consideration cannot set up the defense of ultra vires to defeat an action by the other party.<sup>107</sup> Other courts hold that the contract is absolutely void, that there is no estoppel, and that no action can be maintained on the contract, the remedy of the party who has performed, if he has any remedy at all, being quasi ex contractu for what the other party has received.<sup>108</sup>

<sup>104</sup> See *Clark & M. Corp.* 550 et seq.

<sup>105</sup> *Id.*, 553.

<sup>106</sup> *Id.*, 555.

Where a corporation employs an agent in carrying on an ultra vires business, either may terminate the contract at any time, and the other cannot maintain an action for damages or specific performance. *Bowman Dairy Co. v. Mooney*, 41 Mo. App. 665.

In *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 19 Am. St. Rep. 482, a savings bank and trust corporation undertook, ultra vires, to engage in purchasing and selling cotton for future delivery, and employed the plaintiffs, who were commission merchants and members of the cotton exchange, to act for them. The plaintiffs made purchases and sales in their own names, and afterwards brought an action against the corporation to recover commissions and for money expended. It was held that, as there had been no delivery of any cotton or property of any kind, nor the transfer of the title to any property to the corporation, the contract was executory, and that the action, therefore, could not be maintained.

<sup>107</sup> *Clark & M., Corp.* 569.

<sup>108</sup> *Clark & M., Corp.* 563. Thus, where a railroad company employed a person in an ultra vires transaction,—to examine and report upon mines of which its road was the outlet,—it was held

The principles above stated apply, of course, in determining the effect as between a corporation and third persons of ultra vires contracts which it has entered into through an agent.<sup>109</sup> By the weight of authority, a corporation is liable to third persons for torts committed by its agents in the course of their employment in an ultra vires business or transaction.<sup>110</sup>

(b) **Agency prior to incorporation.**—There can be no agency for a proposed corporation before it has acquired its corporate existence, at least de facto, and therefore, if the promoters of a proposed corporation, or other persons undertaking to represent it, enter into contracts in its name and on its behalf before it is formed, such contracts are not the contracts of the corporation after its formation, and it is not liable thereon, in the absence of a statute, nor entitled to the benefit thereof, unless it adopts the same, either expressly or impliedly.<sup>111</sup> The corporation, however, may adopt such contracts after it is formed, and thereby make them its own.<sup>112</sup>

#### § 24. Partnerships as principals.

A partnership is not a legal entity, like a corporation, distinct from the members who compose it, and therefore, when it is said that a partnership can do anything, it is meant that the thing can be done by the partners jointly. The powers of a partnership, in this sense, are co-extensive with the powers of the persons who compose it, and partners, in

that he could not maintain an action against the corporation for his compensation. *George v. Nevada Cent. R. Co.*, 22 Nev. 228.

<sup>109</sup> See *Clark & M., Corp.* 550 et seq.

<sup>110</sup> *Id.*, 635.

<sup>111</sup> *Clark & M., Corp.* 302; *Bell's Gap R. Co. v. Christy*, 79 Pa. 54; *Gent v. Manufacturers' & M. Mut. Ins. Co.*, 107 Ill. 652; *Western Screw & Mfg. Co. v. Cousley*, 72 Ill. 531; *Park v. Modern Woodmen*, 181 Ill. 214; *Franklin F. Ins. Co. v. Hart*, 31 Md. 60; *Moore & H. Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 13 Am. St. Rep. 23; *Penn Match Co. v. Hapgood*, 141 Mass. 145; *Carmody v. Powers*, 60 Mich. 26; *Battelle v. Northwestern Cement & C. P. Co.*, 37 Minn. 89.

<sup>112</sup> See *Clark & M., Corp.* 302 et seq., where this subject is fully treated.

their joint capacity as such, undoubtedly have the power to appoint agents. In a partnership each member is not only a principal, but generally he is also an agent of the other partners in managing the business of the firm and contracting for the firm, and as agent he has the implied power or authority, unless there is some provision or agreement to the contrary, not only to act himself in carrying out the objects of the partnership, but also to appoint necessary agents for such purpose. This, however, is a question, not as to the capacity of a partnership to appoint agents, but as to the authority of a partner to bind the firm by such appointment, and will be considered in a subsequent chapter.<sup>113</sup>

**§ 25. Unincorporated clubs and societies as principals.**

When a number of persons become members of a club or society for social, political, religious, or charitable purposes, without becoming incorporated, the law does not regard them collectively as a legal entity or artificial person, like a corporation, but merely as so many individuals, and it necessarily follows that the club or society, as such, cannot appoint or have an agent.<sup>114</sup> The members may appoint an agent, but in such a case he is the agent of the members as individuals, and they are joint principals.<sup>115</sup> It is well settled, however, as we shall hereafter see, that such an association, since there is no community of interest for business purposes, is not a partnership, and one member or a majority of members, or an agent appointed by one member or a majority of members, has no authority to bind other members without their assent. Such authority is not implied from the mere fact of membership. This question will be considered more at length in a subsequent chapter.<sup>116</sup>

<sup>113</sup> See post, § 90. And see *Paton v. Baker*, 62 Iowa, 704; *Durgin v. Somers*, 117 Mass. 55; *Sweeney v. Neely*, 53 Mich. 421; *Harvey v. McAdams*, 32 Mich. 472; *Tillier v. Whitehead*, 1 Dall. (Pa.) 269; *Carley v. Jenkins*, 46 Vt. 721.

<sup>114</sup> *Clark & M., Corp.* 48.

<sup>115</sup> *Ray v. Powers*, 134 Mass. 22; *Willcox v. Arnold*, 162 Mass. 577.

<sup>116</sup> See post, § 90.

## II. WHO MAY BE AGENTS.

## § 26. In general—Infants, married women, etc.

The capacity of a person to bind himself by contract to act as agent, so as to become liable to the principal on the contract, and the capacity of a person acting as agent without authority to become liable himself to third persons on the theory of an implied warranty of authority, or on the theory that as he acted without authority he is himself liable as principal, is necessarily the same as his capacity to enter into any other contract. Thus a person who as principal should enter into a contract of agency with an infant could not hold the infant liable for breach of the contract.<sup>117</sup> And an infant or married woman, entering into a contract as agent without authority, could not be held liable as principal or on implied warranty of authority.<sup>118</sup>

These observations do not apply, however, as regards the competency of an agent to bind his principal. Since the act of a person as the authorized agent of another is the act, not of the agent, but of the principal, in accordance with the maxim, *qui facit per alium, facit per se*, a person need not himself be capable of entering into a contract or doing any other act in order to do so as agent and bind his principal, but any person may act as agent for such purpose,<sup>119</sup> subject, of course, to statutory regulations.<sup>120</sup> It has been so held,

<sup>117</sup> See *Widrig v. Taggart*, 51 Mich. 103; *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286; *Gaffney v. Hayden*, 110 Mass. 137, 14 Am. Rep. 58. An infant cannot be compelled to account as factor or bailiff. *Smally v. Smally*, 1 Eq. Cas. Abr. 6.

<sup>118</sup> See *Smout v. Ilbery*, 10 Mees. & W. 1.

<sup>119</sup> *Lyon v. Kent*, 45 Ala. 656; *Lea v. Bringier*, 19 La. Ann. 197; *Foreman v. Great Western R. Co.*, 38 Law T. 851, and other cases in the notes following.

"A monk could make no contract, but he was fully capable of acting as the agent of his sovereign [his superior] and even in litigation he would often appear as the abbot's attorney." *Pollock & M. Hist. Eng. Law*, 419.

In *Chastain v. Bowman*, 1 Hill, Law (S. C.) 270, the court said: "There is no condition, however degraded, which deprives one of the right to act as a private agent—the master is liable even for the act of his dog, done in pursuance of his command."

<sup>120</sup> *Cobb v. Superior Court Judge*, 43 Mich. 289.



for example, of infants,<sup>121</sup> slaves,<sup>122</sup> a resident alien enemy in time of war,<sup>123</sup> and of married women, although their common-law disabilities may not have been removed, and whether they act as agent for their husbands or for some third person.<sup>124</sup> This does not apply, of course, to a person who is so imbecile or insane, or of such tender years, as to be incapable of doing the act authorized.<sup>125</sup>

### § 27. Corporations as agents.

Since a corporation has such powers only as are expressly conferred upon it by its charter, and such as are incidental to the exercise of those powers, and therefore implied, a corporation has no power to enter into a contract of agency, if the transaction is foreign to the objects for which it was created. Thus a manufacturing company, unless the power is conferred upon it by its charter, has no power to act as agent for another in selling goods, bonds, or stocks on commission, and neither national banks nor savings banks have the power to act as an agent or broker in selling stock or bonds.<sup>126</sup>

<sup>121</sup> *Watkins v. Vince*, 2 Starkie, 368; *In re D'Angibau*, 15 Ch. Div. 228; *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; *Brown v. Hartford Fire Ins. Co.*, 117 Mass. 479; *Com. v. Holmes*, 119 Mass. 195. See, also, *Thompson v. Lyon*, 20 Mo. 155.

<sup>122</sup> *Governor v. Dally*, 14 Ala. 471; *Powell v. State*, 27 Ala. 51; *Stanley v. Nelson*, 28 Ala. 514; *Lyon v. Kent*, 45 Ala. 656; *Chastain v. Bowman*, 1 Hill, Law (S. C.) 270.

<sup>123</sup> *Lyon v. Kent*, 45 Ala. 656.

<sup>124</sup> *Emerson v. Blonden*, 1 Esp. 142; *Lang v. Water's Adm'r*, 47 Ala. 624; *Butler v. Price*, 110 Mass. 97; *Brown v. Brown*, 174 Mass. 197; *McKee v. Kent*, 24 Miss. 131; *Pickering v. Pickering*, 6 N. H. 120; *Hopkins v. Mollinieux*, 4 Wend. (N. Y.) 465; *Fenner v. Lewis*, 10 Johns. (N. Y.) 38; *Cox v. Hoffman*, 20 N. C. (4 Dev. & B.) 319; *Webster v. Laws*, 89 N. C. 224; *Sibley v. Gilmer*, 124 N. C. 631; *Stall v. Meek*, 70 Pa. 181; *Gray v. Otis*, 11 Vt. 628; *Birdsall v. Dunn*, 16 Wis. 235; *Butts v. Newton*, 29 Wis. 632.

As to a wife's agency for her husband, see post, §§ 80-89.

<sup>125</sup> See *Lyon v. Kent*, 45 Ala. 656.

<sup>126</sup> *Farmers' & M. Nat. Bank v. Smith's Ex'r*, 40 U. S. App. 690, 77 Fed. 129; *Westinghouse Mach. Co. v. Wilkinson*, 79 Ala. 312; *Weckler v. First Nat. Bank*, 42 Md. 581; *Powell v. Murray*, 157 N. Y. 717, affirming 3 App. Div. 273; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 19 Am. St. Rep. 482; *Anderson v. First Nat. Bank*,

There may be circumstances, however, under which a corporation will have the power to act as agent as an incident to the exercise of the powers conferred upon it by its charter. Thus it has been held that a national bank, as an incident to its power to collect a debt due it, and for which it holds notes of the debtor as collateral, may act as the debtor's agent in selling the notes.<sup>127</sup> And, of course, a corporation may act as agent or attorney for another in conveying property or doing any other act, if it has been expressly authorized to exercise such powers, for there is nothing in the nature of a corporation which prevents it from acting as agent or attorney in fact for another, when its charter gives it such power. If the charter of a corporation confers upon it the power to act "as the general or special agent, or attorney in fact, for any public or private corporation, or person, in the management or control of real estate or other property, its purchase, sale, or conveyance, etc.," it has the same power as a natural person to execute a conveyance as attorney in fact for another person or corporation.<sup>128</sup> And an incorporated collection agency may act as agent in collecting claims, and may employ attorneys for such purpose.<sup>129</sup>

The acting by a corporation as agent or attorney in fact for another does not, because of the fact that a corporation must necessarily act through its officers and other agents, involve a delegation of powers, within the principle, *delegatus non potest delegare*. "When a corporation," said the court in a late Oregon case, "is made the agent of another to sell and convey property, it acts through the same instrumentalities as when acting for itself, and the relation between it and its instrumentalities are as one being, or artificial person, in the performance of its engagement, and involves no

5 N. D. 451; *Peck-Williamson Heating & V. Co. v. Board of Education*, 6 Okl. 279; *First Nat. Bank v. Hoch*, 89 Pa. 324.

A corporation organized solely for the purpose of manufacturing an article and selling the same has no power to purchase the right to act as agent for the sale of similar articles manufactured by others. *Powell v. Murray*, 157 N. Y. 717.

<sup>127</sup> *Anderson v. First Nat. Bank*, 5 N. D. 451.

<sup>128</sup> *Killingsworth v. Portland Trust Co.*, 18 Or. 351, 17 Am. St. Rep. 737.

<sup>129</sup> *Snow, Church & Co. v. Hall*, 19 Misc. (N. Y.) 655.

delegation of powers. So that, when a corporation is invested with a power of attorney to sell and convey real property, the person conferring the power knows that the corporation cannot act personally in the matter, but that, in performing the engagement, it will act through its agents, who for that purpose are its faculties, and whose acts in the discharge of that duty are the acts of the corporation, and, as such, must be considered to be included in the artificial person as instrumentalities authorized by him to do the act conferred upon it by his power of attorney. In this view, the argument that the corporation cannot do such act under the power of attorney without a delegation of authority to its agents, and that the grantor of the power has given no such power of substitution, cannot be sustained.<sup>130</sup>

The effect, as between the parties themselves, of a contract of agency by a corporation in excess of its powers is to be determined by applying the general principles governing *ultra vires* transactions of a corporation, and it is a subject upon which the courts do not agree. The following summary of law may be given: If the contract has been freely executed on both sides, it will stand, and neither party can sue to undo what has been done on the ground that the contract on the part of the corporation was *ultra vires*.<sup>131</sup> But so long as the contract is wholly executory on both sides, or in so far as it is executory on both sides, although it has been partly performed, it is void, and neither party can enforce it against the other.<sup>132</sup> Where the contract has been executed on one side, so that the other has received the consideration, some of the courts hold that the party who has thus received the consideration cannot set up the defense of *ultra vires* to defeat an action by the other party.<sup>133</sup> Other courts hold that the contract is absolutely void, that there is no estoppel, and that no action can be maintained on the contract, the remedy of the party who has performed on his side, if he has any

<sup>130</sup> Killingsworth v. Portland Trust Co., 180 Or. 351, 17 Am. St. Rep. 737.

<sup>131</sup> Clark & M., Corp. 553.

<sup>132</sup> Clark & M., Corp. 555. See Anderson v. First Nat. Bank, 5 N. D. 451.

<sup>133</sup> Clark & M., Corp. 569.

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remedy at all, being quasi ex contractu for what the other party has received.<sup>134</sup>

It also seems perfectly clear that the doctrines as to the effect of ultra vires transactions must apply whenever it is sought to hold a corporation liable to third persons by reason of contracts entered into by it as agent for another, as in a case where it is sought to hold a corporation liable on an express or implied warranty of authority, when it has acted as agent without authority. And of course, the doctrines in relation to ultra vires contracts apply when it is sought to hold a corporation liable as principal on a contract entered into by it as agent for an undisclosed principal. In such a case the corporation is entitled to all the rights and privileges which the law would give it if it occupied the position of principal in fact as well as in law. And therefore, when a corporation is sued upon a contract entered into by it as agent for an undisclosed principal, its plea that the contract was ultra vires cannot be avoided on the ground that it is one which the undisclosed principal could have made.<sup>135</sup>

It seems equally clear, however, that the doctrine of ultra vires has no application in determining the effect upon the principal, so far as third persons are concerned, of contracts entered into or other acts done by a corporation as agent. Since *qui facit per alium, facit per se*, the contract or act is the contract or act, not of the corporation, but of the principal, want of power on the part of the corporation to make such a contract or do such an act as principal would not render it incompetent to make the contract or do the act as agent for another. It is like an infant or married woman acting as agent, although incompetent to act as principal.<sup>136</sup> And though the acting as agent may be beyond the powers conferred upon the corporation by its charter, still a corporation has the capacity to exceed its powers, so that, when it does so, and the transaction is fully executed, it will stand. It seems clear, therefore, that when a corporation, being duly

<sup>134</sup> Clark & M., Corp. 563.

<sup>135</sup> Jemison v. Citizens' Sav. Bank, 122 N. Y. 135, 19 Am. St. Rep. 482.

<sup>136</sup> Ante, § 26. And see McWilliams v. Detroit Cent. Mills Co., 31 Mich. 275.

authorized, makes a contract or executes a conveyance or does any other act as agent for another, neither the principal nor the other party to the contract, nor third persons, can defeat the transaction or avoid the liabilities arising therefrom on the ground, either that the corporation could not have made the contract or done the act as principal, or on the ground that the contract of agency was *ultra vires*.

Even when a corporation is authorized by its charter to act generally as agent or attorney, a statute may require particular acts by an agent to be done by a natural person, or may require them to be done in such a way that a corporation cannot do them. Thus where a statute provided that in all mortgages there might be inserted a clause, authorizing the mortgagee or any other person to be named therein to sell the mortgaged premises, but that before any person so authorized should sue, "he" should give bond, and that all such sales should "be reported under oath," etc., it was held that the statute contemplated the appointment of a natural person, and not a corporation, as the depository of the power of sale.<sup>137</sup>

### § 28. Partnerships as agents.

A partnership, of course, since it is not a legal entity, cannot be an agent in the same sense as a corporation, but the partners, in their capacity as such, may be agents, and in this sense it may be said that a partnership may act as agent. By such an agency, as we shall hereafter see more at length, the individual members of the firm do not become several and separate agents in such a sense as to require joint action on their joint acts in carrying out the purpose of the agency, as in other cases where several persons are appointed agents, but one partner may act for the firm, and his act in executing the power conferred upon the firm will be deemed the act of the firm.<sup>138</sup>

### § 29. Disqualification of agent by adverse interest.

As we shall hereafter see at some length, an agent, although otherwise competent, may be disqualified, as between

<sup>137</sup> *Frostburg Mut. Bldg. Ass'n v. Lowdermilk*, 50 Md. 175.

<sup>138</sup> *Deakin v. Underwood*, 37 Minn. 101, 5 Am. St. Rep. 827. See, also, *post*, § 90, where this subject is treated at length.

the principal and himself, to act in a particular matter because of his having a personal interest adverse to that of the principal.<sup>139</sup> And as between the principal and a third person, an agent may be disqualified because, in making a contract, he is secretly acting for both parties to the knowledge of such third person.<sup>140</sup> If, however, he represents the different principals in matters that are not incompatible, or if both of the principals have knowledge of his acting as agent for each, it would not be fraudulent or unlawful for him to so act.<sup>141</sup>

### § 30. Wife as husband's agent, and husband as wife's agent.

As we have seen, a married woman, although she may not be *sui juris* so as to be capable of acting for herself, may act as agent for another. And it is well settled that she may act as agent for her husband as well as for a stranger. The common-law doctrine of unity of husband and wife does not prevent this.<sup>142</sup>

Nor is there anything in the marriage relation to prevent the husband from acting as agent of his wife where her common-law disabilities have been removed, so as to give her the capacity to act for herself. Her capacity to appoint an agent has been elsewhere considered.<sup>143</sup> In some of the early cases in which the married women's acts have come in ques-

<sup>139</sup> *Gillett v. Peppercorne*, 3 Beav. 78; *In re Watkins' Estate*, 121 Cal. 327; *Webb v. Marks*, 10 Colo. App. 429; *Tewksburg v. Spruance*, 75 Ill. 187; *Warrick v. Smith*, 137 Ill. 504; *Hammond v. Bookwalter*, 12 Ind. App. 177; *McDoel v. Ohio Val. Imp. & C. Co.'s Assignee*, 18 Ky. L. R. 294, 36 S. W. 175; *Kimball v. Ranney*, 122 Mich. 160, 80 Am. St. Rep. 548; *Crump v. Ingersoll*, 44 Minn. 84; *Oliver v. Lansing*, 48 Neb. 338; *Campbell v. Manufacturers' Nat. Bank*, 67 N. J. Law, 301, 91 Am. St. Rep. 438; *Taussig v. Hart*, 58 N. Y. 425; *Claffin v. Farmers' & C. Bank*, 25 N. Y. 293; *Stanley v. Luse*, 36 Or. 25. And see post, § 404 et seq.

<sup>140</sup> *Borough of Salford v. Lever* (1891) 1 Q. B. 168; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Boston v. Simmons*, 150 Mass. 461, 15 Am. St. Rep. 230. And see post, § 414.

<sup>141</sup> See post, § 414. *Duesman v. Hale*, 55 Neb. 577; *Morey v. Laird*, 108 Iowa, 670.

<sup>142</sup> See ante, § 26.

<sup>143</sup> Ante, § 21.

tion the capacity of a husband to act as the agent of his wife was assumed rather than decided, but the question has been raised, and the courts have reached the conclusion that, as it is no violation of the common-law principle of the unity of the husband and wife, for the wife to act as the agent or attorney of her husband, it must irresistibly follow, that it is no infringement of this principle to allow the husband to act as the agent of the wife, in cases where, by the law, she is sui juris and capable of acting for herself. And it is well settled, therefore, that when she is clothed with authority to act and contract as a feme sole, the marriage relation will not preclude her from conferring authority on her husband to act in her behalf, in like manner as she might authorize any one else.<sup>144</sup>

<sup>144</sup> *Weisbrod v. Chicago & N. W. R. Co.*, 18 Wis. 35, 86 Am. Dec. 743. And see the following cases, among many others which might be cited:

*Alabama*: *Louisville Coffin Co. v. Stokes*, 78 Ala. 372.

*Arkansas*: *Hoffman v. McFadden*, 56 Ark. 217, 35 Am. St. Rep. 101.

*California*: *Savings Bank v. Daley*, 121 Cal. 199; *Santa Cruz Rock-Pavement Co. v. Lyons*, 133 Cal. 114.

*Connecticut*: *Gilman v. Disbrow*, 45 Conn. 563.

*Florida*: *Prentiss v. Paisley*, 25 Fla. 927.

*Georgia*: *Foster v. Jones*, 78 Ga. 150.

*Illinois*: *Cubberly v. Scott*, 98 Ill. 38; *Bennett v. Stout*, 98 Ill. 47; *Haight v. McVeagh*, 69 Ill. 624; *Brownell v. Dixon*, 37 Ill. 198; *Richards v. John Spry Lumber Co.*, 169 Ill. 238.

*Indiana*: *Sims v. Smith*, 99 Ind. 469, 50 Am. Rep. 99; *Rowell v. Klein*, 44 Ind. 290.

*Iowa*: *Second Nat. Bank v. Gaylord*, 66 Iowa, 582; *McLaren v. Hall*, 26 Iowa, 297.

*Kansas*: *Hardten v. State*, 32 Kan. 637; *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273; *Wilkinson v. Elliott*, 43 Kan. 590, 19 Am. St. Rep. 158.

*Kentucky*: *Cox v. Armstrong*, 17 Ky. L. R. 1395, 34 S. W. 1075.

*Louisiana*: *Jones v. Read*, 1 La. Ann. 200; *Rolling v. De Bordenave*, 15 La. Ann. 647.

*Maine*: *Maxcy Mfg. Co. v. Burnham*, 89 Me. 538.

*Maryland*: *Conway v. Crook*, 66 Md. 290.

*Massachusetts*: *Arnold v. Spurr*, 130 Mass. 347; *Coolidge v. Smith*, 129 Mass. 554; *McIntyre v. Knowlton*, 6 Allen, 565.

*Michigan*: *Rankin v. West*, 25 Mich. 195; *McBain v. Seligman*, 58 Mich. 294; *First Commercial Bank v. Newton*, 117 Mich. 433.

Agency on the part of a husband to act for his wife is not to be presumed from the mere fact of the marriage relation, nor from circumstances which ordinarily owe their existence solely to that relation, but there must be authority in fact conferred upon the husband by the wife, or conduct on her part which is such as to estop her to deny his authority. The mere fact of the relation does not clothe him with any more authority to act as her agent than a stranger has.<sup>145</sup> A mar-

*Minnesota:* Ladd v. Newell, 34 Minn. 107; Hossfeldt v. Dill, 28 Minn. 469.

*Mississippi:* Anderson v. Gregg, 44 Miss. 170; Crawford v. Redus, 54 Miss. 700.

*Missouri:* Rodgers v. Pike County Bank, 69 Mo. 560; Eysra v. Capille, 61 Mo. 578; Long v. Martin, 152 Mo. 668.

*Montana:* Palmer v. Murray, 8 Mont. 174.

*Nebraska:* Norfolk Nat. Bank v. Nenow, 50 Neb. 429; Edgerly v. Gregory, 17 Neb. 348.

*New Hampshire:* Hutchins v. Colby, 43 N. H. 159; Hall v. Young, 37 N. H. 134.

*New Jersey:* Kutcher v. Williams, 40 N. J. Eq. 436; Tresch v. Wirtz, 34 N. J. Eq. 124; Elliott v. Bodine, 59 N. J. Law, 567.

*New York:* Wronkow v. Oakley, 133 N. Y. 505, 28 Am. St. Rep. 661; Noel v. Kinney, 106 N. Y. 74, 60 Am. Rep. 423; Martin v. Rector, 101 N. Y. 77; Nash v. Mitchell, 71 N. Y. 199, 27 Am. Rep. 38; Knapp v. Smith, 27 N. Y. 277; Kurtz v. Potter, 167 N. Y. 586.

*North Carolina:* Harper v. Dall, 92 N. C. 394; Bazemore v. Mountain, 121 N. C. 59.

*Ohio:* Manhattan L. Ins. Co. v. Smith, 44 Ohio St. 156.

*Oregon:* King v. Voos, 14 Or. 91.

*Pennsylvania:* Baxter v. Maxwell, 115 Pa. 469; Sperling v. Laughlin, 113 Pa. 209; Seeds v. Kahler, 76 Pa. 262; Johnston v. Johnston's Adm'r, 31 Pa. 450; Bodey v. Thackara, 143 Pa. 171, 24 Am. St. Rep. 526; Bankard v. Shaw, 199 Pa. 623.

*South Carolina:* Brown v. Thomson, 31 S. C. 436, 17 Am. St. Rep. 40; McCord v. Blackwell, 31 S. C. 125; Greig v. Smith, 29 S. C. 426.

*Tennessee:* Ready v. Bragg, 1 Head, 511.

*Texas:* Warren v. Smith, 44 Tex. 247; Allen v. Garrison, 92 Tex. 546.

*Virginia:* Penn v. Whiteheads, 12 Grat. 74.

*West Virginia:* Miller v. Peck, 18 W. Va. 75.

*Wisconsin:* Lavassar v. Washburne, 50 Wis. 200; Austin v. Austin, 45 Wis. 523.

<sup>145</sup> Hoffman v. McFadden, 56 Ark. 217, 35 Am. St. Rep. 101; Jones v. Harrell, 110 Ga. 373; Henry v. Sneed, 99 Mo. 407, 17 Am. St.



ried woman's appointment of her husband as her agent must, of course, meet all the requirements which would be necessary to establish a delegation of authority to a stranger for a like purpose, but if there are no special requirements, it may be either in writing or by parol, and either express or implied.<sup>146</sup> She may, by estoppel, become liable for the unauthorized acts of her husband because of having clothed him with apparent authority.<sup>147</sup> And she may become liable for, or entitled to the benefit of, his unauthorized acts on her behalf, by expressly or impliedly ratifying them.<sup>148</sup> A husband's agency for his wife is also subject to the various other general rules governing the relation of principal and agent, which will be discussed in the course of this work, as, the rules that the fact of agency cannot be established by the acts or declarations of the alleged agent, not known to and acquiesced in by the alleged principal;<sup>149</sup> that acts which are beyond the scope of the authority actually conferred are not binding in the absence of estoppel or ratification;<sup>150</sup> that notice to or knowledge of the agent in the course of his employment is notice to or knowledge of the principal;<sup>151</sup> that a principal is liable for the fraud, negligence, and other torts of the agent in the course of his employment, etc.<sup>152</sup>

Rep. 580; *Cushman v. Masterson* (Tex. Civ. App.) 64 S. W. 1031; *Knott v. Carpenter*, 3 Head (Tenn.) 542, 75 Am. Dec. 779, and many other cases cited post, § 79.

<sup>146</sup> *Norfolk Nat. Bank v. Nenow*, 50 Neb. 429. And see post, § 49.

<sup>147</sup> *Bodine v. Killeen*, 53 N. Y. 93; *Richards v. John Spry Lumber Co.*, 169 Ill. 238; *Bull v. Coe*, 77 Cal. 54, 11 Am. St. Rep. 235; *McManus v. Laughlin*, 186 Pa. 498; *Anderson v. Waco State Bank*, 92 Tex. 506. And see post, § 79.

<sup>148</sup> *Norfolk Nat. Bank v. Nenow*, 50 Neb. 429; *Ferguson v. Brooks*, 67 Me. 251. See, also, post, § 79.

<sup>149</sup> *Martin v. Suber*, 39 S. C. 525; *Sanford v. Pollock*, 105 N. Y. 450. And see post, § 465 et seq.

<sup>150</sup> *Drury v. Foster*, 2 Wall. (U. S.) 24; *McCombs v. Wall*, 66 Ark. 236; *Nash v. Mitchell*, 71 N. Y. 199, 27 Am. Rep. 38. And see post, § 450.

<sup>151</sup> *Bray v. Booker*, 8 N. D. 347; *Cox v. Cayan*, 117 Mich. 599, 72 Am. St. Rep. 585; *Allen v. Garrison*, 92 Tex. 546. And see post, § 474 et seq.

<sup>152</sup> *Flesh v. Lindsay*, 115 Mo. 1; *Shane v. Lyons*, 172 Mass. 199, 70 Am. St. Rep. 261; *Baum v. Mullen*, 47 N. Y. 577; *Krumm v.*

### § 31. Agents under the statute of frauds.

Under the statute of frauds requiring for certain contracts some memorandum or note thereof, in writing, and signed by the party to be charged, "or some other person thereunto by him lawfully authorized," or by his "agent," etc., it is held that the agent signing for one of the parties must be some third person, and not the other party to the contract, nor, except in the case of auctioneers, the agent representing the other party in the transaction, on the ground that to allow one of the parties to sign as agent for the other would open the door for the fraud which the statute is intended to prevent.<sup>153</sup> This rule applies to sales at auction, where the auctioneer is also himself the vendor, so as to render him incompetent to act as agent for a purchaser in signing the memorandum required by the statute of frauds.<sup>154</sup> But it does not apply where he is simply auctioneer, and not also vendor. In such a case he is a competent agent of both parties, and his memorandum is binding on both. He (or his clerk) is the agent of the vendor by virtue of his employment, and he is made the agent of the vendee by the latter's act in giving

Beach, 96 N. Y. 398; *Ferguson v. Brooks*, 67 Me. 251; *McNeely v. Ford*, 103 Iowa, 508, 65 Am. St. Rep. 195. And see post, § 493.

<sup>153</sup> *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295; *Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmons*, 5 Barn. & Ald. 333; *Sharman v. Brandt*, L. R. 6 Q. B. 720; *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 55 Am. St. Rep. 680; *Carlisle v. Campbell*, 76 Ala. 247; *Martin v. Duffey*, 4 Phila. (Pa.) 75. But it is sufficient if such signing is made by an authorized agent. *Heffron v. Armsby*, 61 Mich. 505; *Tynan v. Dullnig* (Tex. Civ. App.) 25 S. W. 465; *Morton v. Stone*, 39 Minn. 275; *Rutenberg v. Main*, 47 Cal. 213; *New England Dressed Meat & Wool Co. v. Standard Worsted Co.*, 165 Mass. 328; *Gerll v. Poldebord Silk Mfg. Co.*, 57 N. J. Law, 432; *Davis v. Shields*, 26 Wend. (N. Y.) 341; *Himrod Furnace Co. v. Cleveland & M. R. Co.*, 22 Ohio St. 451. Signature by a broker is sufficient. *Williams v. Woods*, 16 Md. 220; *Pringle v. Spaulding*, 53 Barb. (N. Y.) 17. And see post, § 50. If, however, the agent exceeds his powers, an unauthorized writing signed by him will not bind his principal. *Henderson v. Beard*, 51 Ark. 483.

<sup>154</sup> *Bent v. Cobb*, 9 Gray (Mass.) 327, 69 Am. Dec. 295; *Farebrother v. Simmons*, 5 Barn. & Ald. 333. See, also, *Johnson v. Buck*, 35 N. J. Law, 342; *Tull v. David*, 45 Mo. 446. And see post, § 893.

his bid and receiving the announcement that the property is knocked off to him as purchaser.<sup>155</sup>

**§ 32. Agents of corporations.**

Competency of a person to act as agent of a corporation is the same as is required of the agents of natural persons. Members of the corporation are competent,<sup>156</sup> and if its charter does not prescribe the mode by which it may contract within the limits of its authority, nor designate any particular officer whose action or sanction is necessary to give validity to a corporate act, it is immaterial which of its officers acts within the authority conferred on him.<sup>157</sup> Thus, the president of a corporation will be presumed to have authority to act on all matters arising in the ordinary course of his business,<sup>158</sup> likewise the vice president may act as agent, apart from the official duties required of him,<sup>159</sup> and boards of directors, managers, and the like, are agents of the corporation but only so far as they are directly or impliedly authorized by the charter.<sup>160</sup>

<sup>155</sup> *Henderson v. Barnewall*, 1 Younge & J. 389; *Bird v. Boulter*, 4 Barn. & Adol. 443; *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295; *Morton v. Dean*, 13 Metc. (Mass.) 385; *Gill v. Bicknell*, 2 Cush. (Mass.) 355; *First Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28; *Mentz v. Newwitter*, 1 N. Y. Supp. 73, 122 N. Y. 491, 19 Am. St. Rep. 514; *Meadows v. Meadows*, 3 McCord (S. C.) 458, 15 Am. Dec. 645; *Singstack v. Harding*, 4 Har. & J. (Md.) 186, 7 Am. Dec. 669; *McBrayer v. Cohen*, 13 Ky. L. R. 667, 18 S. W. 123. And see post, § 386 et seq. The memorandum must be made at the time of the sale. *Gill v. Bicknell*, 2 Cush. (Mass.) 355; *Horton v. McCarty*, 53 Me. 394. If the auctioneer leaves before making a sale, and the owner of the property sells it to one who has bid on it, the clerk of the sale is not the agent of the bidder to bind him by making a memorandum. *Wyckoff v. Mickle* (N. J. Eq.) 20 Atl. 214.

<sup>156</sup> *Stoddert v. Vestry of Port Tobacco Parish*, 2 Gill & J. (Md.) 227; *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436.

<sup>157</sup> *St. Andrews Bay Land Co. v. Mitchell*, 4 Fla. 192, 54 Am. Dec. 340; *Washburn v. Nashville & C. R. Co.*, 3 Head. (Tenn.) 638, 75 Am. Dec. 784.

<sup>158</sup> *White v. Elgin Creamery Co.*, 108 Iowa, 522.

<sup>159</sup> *Union Inv. Co. v. Geer*, 64 Ill. App. 648.

<sup>160</sup> *Kent's Com.* § 288. See *Clark & M., Corp.* 2030-2035.

## III. JOINT PRINCIPALS AND JOINT AGENTS.

## § 33. Joint principals.

There is nothing to prevent two or more persons from being joint principals, so as to be jointly bound by the act of their agent. The most common illustration is in the case of a partnership. Each member of a firm is not only a principal as respects himself, but is also agent of the other members, so that his contracts and other acts within the scope of the partnership business and his implied authority will bind himself and the other partners as joint principals.<sup>161</sup> And a single partner, or all the partners, may appoint an agent to act for the firm, in the absence of express provision or agreement to the contrary, so as to make all the partners joint principals.<sup>162</sup>

Another illustration of joint principals is in the case of unincorporated clubs or societies. Such associations as we have seen are not partnerships, and neither a single member nor a majority of the members have any authority to bind the other members, without the latter's assent, but all the members may assent to the appointment of an agent or agents to represent them jointly, and to make contracts which will bind them as joint principals.<sup>163</sup>

Ownership of real or personal property jointly or in common does not place the owners in the position of partners with respect to the property so as to constitute one of them the agent of the others to contract or do other acts,<sup>164</sup> but they may become joint principals by joining in the appointment of one of their number or some third person as their agent.<sup>165</sup>

<sup>161</sup> See post, § 90.

<sup>162</sup> See post, § 90.

<sup>163</sup> Ante, § 25.

<sup>164</sup> Story, Ag., § 39; *Keay v. Fenwick*, 1 C. P. Div. 745; *Perminter v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177; *Murray v. Haverty*, 70 Ill. 318; *Corlles v. Cumming*, 6 Cow. (N. Y.) 181; *Noe v. Christie*, 51 N. Y. 270; *Sewell v. Holland*, 61 Ga. 608.

<sup>165</sup> *Keay v. Fenwick*, 1 C. P. Div. 745; *Holladay v. Daily*, 19 Wall. (U. S.) 606; *Louisiana Trustees v. Dupuy*, 31 La. Ann. 305; *Reiman v. Hamilton*, 111 Mass. 245; *Cunningham v. Washburn*, 119 Mass. 224; *Choteau v. Goddin*, 39 Mo. 229, 90 Am. Dec. 462; *Noe v. Christie*, 51 N. Y. 270; *Sewell v. Holland*, 61 Ga. 608.

## § 34. Joint agents.

As a general rule, when authority to do an act may be delegated to a single individual, it may be delegated to two or more jointly, so as to make them joint agents. Or authority may be conferred upon two or more persons severally. Or it may be conferred upon two or more persons jointly and severally. The nature of the agency in this respect depends, of course, upon the intention. The only question of particular importance in this connection relates to the execution of the authority, whether one may act alone or all must join in the execution. As we shall hereafter see at length, where the agency is joint, all must join in executing it, except in the case of a partnership as agent, in which case one partner may act for the firm, and in the case of public agents, in which case, where there is no controlling statute, a majority may act, although all must be present or be notified and given an opportunity to be present.<sup>166</sup> If the agency is several any one of the agents may execute it.<sup>167</sup>

## IV. SUB-AGENTS.

## § 35. In general.

A sub-agent is a person employed by an agent to perform the whole or some part of the business relating to his agency. He may be the agent of the agent appointing him, so as to create a priority between them for the purpose of determining the rights and liabilities as between themselves and with respect to third persons, or he may be the agent of the original principal, if the appointment of a sub-agent is within the authority conferred by the principal on the agent. The authority of an agent to employ sub-agents, and the liability of a principal and of an agent for the acts of a sub-agent, will be treated in subsequent chapters.<sup>168</sup>

<sup>166</sup> See post, § 292.

<sup>167</sup> See post, § 291.

<sup>168</sup> See post, §§ 341-347, 436-447.

## CHAPTER III.

### PURPOSES FOR WHICH AN AGENCY MAY BE CREATED; ILLEGALITY.

§ 36. In general.

37. Acts required to be done personally.

38. Agency for illegal object.

39. Particular contracts of agency which are illegal.

§ 36. In general.

With the exception, to be hereafter considered, that a person cannot appoint an agent to do an act which he is under the duty, or required by law, to do personally,<sup>1</sup> an agency may be created for the purpose of doing any lawful act or conducting any lawful business. As a general rule a person may appoint an agent to do for him whatever he may lawfully do himself, the maxim being *qui facit per alium facit per se*.<sup>2</sup>

§ 37. Acts required to be done personally.

The general rule, however, that a person may do through an agent whatever he may do himself does not apply to acts which, by established rules of law, by custom having the force of law, by express statutory provision, or by contract, is required to be done personally.<sup>3</sup>

Thus, where a statute authorizing a married woman to convey land required that she should personally execute and acknowledge the deed, it was held that she could not convey through an attorney appointed by her.<sup>4</sup> And under a statute requiring that an acknowledgment of a debt or new

<sup>1</sup> See post, § 37.

<sup>2</sup> *Reg. v. Justices of Kent*, L. R. 8 Q. B. 305; *In re Whitley Partners*, 32 Ch. Div. 339.

<sup>3</sup> *Combes' Case*, 9 Coke, 15a; *Hyde v. Johnson*, 2 Bing. N. C. 776; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485, 37 Am. Rep. 271; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89.

<sup>4</sup> *Sumner v. Conant*, 10 Vt. 9.

promise, to take the debt out of the bar of the statute of limitations, should be in writing and "signed by the party chargeable thereby," it was held that the acknowledgment or new promise, to come within the statute, must be signed by the party himself, and not by his agent.<sup>5</sup> So, where a statute relating to the licensing of vessels required the oath of ownership of a vessel to be taken by the owner, it was held that it could not be taken by the master as his agent.<sup>6</sup> But a statutory requirement that a particular instrument shall be executed or signed by a party should not be construed as excluding the power to sign by an agent unless there is something in the statute, or in the general course of legislation, to show that the legislature so intended.<sup>7</sup> As was said in an English case: "No doubt at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it; nevertheless there may be cases in which a statute may require a personal signature. \* \* \* We ought not to restrict the common-law rule *qui facit per alium facit per se*, unless the statute makes a personal signature indispensable."<sup>8</sup>

As we shall see in a subsequent chapter when a person is appointed to act as agent for another in a particular matter, and the subject matter of the agency is such that the principal is presumed to have conferred the authority in consideration of the personal qualifications of the agent, or of special trust and confidence reposed in him, the agent must execute the authority personally, and cannot delegate the same to a sub-agent without the principal's consent.<sup>9</sup>

Public officers invested with an authority involving the exercise of judgment and discretion cannot delegate the exercise of the same to an agent.<sup>10</sup>

The same principle applies to executors, trustees, and the

<sup>5</sup> *Hyde v. Johnson*, 2 Bing. N. C. 776.

<sup>6</sup> *U. S. v. Bartlett*, 2 Ware, 17, Fed. Cas. No. 14,532.

<sup>7</sup> *In re Whitley Partners*, 32 Ch. Div. 339; *Finnegan v. Lucy*, 157 Mass. 439.

<sup>8</sup> *Reg. v. Justices of Kent*, L. R. 8 Q. B. 305, 307.

<sup>9</sup> See post, § 341.

<sup>10</sup> *Lyon v. Jerome*, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271.

like. An executor cannot delegate to an agent his discretionary authority to sell property belonging to the estate.<sup>11</sup>

**§ 38. Agency for illegal object.**

(a) **Effect of illegality.**—An agency cannot lawfully be created for an illegal object. The fact that a contract of agency is illegal will not necessarily prevent the principal or agent, or both, from incurring liability to third persons, but as a rule the contract of agency is void as between the principal and the agent, and neither can enforce the same, or base any action thereon. As we shall see in a subsequent section, a contract of agency is illegal if it contemplates the doing of an act which is unlawful, either because it is in violation of a statute or some positive rule of the common law, or because it is contrary to public policy.<sup>12</sup> In this section, we shall consider the effect of illegality, assuming that it exists.

As a general rule, if an agency is created for an illegal object, the contract of agency, like any other contract which is illegal, is void, and can give rise to no right of action in favor either of the principal or the agent. Thus, neither the principal nor the agent can maintain an action against the other for breach of the contract of agency.<sup>13</sup> And the agent cannot maintain an action against the principal for his compensation or for expenditures, either on the contract itself or on an implied contract.<sup>14</sup>

<sup>11</sup> *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89.

<sup>12</sup> *Post*, § 39.

<sup>13</sup> *Rosenbaum v. United States Credit-System Co.*, 60 N. J. Law, 294; *Id.*, 61 N. J. Law, 543; *Id.*, 65 N. J. Law, 255.

<sup>14</sup> *Cope v. Rowlands*, 2 Mees. & W. 149; *Trist v. Child*, 21 Wall. (U. S.) 441; *Irwin v. Williar*, 110 U. S. 499; *Embrey v. Jemison*, 131 U. S. 336; *Weed v. Black*, 2 McArthur (D. C.) 268, 29 Am. Rep. 618; *Cunningham v. Augusta Nat. Bank*, 71 Ga. 400, 51 Am. Rep. 266; *Samuels v. Oliver*, 130 Ill. 73; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Stewart v. Schall*, 65 Md. 299, 57 Am. Rep. 327; *Ames v. Gilman*, 10 Metc. (Mass.) 239; *Harvey v. Merrill*, 150 Mass. 1, 15 Am. St. Rep. 159; *McDearmott v. Sedgwick*, 140 Mo. 172; *Buckley v. Humason*, 50 Minn. 195, 36 Am. St. Rep. 637; *Hall v. Bishop*, 3 Daly (N. Y.) 109; *Mills v. Mills*, 40 N. Y. 543; *Kahn v. Walton*, 46 Ohio St. 195; *Holt v. Green*, 73 Pa. 192, 13 Am. Rep. 737; *Johnson*



Some of the courts hold that where an illegal contract of agency has been carried out, and the agent has received money or property for the principal, the illegality of the transaction cannot be set up by the agent to defeat an action by the principal to recover the same, on the ground that to allow the principal to recover is not to enforce the illegal contract, but to enforce a liability resulting from the fact that the agent has received money or property which belongs to the principal, and which the agent has no right to retain.<sup>15</sup> Other courts, however, have taken a contrary view on the ground that to allow the principal to recover is substantially to enforce, or at least to recognize, the illegal contract, and that the courts should leave the parties where they have placed themselves.<sup>16</sup>

By the weight of authority, "if money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before

v. Hulings, 103 Pa. 498, 49 Am. Rep. 131; *Fareira v. Gabell*, 89 Pa. 89; *Spalding v. Ewing*, 149 Pa. 375, 34 Am. St. Rep. 608; *Stevenson v. Ewing*, 87 Tenn. 46; *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677; *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55; *Everingham v. Meighan*, 55 Wis. 354.

<sup>15</sup> *Tenant v. Elliott*, 1 Bos. & P. 3; *Farmer v. Russell*, 1 Bos. & P. 296; *Bousfield v. Wilson*, 16 Mees. & W. 185; *Beeston v. Beeston*, 1 Exch. Div. 13; *McBlair v. Gibbes*, 17 How. (U. S.) 236; *Brooks v. Martin*, 2 Wall. (U. S.) 70; *O'Bryan v. Fitzgerald*, 48 Ark. 487; *Daniels v. Barney*, 22 Ind. 207; *Haacke v. Knights of Liberty*, 76 Md. 429; *Willson v. Owen*, 30 Mich. 474; *Gilliam v. Brown*, 43 Miss. 641; *Andrews v. New Orleans Brew. Ass'n*, 74 Miss. 362, 60 Am. St. Rep. 509; *Hertzler v. Geigley*, 196 Pa. 419, 79 Am. St. Rep. 724; *Peters v. Grim*, 149 Pa. 163, 34 Am. St. Rep. 599; *Floyd v. Patterson*, 72 Tex. 202, 13 Am. St. Rep. 787. In *Hertzler v. Geigley*, supra, it was held that an agent who had sold intoxicating liquors for his principal in violation of law could not set up the illegality to defeat an action by the principal to recover the proceeds.

<sup>16</sup> *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 98; *Skeels v. Phillips*, 54 Ill. 309; *Neustadt v. Hall*, 58 Ill. 172; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Goodrich v. Tenney*, 144 Ill. 422, 36 Am. St. Rep. 459; *Hovey v. Storer*, 63 Me. 486; *Northrup v. Bufington*, 171 Mass. 468; *Green v. Corrigan*, 87 Mo. 359; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Lemon v. Grosskopf*, 22 Wis. 447, 99 Am. Dec. 58; *Atwater v. Manville*, 106 Wis. 64.

the illegal purpose is carried out," for, so long as the illegal purpose has not been consummated, a *locus poenitentiae* remains; and this principle will allow a principal to recover money or property paid or delivered by him to his agent for an illegal purpose, if the purpose has not been carried out.<sup>17</sup> But in the absence of a statute, the principal cannot maintain an action against the agent to recover money or property which he has paid or delivered to the agent to be used by the latter for an illegal purpose, and which has been so used and expended. In such a case, the courts will leave the principal where he has placed himself.<sup>18</sup> In some states, by express statutory provision, a person is allowed to recover back money or property paid or delivered by him on a wager or other gambling transaction, and the statute applies to money paid to a broker on gambling in futures.<sup>19</sup>

<sup>17</sup> Taylor v. Bowers, 1 Q. B. Div. 291; Barclay v. Pearson [1893] 2 Ch. 154; Congress & E. Spring Co. v. Knowlton, 103 U. S. 49; Wassermann v. Sloss, 117 Cal. 425; Clarke v. Brown, 77 Ga. 606, 4 Am. St. Rep. 98; Stacy v. Foss, 19 Me. 335, 36 Am. Dec. 755; Tyler v. Carlisle, 79 Me. 210, 1 Am. St. Rep. 301; Sampson v. Shaw, 101 Mass. 145; Adams Exp. Co. v. Reno, 48 Mo. 264; Souhegan Nat. Bank v. Wallace, 61 N. H. 24; Bernard v. Taylor, 23 Or. 416, 37 Am. St. Rep. 693; Peters v. Grim, 149 Pa. 163, 34 Am. St. Rep. 599. Contra, Knowlton v. Congress & E. Spring Co., 57 N. Y. 518. And see Rolfe v. Delmar, 7 Rob. (N. Y.) 80 (where it is held that money advanced to an agent, by the managers of a lottery, to forward the sale of tickets by him, cannot be recovered back).

<sup>18</sup> Hammon, Cont. §§ 257, 258; Holman v. Johnson, 1 Cowp. 341; Gregory v. Wendell, 39 Mich. 337, 33 Am. Rep. 390; Northrup v. Buffington, 171 Mass. 468. But in Peters v. Grim, 149 Pa. 163, 34 Am. St. Rep. 599, it was held that where a gambling transaction in stocks is closed between the principal and his broker, the account rendered and settled, and the entire profit paid over, leaving in the broker's hands only the original deposit recognized by both parties as the principal's money in the broker's hands in contemplation of new transactions, the principal may recover the amount of such deposit from the broker before he enters into further transactions, and the broker cannot set up the illegality of the former transactions as a defense. See, also, Clarke v. Brown, 77 Ga. 606, 4 Am. St. Rep. 98.

<sup>19</sup> McGrew v. City Produce Exch., 85 Tenn. 572, 4 Am. St. Rep. 771; Pearce v. Foot, 113 Ill. 228, 55 Am. Rep. 414; Kruse v. Kennett, 181 Ill. 199; Lester v. Buel, 49 Ohio St. 240, 34 Am. St. Rep.

(b) **Agent not privy to illegality.**—Of course, a contract of agency is not illegal so far as the agent is concerned, because of unlawful intention on the part of the principal, where the illegality is not apparent on the face of the transaction, and the agent is not privy to the illegality.<sup>20</sup> Thus a broker's right to recover commissions and expenditures is not affected by the fact that his principal intended, not an actual delivery, but a mere gambling in futures, where the broker was not privy to such unlawful intention.<sup>21</sup> And an agent is not precluded from recovering on his principal's bond or promise of indemnity against liability for doing an act because such act constitutes a trespass, where it is not so on its face, and the agent is ignorant of its unlawful character.<sup>22</sup>

(c) **Partial illegality.**—If a contract of agency is illegal in part only, and the part which is good can be separated from the part which is bad, the part which is good may be enforced.<sup>23</sup> But if the part which is good cannot be separated from the part which is bad, the whole is void. Such is the case where the contract involves an indivisible promise to do several acts, some of which are illegal, or where it consists of a promise which is based upon several considerations, some of which are illegal.<sup>24</sup>

556; *Davy v. Bangs*, 174 Mass. 238; *Bingham v. Scott*, 177 Mass. 208; *Lyons v. Coe*, 177 Mass. 382; *Parker v. Otis*, 130 Cal. 322; *Saunders v. A. C. Phelps Co.*, 53 S. C. 173.

<sup>20</sup> *Hammon, Cont.*, § 246 et seq.; *Emery v. Kempton*, 2 Gray (Mass.) 257; *Roys v. Johnson*, 7 Gray (Mass.) 162.

<sup>21</sup> *Crawford v. Spencer*, 92 Mo. 498, 1 Am. St. Rep. 745; *Donovan v. Dalber*, 124 Mich. 49; *Harvey v. Merrill*, 150 Mass. 1, 15 Am. St. Rep. 159; *Irwin v. Willmar*, 110 U. S. 499; *Roundtree v. Smith*, 108 U. S. 269; *Lehman v. Feld*, 37 Fed. 852; *Edwards v. Hoeffinghoff*, 38 Fed. 635; *Boyd v. Hanson*, 41 Fed. 174; *Ponder v. Jerome Hill Cotton Co.*, 100 Fed. 373; *Pape v. Wright*, 116 Ind. 502; *Wright v. Crabbs*, 78 Ind. 487; *Williams v. Carr*, 80 N. C. 294.

<sup>22</sup> *Davis v. Arledge*, 3 Hill (S. C.) 170, 30 Am. Dec. 360; *Ives v. Jones*, 25 N. C. (3 Ired.) 538, 40 Am. Dec. 421. See, also, *Smith v. Delaney*, 64 Conn. 264, 42 Am. St. Rep. 181.

<sup>23</sup> *Hammon, Cont.*, § 251; *Haynes v. Doman* [1899] 2 Ch. Div. 13; *Rosenbaum v. U. S. Credit-System Co.*, 65 N. J. Law, 255.

<sup>24</sup> *Hammon, Cont.*, § 251; *Trist v. Child*, 21 Wall. (U. S.) 441;

**§ 39. Particular contracts of agency which are illegal.**

(a) **In general.**—A contract of agency may be illegal, so as to render the above rules applicable either because it is in violation of some express statutory provision, or because it contemplates the doing of an act prohibited by a statute, or by some positive rule of the common law, or because the object is such as to render it contrary to public policy.<sup>25</sup>

Of course a contract of employment with a broker or other agent will not be rendered illegal and void because it is contrary to a statutory prohibition, if it appears from the nature of the prohibition or otherwise that the legislature did not intend to render contracts in violation of the prohibition illegal.<sup>26</sup>

(b) **Exercise of trade or profession without a license, etc.**—Among the contracts of agency which are illegal because of a statutory prohibition are contracts with a person practicing a particular trade or profession without a license. Thus, where a statute prohibits any person from practicing as an attorney at law without a license or diploma, etc., a contract by which a person is employed to render services as an attorney, in violation of the statute, is illegal and void, and he cannot maintain an action to recover for its breach or for his services, unless there is something to show that the

*Edwards v. Randle*, 63 Ark. 318, 58 Am. St. Rep. 108; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211; *Crichfield v. Bermudez Asphalt Pav. Co.*, 174 Ill. 466; *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339; *Case v. Smith*, 107 Mich. 416, 61 Am. St. Rep. 341; *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 16 Am. St. Rep. 695; *Bixby v. Moor*, 51 N. H. 402; *Filson v. Himes*, 5 Pa. 452, 47 Am. Dec. 422; *Sullivan v. Horgan*, 17 R. I. 109.

<sup>25</sup> See generally as to illegal contracts, *Hammon, Cont.*, § 207 et seq.

<sup>26</sup> See *Hammon, Cont.*, § 209; *Banks v. McCosker*, 82 Md. 518, 51 Am. St. Rep. 478. Thus it has been held that a statute which forbids a broker to charge more than a certain amount for procuring a loan, but does not prescribe any penalty for its violation, does not render illegal and void a contract which stipulates for a greater brokerage, but the broker can only recover the amount allowed to be charged by the statute. *Buchanan v. Tilden*, 18 App. Div. (N. Y.) 123.

legislature did not intend to make contracts in violation of the statute illegal and void.<sup>27</sup> The same is true of a contract for the services of a stock broker,<sup>28</sup> commercial broker or agent,<sup>29</sup> real estate broker or agent,<sup>30</sup> etc., who is transacting business without a license, in violation of a statute or city ordinance.<sup>31</sup>

(c) **Sale of intoxicating liquors.**—A contract by which a person employs an agent to sell intoxicating liquors in violation of a statutory prohibition is illegal and void, and no action can be maintained to recover commissions or other compensation.<sup>32</sup> If the contract is for services in conducting a business which consists in part of sales of intoxicating liquor in violation of law, the illegality vitiates the whole contract, and prevents any recovery at all, although some of the services rendered may not have been illegal.<sup>33</sup>

(d) **Lotteries.**—A contract of agency for the purchase or sale of lottery tickets is illegal where the sale of lottery tickets is prohibited and made illegal by statute, and no right of action can be based upon or grow out of it, either in favor of the principal or the agent.<sup>34</sup> Thus where persons, in violation of a statute making the sale of lottery tickets unlawful,

<sup>27</sup> *Ames v. Gilman*, 10 Metc. (Mass.) 239; *Hall v. Bishop*, 3 Daly (N. Y.) 109; *Hittson v. Browne*, 3 Colo. 304. Compare *Yates v. Robertson*, 80 Va. 475; *Harland v. Lillenthal*, 53 N. Y. 438.

<sup>28</sup> *Cope v. Rowlands*, 2 Mees. & W. 149; *Hustis v. Pickands*, 27 Ill. App. 270.

<sup>29</sup> *Holt v. Green*, 73 Pa. 198, 13 Am. Rep. 737. And see *Singer Mfg. Co. v. Drafer*, 103 Tenn. 262.

<sup>30</sup> *Buckley v. Humason*, 50 Minn. 195, 36 Am. St. Rep. 637; *Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 131; *Stevenson v. Ewing*, 87 Tenn. 46.

<sup>31</sup> Where a valid city ordinance prohibits transaction of business by unlicensed real estate brokers within the city limits, a broker negotiating a sale of real estate in violation of the ordinance cannot recover his commissions. *Buckley v. Humason*, 50 Minn. 195, 36 Am. St. Rep. 637.

<sup>32</sup> *Bixby v. Moor*, 51 N. H. 402; *Rocco v. Frapoli*, 50 Neb. 665. See, also, *Falk v. Ferd. Heim Brew. Co.*, 10 Kan. App. 248.

<sup>33</sup> *Bixby v. Moor*, 51 N. H. 402.

<sup>34</sup> *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423; *Rolfe v. Delmar*, 7 Rob. (N. Y.) 80; *Roselle v. McAuliffe*, 141 Mo. 36; *Lanahan v. Pat-tison*, 1 Flip. (U. S.) 410, Fed. Cas. No. 8,036.

purchase tickets and turn them over to an agent to sell on commission, under an agreement that the agent is to take and be accountable to them for all tickets unsold and not returned to them at the time of the lottery, the agent cannot maintain trover against them for the value of unsold and unreturned tickets vesting in him under the contract, and of which they have obtained possession without right.<sup>35</sup> And where persons appoint an agent to purchase tickets in violation of law, they cannot maintain an action against him for their share of the proceeds.<sup>36</sup> Nor can the managers of a lottery recover from an agent money advanced to him to forward the sale of tickets by him.<sup>37</sup>

(e) **Injury to the public service.**—A contract of agency is contrary to public policy and illegal if the object is such that its performance will tend to injure the public service.<sup>38</sup> This principle has been applied, for example, to contracts in which a promise is made in consideration of the promisee's securing, or rendering services and using his influence in endeavoring to secure, by appointment or election, a public office for the promisor;<sup>39</sup> to a contract by which a public officer employs another to perform the duties of his office for him, otherwise than as a mere deputy or assistant, or farms

<sup>35</sup> *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423.

<sup>36</sup> *Roselle v. McAuliffe*, 141 Mo. 36.

<sup>37</sup> *Rolfe v. Delmar*, 7 Rob. (N. Y.) 80.

<sup>38</sup> See *Hammon, Cont.*, § 228 et seq.

<sup>39</sup> *Law v. Law*, 3 P. Wms. 391; *Meguire v. Corwine*, 101 U. S. 111; *Robertson v. Robinson*, 65 Ala. 610, 39 Am. Rep. 17; *Edwards v. Randle*, 63 Ark. 318, 58 Am. St. Rep. 108; *Martin v. Wade*, 37 Cal. 168; *Liness v. Hesing*, 44 Ill. 113, 92 Am. Dec. 153; *Stout v. Ennis*, 28 Kan. 706; *Woodworth v. Wilson*, 11 La. Ann. 402; *Glover v. Taylor*, 38 La. Ann. 634; *Faurie v. Morin*, 4 Mart. (La.) 39, 6 Am. Dec. 701; *Keating v. Hyde*, 23 Mo. App. 555; *Gaston v. Drake*, 14 Nev. 175, 33 Am. Rep. 548; *Swayze v. Hull*, 8 N. J. Law, 54, 14 Am. Dec. 399; *Foley v. Speir*, 100 N. Y. 552; *Gray v. Hook*, 4 N. Y. 459; *Basket v. Moss*, 115 N. C. 448, 44 Am. St. Rep. 463; *Wishek v. Hammond*, 10 N. D. 72; *Hunter v. Nolf*, 71 Pa. 282; *Filson v. Himes*, 5 Pa. 452, 47 Am. Dec. 422; *Whitman v. Ewin* (Tenn. Ch. App.) 39 S. W. 742. A contract by a candidate for a public office to appoint another his deputy if elected is contrary to public policy. *Conner v. Canter*, 15 Ind. App. 690.

out his office;<sup>40</sup> and to a contract by which a public officer is employed for additional compensation to perform duties which pertain to his office and which he is bound to perform without such additional compensation.<sup>41</sup>

Any contract of agency by a public officer by which he binds himself to violate his duty to the public, or which places him in a position which is inconsistent with his duty to the public and has a tendency to induce him to violate such duty, is clearly illegal and void. But this does not apply to contracts of a public officer, although they may relate to public concerns, where the subject-matter is not one as to which he owes any duty to the public.<sup>42</sup>

(f) **Contracts for lobbying services.**—A contract for lobbying services, that is, a contract by which a person employs another to render services in procuring or defeating legislation, either by congress or a state legislature, or by a municipal council or assembly, by personal solicitation of the members or other objectionable means, is contrary to public policy and illegal, and no compensation can be recovered for services rendered or money expended under it.<sup>43</sup> This prin-

<sup>40</sup> *Onton v. Rodes*, 3 A. K. Marsh. (Ky.) 432, 13 Am. Dec. 193; *Salling v. McKinney*, 1 Leigh (Va.) 42, 19 Am. Dec. 722; *Engle v. Chipman*, 51 Mich. 524; *Schloss v. Hewlett*, 81 Ala. 266; *Martin v. Royster*, 8 Ark. 74. A contract between a sheriff and a taxpayer by which the taxpayer is to act as the sheriff's attorney at a fixed compensation, to be applied on the taxpayer's taxes, is against public policy and illegal. *Miller v. Wisener*, 45 W. Va. 59.

<sup>41</sup> *Weaver v. Whitney*, 1 Hopk. Ch. (N. Y.) 13; *Kick v. Merry*, 23 Mo. 72, 66 Am. Dec. 658; *Preston v. Bacon*, 4 Conn. 471; *Neustadt v. Hall*, 58 Ill. 172. See *Hammon, Cont.*, § 228.

<sup>42</sup> An agreement by the mayor of a city to render personal services in negotiating the purchase of a mortgage on lands within the city is not illegal because he agrees not to interfere with the efforts of the other party to obtain an adjustment or reduction of taxes on the land, where he has no power over the remission of taxes, and does no act nor exercises any influence in that direction. *Edmunds v. Bullett*, 59 N. J. Law, 312.

<sup>43</sup> *Trist v. Child*, 21 Wall. (U. S.) 441; *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314; *Colusa County v. Welch*, 122 Cal. 428; *Weed v. Black*, 2 McArthur (D. C.) 268, 29 Am. Rep. 618; *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415; *Cook v. Shipman*, 24 Ill. 614; *Crichfield v. Bermudez Asphalt Pav. Co.*, 174 Ill. 466;

ciple does not prevent the regular employment of an attorney or other agent to draft a bill, to appear before the legislative body or a committee and make an argument, or render other proper services, in pressing a claim and securing legislation.<sup>44</sup> But, by the weight of authority, because of the incentive to use improper means, even the employment of an attorney to present a claim and secure legislation for the purpose of obtaining payment is illegal, where the compensation is contingent upon success or upon the amount recovered, particularly where the attorney is to pay expenses.<sup>45</sup>

*Goodrich v. Tenney*, 144 Ill. 422, 36 Am. St. Rep. 459; *Coquillard's Adm'r v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362; *McBratney v. Chandler*, 22 Kan. 692; *Haas v. Fenlon*, 8 Kan. 601; *Wood v. McCann*, 6 Dana (Ky.) 366; *Gil v. Williams*, 12 La. Ann. 219, 68 Am. Dec. 767; *Burney's Heirs v. Ludeling*, 47 La. Ann. 73; *Frost v. Belmont*, 6 Allen (Mass.) 152; *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Houlton v. Dunn*, 60 Minn. 26, 51 Am. St. Rep. 493; *McDonald v. Buckstaff*, 56 Neb. 88; *Richardson v. Scott's Bluff County*, 59 Neb. 400, 80 Am. St. Rep. 682; *Carleton v. Whitchee*, 5 N. H. 196; *Mills v. Mills*, 40 N. Y. 543; *Brown v. Brown*, 34 Barb. (N. Y.) 533; *Harris v. Simonson*, 28 Hun (N. Y.) 318; *Milbank v. Jones*, 127 N. Y. 370, 24 Am. St. Rep. 454; *Clippenger v. Hepbaugh*, 5 Watts & S. (Pa.) 315, 40 Am. Dec. 519; *Spalding v. Ewing*, 149 Pa. 375, 34 Am. St. Rep. 608; *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677; *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55; *Houlton v. Nichol*, 93 Wis. 393, 57 Am. St. Rep. 928.

<sup>44</sup> *Trist v. Child*, 21 Wall. (U. S.) 441; *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314, 335; *Hunt v. Test*, 8 Ala. 713, 42 Am. Dec. 659; *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384; *Foltz v. Cogswell*, 86 Cal. 542; *Coquillard's Adm'r v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362; *Chesebrough v. Conover*, 140 N. Y. 382; *Dunham v. Hastings Pavement Co.*, 56 App. Div. (N. Y.) 244, 57 App. Div. 426; *Spalding v. Ewing*, 149 Pa. 375, 34 Am. St. Rep. 608; *Houlton v. Nichol*, 93 Wis. 393, 57 Am. St. Rep. 928; *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55.

<sup>45</sup> *Gil v. Williams*, 12 La. Ann. 219, 68 Am. Dec. 767; *Wood v. McCann*, 6 Dana (Ky.) 366; *Coquillard's Adm'r v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362; *Clippinger v. Hepbaugh*, 5 Watts & S. (Pa.) 315, 40 Am. Dec. 519; *Spalding v. Ewing*, 149 Pa. 375, 34 Am. St. Rep. 608; *Richardson v. Scott's Bluff County*, 59 Neb. 400, 80 Am. St. Rep. 682; *Chippewa Val. & S. R. Co. v. Chicago, St. P., M. & O. R. Co.*, 75 Wis. 224. Compare, however, *Workman v. Campbell*, 46 Mo. 305; *Denison v. Crawford County*, 48 Iowa, 211. And see *Foltz v. Cogswell*, 86 Cal. 542.



(g) **Contracts to procure action by public officers.**—The same principle certainly applies to a contract by which a person employs another to procure action by a public administrative officer, as the payment of a claim, the awarding of a contract for public work, etc., if the contract contemplates the use of undue personal influence, bribery, or other corrupt or improper means.<sup>46</sup> Some of the courts have gone further and held that any contract, for a compensation, particularly where the compensation is contingent, to render services in procuring action by a public officer is contrary to public policy and illegal, because of the tendency to introduce personal solicitation and personal influence as elements in procuring favorable action, when the officer should be influenced solely by what he considers the public good, although the contract may not contemplate the use of corrupt means.<sup>47</sup> But other courts sustain such a contract of employment when it appears that corrupt means were not to be resorted to, and were not resorted to.<sup>48</sup>

(h) **Collection of claims against the United States.**—Under the act of congress to prevent frauds upon the treasury,

<sup>46</sup> *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Trist v. Child*, 21 Wall. (U. S.) 441; *Hayward v. Nordberg Mfg. Co.*, 29 C. A. 438, 85 Fed. 4; *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415; *Brown v. First Nat. Bank*, 137 Ind. 655; *Willemin v. Bateson*, 63 Mich. 309; *Kribben v. Haycraft*, 26 Mo. 396; *Burney's Heirs v. Ludeling*, 47 La. Ann. 73; *Barron v. Tucker*, 53 Vt. 338, 38 Am. Rep. 684.

<sup>47</sup> *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Meguire v. Corwine*, 101 U. S. 108; *Wilkey v. Collier*, 7 Md. 273, 61 Am. Dec. 346; *St. Louis, J. & C. R. Co. v. Mathers*, 104 Ill. 257; *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746; *Caton v. Stewart*, 76 N. C. 357; *Hatzfield v. Gulden*, 7 Watts (Pa.) 152; *Ormerod v. Dearman*, 100 Pa. 561, 45 Am. Rep. 391; *Kribben v. Haycraft*, 26 Mo. 396. And see *Jones v. Blackledge*, 9 Kan. 562, 12 Am. Rep. 503.

<sup>48</sup> *Southard v. Boyd*, 51 N. Y. 177; *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502; *Dunham v. Hastings Pavement Co.*, 56 App. Div. (N. Y.) 244, 57 App. Div. 426; *Bergen v. Frisbie*, 125 Cal. 168; *Winpenny v. French*, 18 Ohio St. 469; *Barry v. Capen*, 151 Mass. 99; *Beal v. Polhemus*, 67 Mich. 130; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Moyer v. Cantieny*, 41 Minn. 242. And see *Fearnley v. De Mainville*, 5 Colo. App. 441.

providing that all transfers and assignments of any claim against the United States, or any part or share thereof, or interest therein, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be void unless freely made and executed in the presence of two witnesses after the allowance of the claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof, it has been held that a contract by which a person who has a claim against the United States employs an attorney to secure payment of the same, agreeing to pay him a certain percentage when collected, is illegal and void.<sup>49</sup> But the mere fact that an attorney has been employed to aid in prosecuting a claim against the United States does not make the contract illegal or void; and an attorney thus employed may recover for services thus rendered, if they were rendered without any fraud or unfairness.<sup>50</sup>

(i) **Suppression of criminal prosecutions, procuring pardons, etc.**—While a person who has committed or is accused of having committed a crime may lawfully employ an attorney to render legitimate professional services in his defense, he cannot employ an attorney or any other person to render services in suppressing a criminal prosecution, or otherwise obstructing or preventing the due course of law. Any contract for services having this object is contrary to public policy and illegal.<sup>51</sup> This applies, for example, to a contract for the services of an attorney or another in endeavoring to defeat the finding of an indictment, or in endeavoring to induce the state's attorney to enter a nolle prosequi;<sup>52</sup> or in en-

<sup>49</sup> *Jones v. Blacklidge*, 9 Kan. 562, 12 Am. Rep. 503.

<sup>50</sup> *Stanton v. Embrey*, 93 U. S. 548.

<sup>51</sup> *Willey v. Collier*, 7 Md. 273, 61 Am. Dec. 346; *Rhodes v. Neal*, 64 Ga. 704, 37 Am. Rep. 93; *Wight v. Rindskopf*, 43 Wis. 344; *Barron v. Tucker*, 53 Vt. 338, 38 Am. Rep. 684; *Haines v. Lewis*, 54 Iowa, 301, 37 Am. Rep. 202; *Buck v. First Nat. Bank*, 27 Mich. 293, 15 Am. Rep. 189; *Goodrich v. Tenney*, 144 Ill. 422, 36 Am. St. Rep. 459.

<sup>52</sup> *Barron v. Tucker*, 53 Vt. 338, 38 Am. Rep. 684; *Weber v. Shay*, 56 Ohio St. 116, 60 Am. St. Rep. 743. And see *Willey v. Collier*, 7 Md. 273, 61 Am. Dec. 346.

deavoring to induce the complainants in a criminal prosecution for felony to discontinue or not to commence proceedings;<sup>53</sup> or in endeavoring to prevent an arrest for a crime and thus allow the accused to escape, or otherwise aid in an escape;<sup>54</sup> or in endeavoring to induce the state's attorney to allow the accused to turn state's evidence in consideration of a pardon, or to mitigate the punishment.<sup>55</sup> An agreement by an attorney to procure for a contingent fee the quashing of a criminal prosecution is contrary to public policy and void.<sup>56</sup>

It has been held that a contract for compensation founded upon a promise or engagement by an attorney or another to procure signatures and endeavor to obtain from the governor a pardon or a commutation of sentence, of one who has been convicted of a crime and sentenced to punishment, is contrary to public policy and void.<sup>57</sup> But according to the better opinion, a contract to pay an attorney for services in endeavoring to procure a pardon for one who has been convicted of a crime, will be upheld, where no corrupt means are to be resorted to.<sup>58</sup>

<sup>53</sup> *Rhodes v. Neal*, 64 Ga. 704, 37 Am. Rep. 93; *Mack v. Campeau*, 69 Vt. 558, 60 Am. St. Rep. 948. See, also, *McMahon v. Smith*, 47 Conn. 221, 36 Am. Rep. 67.

<sup>54</sup> *Arrington v. Sneed*, 18 Tex. 135; *Dodson v. Swan*, 2 W. Va. 511, 98 Am. Dec. 787.

<sup>55</sup> *Wight v. Rindskopf*, 43 Wis. 344.

<sup>56</sup> *Ormerod v. Dearman*, 100 Pa. 561, 45 Am. Rep. 391.

<sup>57</sup> *Hatzfield v. Gulden*, 7 Watts (Pa.) 152, 32 Am. Dec. 750; *Norman v. Cole*, 3 Esp. 253; *Kribben v. Haycraft*, 26 Mo. 396; *O'Reilly v. Cleary*, 8 Mo. App. 186; *Haines v. Lewis*, 54 Iowa, 301, 37 Am. Rep. 202; *Adams Exp. Co. v. Reno*, 48 Mo. 264. This rule does not apply where the tribunal which tried the accused had no jurisdiction, so that the conviction and sentence are illegal; and no improper means are to be used to secure the pardon. *Thompson v. Wharton*, 7 Bush (Ky.) 563, 3 Am. Rep. 306.

<sup>58</sup> *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Timothy v. Wright*, 8 Gray (Mass.) 522; *Formby v. Pryor*, 15 Ga. 258; *Bird v. Breedlove*, 24 Ga. 623; *Rau v. Boyle*, 5 Bush (Ky.) 253; *Moyer v. Cantieny*, 41 Minn. 242; *Bird v. Meadows*, 25 Ga. 251; *Bremsen v. Engler*, 49 N. Y. Super. Ct. 172. It will be assumed that an employment of an attorney to do what he can to obtain a pardon, etc., contemplates only such legal and proper acts as the law allows an

(j) **Procuring or suppressing evidence.**—A contract by which a person is employed to suppress evidence which may be used, either in a criminal or civil action or proceeding, is clearly contrary to public policy and void; and the same is true of a contract by which one is employed to procure evidence, where by reason of the compensation for his services being made contingent, or for any other reason, the contract has a direct tendency to induce him to procure false testimony, etc.<sup>59</sup> But there is no objection to the employment of a person to render services in looking up witnesses, ascertaining what their testimony will be, and otherwise preparing the evidence for a trial, where the contract does not contemplate or tend to the suppression of evidence or the production of false testimony.<sup>60</sup>

(k) **Contracts involving commission of a fraud or other civil wrong.**—A contract of agency, like any other contract, is illegal if it contemplates the commission of a civil wrong against a third person, and the agent, if he is privy to the illegality, cannot maintain an action to recover his com-

attorney to agree to perform: *Bremsen v. Engler*, 49 N. Y. Super. Ct. 172. In this case, it was also held by the court "that a distinction should be made between an employment of this kind and a contract to procure a pardon made by a person who is not an attorney; such a contract would be objectionable, because it would appear on its face that the means to be employed were influence or personal solicitation, or some others equally objectionable, while in this case the employment is to perform services in the line of the employer's profession, which for any other object would be objectionable." But see *Bird v. Breedlove*, 24 Ga. 623, where it was held that the obtaining of pardons before the legislature was not restricted to attorneys at law.

<sup>59</sup> *Valentine v. Stewart*, 15 Cal. 387; *Patterson v. Donner*, 48 Cal. 369; *Hoyt v. Macon*, 2 Colo. 502; *Kennedy v. Hodges*, 97 Ga. 753; *Goodrich v. Tenney*, 144 Ill. 422, 36 Am. St. Rep. 459; *Gillett v. Logan County Sup'rs*, 67 Ill. 256; *Lucas v. Allen*, 80 Ky. 681; *Crisup v. Grosslight*, 79 Mich. 380; *Quirk v. Muller*, 14 Mont. 467, 43 Am. St. Rep. 647; *Lyon v. Hussey*, 82 Hun (N. Y.) 15; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370.

<sup>60</sup> *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370, and note in 94 Am. Dec. 375-378; *Wellington v. Kelly*, 84 N. Y. 543; *Chandler v. Mason*, 2 Vt. 193; *Quirk v. Muller*, 14 Mont. 467, 43 Am. St. Rep. 647. See, also, *Casserleigh v. Wood*, 14 Colo. App. 265.

pensation, or to hold the principal liable on a promise to indemnify him.<sup>61</sup> It is otherwise, of course, if the contract is not illegal on its face, and the agent does not know of the illegality.<sup>62</sup>

In accordance with this principle, a contract of agency may be illegal because it contemplates or involves the publication of a libel,<sup>63</sup> or a trespass,<sup>64</sup> breach of contract, breach of trust or confidence,<sup>65</sup> or fraud.<sup>66</sup>

(1) **Contracts affecting auction sales and public letting of contracts.**— A contract by which the owner of property which is to be sold at auction, or a person who is letting a contract at public bidding, employs others to make fictitious bids, is illegal because it operates as a fraud upon bona fide bidders, and an agent so employed could not maintain an action to recover compensation promised him.<sup>67</sup> In like manner an agreement between persons for the purpose of deterring bidders and preventing competition at an auction sale, or pub-

<sup>61</sup> *Scott v. Brown* [1892] 2 Q. B. Div. 724; *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U. S. 643; *McCall's Adm'r v. Capehart*, 20 Ala. 521; *Clement's Appeal*, 52 Conn. 464; *Jerome v. Bigelow*, 66 Ill. 452, 16 Am. Rep. 597; *Gray v. McReynolds*, 65 Iowa, 461, 54 Am. Rep. 16; *Huckins v. Hunt*, 138 Mass. 366; *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369; *Materne v. Horwitz*, 101 N. Y. 469; *Davis v. Arledge*, 3 Hill, Law (S. C.) 170, 30 Am. Dec. 360. Or if it involves a fraudulent imposition upon the government. *Moore v. Moore*, 130 Cal. 110, 80 Am. St. Rep. 78.

<sup>62</sup> *Davis v. Arledge*, 3 Hill, Law (S. C.) 170, 30 Am. Dec. 360; *Ives v. Jones*, 3 Ired. (N. C.) 538, 40 Am. Dec. 421.

<sup>63</sup> *Shackell v. Rosier*, 2 Bing. N. C. 634; *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260; *Jewett Pub. Co. v. Butler*, 159 Mass. 517.

<sup>64</sup> *Merryweather v. Nixan*, 8 Term R. 186; *Davis v. Arledge*, 3 Hill, Law (S. C.) 170, 30 Am. Dec. 360; *Ives v. Jones*, 3 Ired. (N. C.) 538, 40 Am. Dec. 421; *Stanton v. McMullen*, 7 Ill. App. 326; *Coventry v. Barton*, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376.

<sup>65</sup> *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369.

<sup>66</sup> *Jerome v. Bigelow*, 66 Ill. 452, 16 Am. Rep. 597; *Materne v. Horwitz*, 101 N. Y. 469; *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369; *Gray v. McReynolds*, 65 Iowa, 461, 54 Am. Rep. 16.

<sup>67</sup> See *Smith v. Greenlee*, 13 N. C. (2 Dev.) 126, 18 Am. Dec. 564; *Curtis v. Aspinwall*, 114 Mass. 187, 19 Am. Rep. 332; *Moncrieff v. Goldsborough*, 4 Har. & McH. (Md.) 281, 1 Am. Dec. 407; *Pennock's Appeal*, 14 Pa. 446, 53 Am. Dec. 561; *Staines v. Shore*, 16 Pa. 200, 55 Am. Dec. 492; *Peck v. List*, 23 W. Va. 338, 48 Am. Rep. 398.

lic letting of a public or private contract, is illegal as constituting a fraud upon the owner of the property or person letting the contract as the case may be.<sup>68</sup> This rule, however, does not apply in a case where a person merely employs another to bid for him at an auction sale or letting of a contract, or where two or more persons combine, not for the purpose of deterring bidders and preventing competition, but in good faith and for the purpose of jointly purchasing the property or obtaining the contract.<sup>69</sup>

**(m) Contracts tending to induce fraud or breach of trust.**

—In order that a contract of agency may be illegal on the ground of fraud or breach of trust, it is not necessary that the fraud or breach of trust shall be actually contemplated by the parties, that it shall be a necessary consequence of carrying out the agreement. “Any agreement which has a direct tendency to induce a person to commit a fraud upon the rights of others, or a breach of trust and confidence, is illegal as being contrary to public policy.”<sup>70</sup>

<sup>68</sup> *McMullen v. Hoffman*, 174 U. S. 639; *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Ray v. Mackin*, 100 Ill. 246; *Loyd v. Malone*, 23 Ill. 43, 74 Am. Dec. 179; *Hunter v. Pfeiffer*, 108 Ind. 197; *Goldman v. Oppenheim*, 118 Ind. 95; *Hallam v. Huffman*, 5 Kan. App. 303; *Gibbs v. Smith*, 115 Mass. 592; *Doolin v. Ward*, 6 Johns. (N. Y.) 194; *Wilbur v. How*, 8 Johns. (N. Y.) 346; *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; *King v. Winants*, 71 N. C. 469, 17 Am. Rep. 11; *Smith v. Greenlee*, 13 N. C. (2 Dev.) 126, 18 Am. Dec. 564; *Barton v. Benson*, 126 Pa. 431, 12 Am. St. Rep. 883; *Dudley v. Odom*, 5 S. C. 131, 22 Am. Rep. 6; *Baggott v. Sawyer*, 25 S. C. 405; *Camp v. Bruce*, 96 Va. 521, 70 Am. St. Rep. 873; *Ralphsnyder v. Shaw*, 45 W. Va. 680.

<sup>69</sup> *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Gibbs v. Smith*, 115 Mass. 592; *Smith v. Ullman*, 58 Md. 183, 42 Am. Rep. 329; *Breslin v. Brown*, 24 Ohio St. 565, 15 Am. Rep. 627; *Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 794; *Bellows v. Russell*, 20 N. H. 427, 51 Am. Dec. 238; *Marle v. Garrison*, 83 N. Y. 14; *Switzer v. Skiles*, 3 Gilm. (Ill.) 529, 44 Am. Dec. 723; *Garrett v. Moss*, 20 Ill. 549; *Olson v. Lamb*, 56 Neb. 104. See, also, *Barnes v. Morrison*, 97 Va. 372.

<sup>70</sup> *Hammon, Cont.*, § 228; *Harrington v. Victoria Graving Dock Co.*, L. R. 3 Q. B. Div. 549; *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Edwards v. Estell*, 48 Cal. 194; *Levy v. Spencer*, 18 Colo. 532, 36 Am. St. Rep. 303; *Bollman v. Loomis*, 41 Conn. 581; *Nearey v. Crawford*, 16 Conn. 549; *Ray v.*

This principle applies, for example, where a broker who is employed to sell property is also employed by the person to whom he sells to buy, thus to receive a commission from both parties. The contract of agency with the buyer places the agent in a position which is inconsistent with his duty as agent of the seller, and is illegal, so that he cannot recover his compensation from the buyer.<sup>71</sup> And the rule applies in any other case in which an agent, including an officer or agent of a corporation, without the consent of his principal, enters into a contract with a third person which is inconsistent with his duties, and which, by giving him an interest adverse to the interest of his principal, or otherwise, tends to induce him to violate the trust and confidence placed in him by the principal.<sup>72</sup>

An agreement by a person for a consideration to use his influence to procure another's appointment as an officer of a corporation is illegal and void, in that it tends to induce a breach of trust and confidence in recommending the other for the office without regard to his personal fitness.<sup>73</sup> This

*Mackin*, 100 Ill. 246; *Byrd v. Hughes*, 84 Ill. 174, 25 Am. Rep. 442; *Gleason v. Chicago, M. & St. P. R. Co.* (Iowa) 43 N. W. 517; *Gray v. McReynolds*, 65 Iowa, 461; *Buchtella v. Stepanek*, 53 Kan. 373; *Bennett v. Tiernay*, 78 Ky. 580; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369; *Wilbur v. Stoepel*, 82 Mich. 344, 21 Am. St. Rep. 568; *St. Mary's Benev. Ass'n v. Lynch*, 64 N. H. 213.

<sup>71</sup> *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459.

<sup>72</sup> *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. Div. 549; *Smith v. Sorby*, 3 Q. B. Div. 552; *Holcomb v. Weaver*, 136 Mass. 265; *Smith v. Townsend*, 109 Mass. 500; *Everhart v. Searle*, 71 Pa. 256; *Bollman v. Loomis*, 41 Conn. 581; *Levy v. Spencer*, 18 Colo. 532, 36 Am. St. Rep. 303; *Spinks v. Davis*, 32 Miss. 152; *Attaway v. St. Louis Third Nat. Bank*, 93 Mo. 485; *Lum v. McEwen*, 56 Minn. 278. Compare, however, *Dexter v. McClellan*, 116 Ala. 37. A secret agreement by a lumber dealer with one employed to supervise the erection of a building for another and to pass upon accounts for materials, but not to make purchases, for a commission on sales made to the employer through his influence, is void as against public policy. *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385.

<sup>73</sup> *Blachford v. Preston*, 8 Term R. 89; *Robertson v. Robinson*, 65 Ala. 610, 39 Am. Rep. 17; *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162; *Guernsey v. Cook*, 120 Mass. 501; *Noyes v. Marsh*, 123 Mass. 286; *Holcomb v. Weaver*, 136 Mass. 265.

is particularly true when the person promising to use his influence is a director or officer of the corporation and therefore charged with the duty of acting solely in its interest,<sup>74</sup> or where he has been expressly placed in a confidential relation by being requested to recommend some one for the office,<sup>75</sup> and in other like cases.

An agreement by an agent to induce his principals to discharge their present attorney and employ another, who agrees in consideration thereof to divide his fees with the agent, is illegal and void.<sup>76</sup>

A contract by which a doctor is employed by a person injured in a railway accident, to explain his injuries to the company and its medical men, and by which he is to receive compensation in proportion to the amount which the company may pay as damages, is illegal because of its tendency to induce a breach of confidence and trust by the doctor.<sup>77</sup>

(n) **Dealings in futures — Gambling contracts.** — Agreements for the sale of stocks, grain, or any other commodity, where the parties do not intend an actual delivery, but contemplate that at the time fixed for delivery they shall settle by one of them paying the other the difference between the price agreed upon and the market price at the time fixed for delivery, is a gambling contract and illegal, and therefore, a contract by which a broker or other agent is employed in such transactions is illegal and void, and he cannot maintain an action to recover his compensation, or to recover for expenditures in performing the contract, or to recover on a note given therefor.<sup>78</sup> "Where a broker is privy to a wagering contract,

<sup>74</sup> Noel v. Drake, *supra*; Dickson v. Kittson, 75 Minn. 168.

<sup>75</sup> Holcomb v. Weaver, *supra*.

<sup>76</sup> Byrd v. Hughes, 84 Ill. 174, 25 Am. Rep. 442.

<sup>77</sup> Thomas v. Caulkett, 57 Mich. 392, 58 Am. Rep. 369.

<sup>78</sup> Universal Stock Exch. v. Strachan [1896] App. Cas. 166; Irwin v. Williar, 110 U. S. 499; Embrey v. Jemison, 131 U. S. 336; Morris v. Norton, 75 Fed. 912, 21 C. C. A. 553; Parker v. Otis, 130 Cal. 322; Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302; Cothran v. Ellis, 125 Ill. 496; Lyon v. Culbertson, 83 Ill. 33, 25 Am. Rep. 349; Pardridge v. Cutler, 168 Ill. 504; Whitesides v. Hunt, 97 Ind. 191, 49 Am. Rep. 441; Pearce v. Dill, 149 Ind. 136; Counselman v. Reichart, 103 Iowa. 430; Rumsey v. Berry, 65 Me. 570; Morris v. West-



and brings the parties together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself in forwarding the transaction."<sup>79</sup> Nor can the principal maintain an action against the broker to recover back margins paid,<sup>80</sup> unless, as is sometimes the case, he is allowed to do so by express statutory provision.<sup>81</sup> It has been held in some states that where the broker has carried out the contract of agency by making the illegal contracts, and has received money for his principal, the law will imply a promise on the part of the agent to pay it over, and the principal may maintain an action thereon, but in many other states the rule is otherwise.<sup>82</sup>

The above rule does not apply, although the contract may contemplate purchases and sales for future delivery, and on speculation, where it is understood that there shall be an actual delivery, or that actual delivery may be required.<sup>83</sup>

*ern Union Tel. Co.*, 94 Me. 423; *Stewart v. Schall*, 65 Md. 299, 57 Am. Rep. 327; *Harvey v. Merrill*, 150 Mass. 1, 15 Am. St. Rep. 159; *Campbell v. New Orleans Nat. Bank*, 74 Miss. 526; *Rogers v. Marriott*, 59 Neb. 759; *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308; *Kahn v. Walton*, 46 Ohio St. 195; *Lester v. Buel*, 49 Ohio St. 240, 34 Am. St. Rep. 556; *Wagner v. Hildebrand*, 187 Pa. 136; *Gist v. Western Union Tel. Co.*, 45 S. C. 344, 55 Am. St. Rep. 763; *Riordan v. Doty*, 50 S. C. 537; *Seeligson v. Lewis*, 65 Tex. 215, 57 Am. Rep. 593; *Lowry v. Dillman*, 59 Wis. 197; *Atwater v. Manville*, 106 Wis. 64. See, also, *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390; *Violet v. Mangold* (Miss.) 27 So. 875; *Crawford v. Spencer*, 92 Mo. 498, 1 Am. St. Rep. 745; *Pearce v. Foot*, 113 Ill. 228, 55 Am. Rep. 414; *McGrew v. City Produce Exch.*, 85 Tenn. 572, 4 Am. St. Rep. 771. But compare *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45; *Thompson v. Maddux*, 117 Ala. 468.

<sup>79</sup> *Irwin v. Willmar*, 110 U. S. 499.

<sup>80</sup> *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390; *Northrup v. Buffington*, 171 Mass. 468.

<sup>81</sup> *Ante*, § 38a.

<sup>82</sup> See *ante*, § 38a, and the cases on both sides cited in notes.

<sup>83</sup> *Ponder v. Jerome Hill Cotton Co.*, 40 C. C. A. 416, 100 Fed. 373; *Bibb v. Allen*, 149 U. S. 481; *Johnston v. Miller*, 67 Ark. 172; *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154; *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199; *Taylor v. Bailey*, 169 Ill. 181; *Sondheim v. Gilbert* 117 Ind. 71, 10 Am. St. Rep. 23; *Harvey v. Merrill*, 150

And the rule does not apply so far as the broker is concerned, so as to prevent him from recovering his commissions and expenditures, where he is not privy to his principal's unlawful intention.<sup>84</sup>

**(o) Contracts in derogation of the marriage relation.—**

"As a general rule, any agreement which restrains the freedom of parties to marry, or the freedom of choice in marrying, or impairs the sanctity and security of the marriage relation, or is otherwise in derogation of such relation, is contrary to public policy."<sup>85</sup> Contracts of agency, therefore, if they violate this principle, are illegal and void. Marriage brokerage contracts, by which a person, for a consideration, agrees to procure or bring about a marriage, since they affect the freedom of choice in entering into the relation, are regarded as illegal.<sup>86</sup>

**(p) Contracts in restraint of trade.—**A contract of agency may be illegal as being in restraint of trade.<sup>87</sup> It may be laid down as a general rule that a contract of agency is contrary to public policy and illegal, in so far as it unnecessa-

Mass. 1, 15 Am. St. Rep. 159; *Carland v. Western Union Tel. Co.*, 118 Mich. 369; *Rogers v. Marriott*, 59 Neb. 759; *Pratt v. Boody*, 55 N. J. Eq. 175; *Bigelow v. Benedict*, 70 N. Y. 202, 26 Am. Rep. 573; *In re Taylor & Co.'s Estate*, 192 Pa. 304; *Wagner v. Hildebrand*, 187 Pa. 136; *Smyth v. Glendinning*, 194 Pa. 550; *Harvey v. Doty*, 50 S. C. 548. It was held in a late Pennsylvania case that a stock transaction originating in an intention merely to wager by payment of differences is rendered valid by a subsequent agreement for actual delivery, so as to support, after such agreement, a claim against the broker or his estate in favor of the customer. And in like manner, of course, it would support a claim in favor of the broker for his commissions and expenditures. *In re Taylor & Co.'s Estate*, 192 Pa. 304.

<sup>84</sup> *Crawford v. Spencer*, 92 Mo. 498, 1 Am. St. Rep. 745; *Donovan v. Daiber*, 124 Mich. 49; *Roundtree v. Smith*, 108 U. S. 269.

<sup>85</sup> *Hammon*, Cont. § 240.

<sup>86</sup> *Arundel v. Trevillian*, Rep. Ch. 47; *White v. Equitable N. B. Union*, 76 Ala. 251, 52 Am. Rep. 325; *Morrison v. Rogers*, 115 Cal. 252, 56 Am. St. Rep. 95; *Hellen v. Anderson*, 83 Ill. App. 506; *Johnson's Adm'r v. Hunt*, 81 Ky. 321; *Antcliff v. June*, 81 Mich. 477; *Duval v. Wellman*, 124 N. Y. 156; *Place v. Conklin*, 34 App. Div. (N. Y.) 191.

<sup>87</sup> See *Hammon*, Cont., § 244a et seq.

riely or unreasonably restrains the right, either of the principal or the agent, to exercise his trade or business, or to sell commodities which are the subject of trade and commerce.<sup>88</sup>

But this principle does not render reasonable restrictions unlawful, and as a rule a stipulation in a contract of agency, although it may be in partial restraint of trade, is reasonable and therefore valid, if there is sufficient consideration, and if the restraint is no greater than is reasonably necessary for the protection of the party for whose benefit it is imposed.<sup>89</sup> Thus it is not contrary to public policy or illegal, at least in the absence of a statute, for a merchant or manufacturer, on employing an agent, to give him the exclusive right to sell a commodity in a particular territory, and for the agent to agree on his part not to sell the goods of others, on his own account or as agent, during the continuance of the contract.<sup>90</sup> A contract of employment by which it is

<sup>88</sup> *Mitchel v. Reynolds*, 1 P. Wms. 181; *Herreshoff v. Boutineau*, 17 R. I. 3, 33 Am. St. Rep. 850; *Seward v. Shields*, 9 Pa. Dist. R. 583; *Keeler v. Taylor*, 53 Pa. 467, 91 Am. Dec. 221; *Althen v. Vreeland* (N. J. Eq.) 36 Atl. 479; *Curran v. Galen*, 152 N. Y. 33; *Cleaver v. Lenhart*, 182 Pa. 285; *Lanzit v. J. W. Sefton Mfg. Co.*, 184 Ill. 326.

<sup>89</sup> *Hammon, Cont.*, § 244a et seq., and many cases there cited; *Haynes v. Doman* [1899] 2 Ch. 13; *Underwood v. Barker* [1899] 1 Ch. 300; *Swanson v. Kirby*, 98 Ga. 586; *Weiboldt v. Standard Fashion Co.*, 80 Ill. App. 67; *Ferris v. American Brew. Co.*, 155 Ind. 539; *Carnig v. Carr*, 167 Mass. 544; *Up River Ice Co. v. Denler*, 114 Mich. 296; *Woods v. Hart*, 50 Neb. 497; *New York Trap-Rock Co. v. Brown*, 61 N. J. Law, 536; *Hackett v. A. L. & J. J. Reynolds Co.*, 30 Misc. (N. Y.) 733; *Brett v. Ebel*, 29 App. Div. (N. Y.) 256; *Kramer v. Old*, 119 N. C. 1; *Tillinghast v. Boothby*, 20 R. 1, 59.

<sup>90</sup> *New York Trap-Rock Co. v. Brown*, 61 N. J. Law, 536; *Woods v. Hart*, 50 Neb. 497; *Carnig v. Carr*, 167 Mass. 544; *Ferris v. American Brew. Co.*, 155 Ind. 539; *Weiboldt v. Standard Fashion Co.*, 80 Ill. App. 67. In Texas, under a statute of that state prohibiting and declaring unlawful contracts or agreements in restraint of trade or preventing competition in the sale of a commodity, it is held that a contract by which a person is given the exclusive right to sell the goods of a certain manufacturer in a certain territory, and agrees that he will not sell the product of any other manufacturer of like goods, is illegal, as in restraint of trade. *Texas Brew. Co. v. Templeman*, 90 Tex. 277; *Fuqua v. Pabst Brew. Co.*, 90 Tex. 298; *Texas Brew. Co. v. Meyer* (Tex. Civ. App.) 38 S. W. 263;

agreed that the employe shall give up his business, and not render services for any other person during the term of the employment, is not illegal as being in unreasonable restraint of trade.<sup>91</sup> Nor is it illegal for an agent to agree that he will not serve his employer's customers, or that he will not engage in a similar business, as principal or as agent, for another, in the territory covered by his employer, for a reasonable time after termination of the employment.<sup>92</sup> An agreement by an agent that he will never make use of or divulge to others trade secrets, as a secret process for the manufacture of an article, for example, confided to him by the principal in the course of the employment, is not objectionable as in restraint of trade.<sup>93</sup>

*S. S. White Dental Mfg. Co. v. Hertzberg* (Tex. Civ. App.) 51 S. W. 355.

<sup>91</sup> *Carnig v. Carr*, 167 Mass. 544.

<sup>92</sup> *Haynes v. Doman* [1899] 2 Ch. 13; *Underwood v. Barker* [1899] 1 Ch. 300; *Davis v. Racer*, 72 Hun (N. Y.) 43; *A. L. & J. J. Reynolds Co. v. Dreyer*, 12 Misc. (N. Y.) 368; *Hackett v. A. L. & J. J. Reynolds Co.*, 30 Misc. (N. Y.) 733. Compare *Seward v. Shields*, 9 Pa. Dist. R. 583. In *Hackett v. A. L. & J. J. Reynolds Co.*, 30 Misc. (N. Y.) 733, a contract between an employer, engaged in the wholesale grocery business through the medium of salesmen driving over established routes and supplying grocers along the line, and a salesman, that the latter would not engage in a similar business within six months after termination of the contract of employment, and within ten miles of the city where the business was located, either on his own account or as agent of others, was held reasonable and valid.

And in a late English case, where it appeared that plaintiffs as hay and straw merchants were doing a large business in buying and selling hay and straw from all parts of Great Britain, Canada, France, Belgium and Holland, the court sustained as reasonable and not contrary to public policy an agreement by one of their employes, made on entering their employ, that he would not, within a year after leaving or being dismissed, carry on the business of hay and straw merchant, or act as agent or employe of any other person in carrying on such business, in any of the countries above named. *Underwood v. Barker* [1899] 1 Ch. 300.

<sup>93</sup> *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149; *C. F. Simmons Medicine Co. v. Simmons*, 81 Fed. 163. And see *Haynes v. Doman* [1899] 2 Ch. 13.

## **CHAPTER IV.**

### **CREATION AND EXISTENCE OF THE RELATION BY PRECEDENT OR CONTEMPORANEOUS AGREEMENT OR CONDUCT.**

#### **I. CREATION BY CONSENT OR AGREEMENT.**

- § 40. In general.
- 41. Necessity for actual agreement or consent.
- 42. How the contract of agency may be formed—Offer and acceptance.
- 43. Implied contract of agency.
- 44. Express authority as agent.
- 45. Implied authority as agent.
- 46. Consideration—Gratuitous agency.

#### **II. FORM OF CONTRACT OF AGENCY.**

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#### I. CREATION BY CONSENT OR AGREEMENT.

##### § 40. In general.

In dealing with the creation or formation of the relation of principal and agent, we have to consider the relation in two aspects, namely (1) as involving a contract of agency, that is, a contract between the principal and the agent; and (2) as involving authority of the agent to represent and bind the principal as regards third persons. There may be an appointment of an agent, or conferring of authority upon an agent without any contract of agency, as in a case where a person authorizes another to do an act for him, without any agreement by the principal to compensate him, and without any binding undertaking on the part of the agent to execute the authority.

The relation of principal and agent, both as between the parties themselves and as regards third persons, may be created or established in four ways, namely: (1) By an actual prior or contemporaneous agreement or consent, express or implied as a fact; (2) by operation of law, by reason of an estoppel arising out of the conduct of the parties, although there may be no actual agreement or consent; (3) by operation of law on the ground of necessity; and (4) by ratification. In this chapter we shall deal with the creation of the relation in the first three modes, and in the chapter following we shall deal with the doctrine of ratification.

##### § 41. Necessity for actual agreement or consent.

Under some circumstances, as we shall hereafter see more at length, the relation of principal and agent may arise by estoppel, or by necessity, without any actual agreement or consent, and even though it may appear affirmatively that

the parties did not intend any such relation.<sup>1</sup> And the relation may be established by ratification, express or implied, of an act done by a person as agent without authority.<sup>2</sup> Except in these cases, however, the relation cannot be created or arise without the agreement or consent of the parties, express or implied. The relation, as between the parties, is one of contract, and as a general rule, therefore, mutual assent of the principal and the agent is essential.<sup>3</sup> No one can become the agent of another except by the will of the principal, manifested in writing, or orally, or by his being placed in a situation in which, according to the ordinary usages of

<sup>1</sup> Post, § 55 et seq.

<sup>2</sup> Post, § 97 et seq.

<sup>3</sup> *Markwick v. Hardingham*, 15 Ch. Div. 349; *Chadburn v. Moore*, 67 Law T. (N. S.) 257; *Pole v. Leask*, 9 Jur. (N. S.) 829; *Central Trust Co. v. Bridges*, 16 U. S. App. 115, 6 C. C. A. 539, 57 Fed. 753; *Barr v. Lapsley*, 1 Wheat. (U. S.) 151; *Bosseau v. O'Brien*, 4 Bias. 395, Fed. Cas. No. 1,667; *Willcox & G. Sew. Mach. Co. v. Ewing*, 141 U. S. 627; *Evans v. Cincinnati, S. & M. R. Co.*, 78 Ala. 341; *Haynes v. Crutchfield*, 7 Ala. 189; *Banks v. Flint*, 54 Ark. 40; *Fisher v. Seymour*, 23 Colo. 542; *Goodale v. Middaugh*, 8 Colo. App. 223; *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566; *Hunter v. Fitzmaurice*, 102 Ind. 449; *Hayes v. Burkam*, 94 Ind. 311; *Cravens v. Cravens*, 1 Morris (Iowa) 285; *Bayliss v. Davis*, 47 Iowa, 340; *Storm Lake Bank v. Missouri Valley L. Ins. Co.*, 66 Iowa, 617; *Chicago, I. & D. R. Co. v. Estes*, 71 Iowa, 603; *Stewart v. Pickering*, 73 Iowa, 652; *Delano v. Smith Charities*, 138 Mass. 63; *Blake v. Bayley*, 16 Gray (Mass.) 531; *Hyde v. Boston & Barre Co.*, 21 Pick. (Mass.) 90; *Willis v. Toledo, A. A. & N. M. R. Co.*, 72 Mich. 160; *Beecher v. Venn*, 35 Mich. 466; *Graves v. Horton*, 38 Minn. 66; *Lowenstein v. Goodbar*, 69 Miss. 808; *Alexander v. Rollins*, 14 Mo. App. 109, 84 Mo. 657; *Kansas & T. Coal Co. v. Millett*, 50 Mo. App. 382; *Fortescue v. Makeley*, 92 N. C. 56; *Anderson v. State*, 22 Ohio St. 305; *Harris v. Bradley*, 7 Yerg. (Tenn.) 310; *Freiberg v. Beach Hotel & S. Imp. Co.*, 63 Tex. 449; *Cooksie v. State*, 26 Tex. App. 72; *Marks v. Sullivan*, 8 Utah, 406; *Fay v. Richmond*, 43 Vt. 25; *Noyes v. Landon*, 59 Vt. 569. An authority to one to receive bids for property, and report the same to the owner for his acceptance or rejection, does not create an agency. *Dempster v. West*, 69 Ill. 614. So one who obtains stock lists from several lumber companies, and sends in orders for acceptance or rejection, receiving no salary, expenses, or compensation except a commission upon such of his orders as are accepted, is not an agent of such companies, to sell lumber or guarantee its quality. *Illinois Moulding Co. v. Page*, 104 Ill. App. 1.

mankind, he would be understood to represent and act for the principal.<sup>4</sup> It is also essential that the agent should assent to any appointment of him made by the principal. This assent may be implied from the agent's acts, or it may be given expressly. But whether such assent is made expressly or impliedly, it is essential that it should be made, for until then there is no binding contract of agency.<sup>5</sup> It follows, in the absence of an estoppel or ratification, that a person who assumes to act as agent for another, without any authority in fact, cannot recover for his services or for expenditures.<sup>6</sup> And even when a person is requested or authorized to act as agent for another, he cannot recover for his services, if there is no contract, express or implied, that the services shall be paid for.<sup>7</sup>

Agreement or consent is also necessary, except in cases of necessity,<sup>8</sup> and estoppel<sup>9</sup> to authorize a person to act as agent for another for the purpose of bringing him into relations with third persons. Although a contract of agency, as between principal and agent, is not necessary in order that one may be authorized to act as agent for another in dealings with third persons, consent of the principal, express or implied, is essential.<sup>10</sup> "One may be liable for the acts of another as

<sup>4</sup> *Pole v. Leask*, 9 Jur. (N. S.) 829. And see cases cited in preceding notes.

<sup>5</sup> *Cameron v. Seaman*, 69 N. Y. 396, 25 Am. Rep. 212; *Beebe v. De Baun*, 8 Ark. 510; *First Nat. Bank v. Free*, 67 Iowa, 11; *Collar v. Ford*, 45 Iowa, 331; *Delano v. Smith Charities*, 138 Mass. 63; *Mordecai v. Schirmer*, 38 S. C. 294. One cannot, without his consent, be created the agent of another, although an agency may be inferred from the relations of the parties to each other, or from their language and actions in regard to a particular transaction. *State v. Foster*, 1 Pen. (Del.) 289.

<sup>6</sup> *Taylor v. Laird*, 1 Hurl. & N. 266, 25 Law J. Exch. 329; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; *James v. O'Driscoll*, 2 Bay (S. C.) 101, 1 Am. Dec. 632.

<sup>7</sup> *Scott v. Maler*, 56 Mich. 554, 56 Am. Rep. 402; *Hall v. Finch*, 29 Wis. 278, 9 Am. Rep. 559.

<sup>8</sup> See post, § 61.

<sup>9</sup> See post, § 55.

<sup>10</sup> *Barr v. Lapsley*, 1 Wheat. (U. S.) 151; *Central Trust Co. v. Bridges*, 16 U. S. App. 115, 57 Fed. 753; *Ball v. Bank of Ala.*, 8 Ala. 590, 42 Am. Dec. 649; *Rochester First Nat. Bank v. Bentley*, 27



his agent on one of two grounds: First, because by his conduct or statements he has held the other out as his agent; or second, because he has actually conferred authority on the other to act as such."<sup>11</sup> Where there is no estoppel, "an agency is created—authority is actually conferred—very much as a contract is made, i. e., by an agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency. The principal must intend that the agent shall act for him, and the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them."<sup>12</sup>

**§ 42. How the contract of agency may be formed—Offer and acceptance.**

The agreement resulting in a contract of agency may be formed by an offer and acceptance in the same way as any other contract. It may be: (1) By the offer of a promise

Minn. 87; *Graves v. Horton*, 38 Minn. 66; *Walsh v. St. Paul Trust Co.*, 39 Minn. 23; *McGoldrick v. Willits*, 52 N. Y. 612; *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411, 53 Am. Rep. 197; *Felton v. McClave*, 46 N. Y. Super. Ct. 53; *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. Dec. (N. Y.) 315. Where persons made an offer to another by letter containing certain conditions, and in the letter said, "and to this effect we shall direct Mr. M., to whom we propose to write by the next mail," but never wrote to M., or instructed him in any way as to the subject of the letter, it was held that M. was not thereby constituted the agent of the parties who wrote the letter, so as to bind them by an acceptance of the offer delivered to him by the party to whom the letter was written with knowledge that he had not received any instructions in the matter, although a written acceptance sent to him in the belief that instructions had been sent to him as the letter stated they would be, would have been effectual. *Barr v. Lapsley*, 1 Wheat. (U. S.) 151. No person can transfer title to the property of another unless the latter has clothed him with oral or apparent authority to do so. *McGoldrick v. Willits*, 52 N. Y. 612. If one acts for and in behalf of another, it is immaterial to the question of agency, so far as third persons are concerned, whether he acts by his direction and request, or by his permission merely. *Fay v. Richmond*, 43 Vt. 25.

<sup>11</sup> *Central Trust Co. v. Bridges*, 16 U. S. App. 115, 6 C. C. A. 539, 57 Fed. 753.

<sup>12</sup> *Central Trust Co. v. Bridges*, *supra*.

for an act, and acceptance by performance of the act; (2) by the offer of an act for a promise, and acceptance of the act, from which the promise will be implied; or (3) by the offer of a promise for a promise, and acceptance by giving the promise.<sup>13</sup> The promise may be expressly given, or it may be implied as a matter of fact from the circumstances.

Thus, if a person requests another to perform an act for him as his agent, expressly promising him compensation, indemnity, etc., performance of the act is an acceptance which will render the promise binding. And even when there is no express promise, a promise of indemnity, and also of compensation, will be implied from the request, unless the circumstances are such as to show that such was not the intention.<sup>14</sup>

In like manner, if a person offers an act by assuming to do it as the agent of another, with the latter's knowledge, this is an offer of an act for a promise, and if the other allows him to do the act, he accepts and thereby impliedly promises him compensation and indemnity, unless the circumstances are such as to rebut this implication.<sup>15</sup> Or the act may be accepted and the promise given in words, in which case there is an express contract.

Again, a person may request another to act as his agent, promising compensation, indemnity, etc., and the other may accept and promise to act; or a person may offer to act as agent for another if the other will promise compensation, etc., and the other may accept and give the promise, in either of which cases, the offers and promises may be set forth in a written contract, or may be altogether oral, or partly in writing and partly oral. In such a case there is an offer of a promise for a promise, and the acceptance results in a bilateral contract to act as agent on the one side, and on the other to permit him to act, and to pay the compensation, etc.

#### § 43. Implied contract of agency.

As is stated above, the contract of agency may be express or implied. As between the parties, the question whether

<sup>13</sup> Hammon, *Cont.*, pp. 41, 42.

<sup>14</sup> See *post*, § 350.

<sup>15</sup> *Post*, § 348 et seq.

there is an implied contract generally arises when a person has acted as agent claims compensation for his services, or indemnity for a liability incurred or expenditures, and in these aspects the question will be treated in subsequent chapters.<sup>16</sup> For present purposes it is only necessary to state the principles in a general way.

As a general rule, whenever a person requests another to perform services as his agent, and the latter performs the services as requested, a promise of compensation and indemnity is to be implied as a matter of fact, unless the relation of the parties or other circumstances are such as to rebut the presumption that the parties so intended.<sup>17</sup> And the same is true where a person performs services for another, with the latter's knowledge and consent or acquiescence.<sup>18</sup>

A promise will not be implied, however, where the circumstances are such as to show, or to raise the presumption, that no promise was intended or expected.<sup>19</sup> For example, no promise of compensation can be implied, where a person performs services for another without any request, and without his knowledge, and the other cannot be held liable, however valuable the services, unless he consents.<sup>20</sup> Even when services are rendered on request or with knowledge, no promise of compensation will be implied if the principal supposed, and as a reasonable man had a right to suppose, that the services were intended to be gratuitous.<sup>21</sup> This principle has often been applied in cases where services were rendered by

<sup>16</sup> Post, §§ 348-371.

<sup>17</sup> *Van Arman v. Byington*, 38 Ill. 443; *Security Co. v. Graybeal*, 85 Iowa, 543, 39 Am. St. Rep. 311. And see post, §§ 348, 371.

<sup>18</sup> *Paynter v. Williams*, 1 Crompt. & M. 810; *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347; *Muscott v. Stubbs*, 24 Kan. 520; *McCrary v. Ruddick*, 33 Iowa, 521. And see post, § 350.

<sup>19</sup> *Taylor v. Laird*, 1 Hurl. & N. 266, 25 Law J. Exch. 329; *Scott v. Maier*, 56 Mich. 554, 56 Am. Rep. 402; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; *Hertzog v. Hertzog*, 29 Pa. 465; *Hall v. Finch*, 29 Wis. 278, 9 Am. Rep. 559.

<sup>20</sup> *Taylor v. Laird*, 1 Hurl. & N. 266, 25 Law J. Exch. 329; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237.

<sup>21</sup> *Huffcut, Agency*, § 12; *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347.

a wife for her husband or child for his parent, or vice versa, or otherwise by one member of a family for another, and they were such as are usually rendered without expectation of compensation.<sup>22</sup>

**§ 44. Express authority as agent.**

Authority to act as agent for another may be conferred either expressly or impliedly. Subject to the qualifications which will be shown in subsequent sections, an express authority may be conferred by a written instrument under the seal of the principal, or by a writing not under seal, or by words, or partly by writing and partly by words.<sup>23</sup> A formal written instrument conferring authority to act as agent is called a power or letter of attorney. The construction of a written instrument, both for the purpose of ascertaining whether it is a power of attorney creating an agency, and for the purpose of determining the extent of the authority conferred, will be considered in subsequent sections.<sup>24</sup> It is sufficient to say here, that no particular form of words is required. It is sufficient if an intention to create an agency and confer a particular authority appears from the language of the instrument, read as a whole, and in the light of the situation of the parties, the purpose to be accomplished, and the other circumstances under which it was executed.<sup>25</sup> A written instrument, in order that it may be held to create an agency, must clearly show on its face, or when read in the light of surrounding circumstances, that such was the intention.<sup>26</sup> And the same is true of spoken words, when they are relied upon as creating an agency.<sup>27</sup>

<sup>22</sup> *Weir v. Weir's Adm'r*, 3 B. Mon. (Ky.) 645, 39 Am. Dec. 487; *Hertzog v. Hertzog*, 29 Pa. 465; *Hall v. Finch*, 29 Wis. 278, 9 Am. Rep. 559; *Disbrow v. Durand*, 54 N. J. Law, 343, 33 Am. St. Rep. 678. And see post, § 351.

<sup>23</sup> Post, § 49 et seq.

<sup>24</sup> See post, § 211 et seq.

<sup>25</sup> See *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600; *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539; *Kuhlman v. Burns*, 117 Cal. 469.

<sup>26</sup> *Bosseau v. O'Brien*, 4 Biss. 395, Fed. Cas. No. 1,667; *Kuhlman v. Burns*, 117 Cal. 469; *Lauer v. Bandow*, 43 Wis. 556; *Challoner v. Bouck*, 56 Wis. 652.

<sup>27</sup> *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Chicago, I. & D.*

A power of attorney, to be valid, must be sufficiently certain in its terms to enable the court, applying the rules in relation to the construction of written instruments, to say what the parties intended. A power of attorney to convey land must have the same certainty as is required for the deed to be executed in pursuance thereof.<sup>28</sup> A power of attorney to convey lands need not describe in detail the lands authorized to be conveyed, but may be general and authorize the conveyance of any lands or interest therein owned by the grantor of the power.<sup>29</sup>

The necessity for acknowledging and recording powers of attorney is considered in a subsequent section.<sup>30</sup>

#### § 45. Implied authority as agent.

In a preceding section we have spoken of implied contracts of agency as between principal and agent.<sup>31</sup> Agency may also be implied from conduct when the question is as to the rights of third persons. In other words, laying aside any question as to contract obligations as between the principal and the agent, conduct may be relied upon as showing that a person has authorized another to act as his agent for the purpose of bringing him into relations with third persons. If a person allows another to act as his agent in a particular matter, or generally, and the other makes a contract with a

R. Co. v. Estes, 71 Iowa, 603; Union M. L. Ins. Co. v. Masten, 3 Fed. 881.

<sup>28</sup> *Lumbard v. Aldrich*, 8 N. H. 31, 28 Am. Dec. 381; *Clark v. Graham*, 6 Wheat. (U. S.) 577; *Johnson v. Dodge*, 17 Ill. 433. And see post, § 52.

<sup>29</sup> *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273. See post, § 227 et seq. A power of attorney granted by a wife to her husband "to execute and acknowledge, sign, seal, and deliver any deed or deeds for the conveyance or assurance of all my right, title, and interest in and to any lands and tenements the title to which is in A. (her husband), and in which I have any interest as being the wife of him, the said A.," is sufficient to authorize the husband, as her attorney in fact, to convey, and thereby release her inchoate dower right in, any land then owned by the husband in the county where the power is recorded. *Munger v. Baldrige*, supra.

<sup>30</sup> See post, § 54.

<sup>31</sup> Ante, § 43.

third person within the scope of his apparent authority, it is not necessary, in order that the third person may hold the principal liable, to show express authority from the principal to the agent, but authority will be implied as a fact from the conduct of the principal in allowing the agent to act. And the same is true in any other case in which the conduct of the parties is inconsistent with the nonexistence of the relation of principal and agent.<sup>32</sup> Indeed, as we shall see in subsequent sections, agency may be implied in such cases, as a matter of law, by application of the doctrine of estoppel, although it may be shown that the principal secretly forbade the agent to act.<sup>33</sup> Thus, authority to perform certain acts may be implied from the

<sup>32</sup> Story, Agency, §§ 54, 55; Brockelbank v. Sugrue, 5 Car. & P. 21; Thompson v. Bell, 10 Exch. 10; Bronson's Ex'r v. Chappell, 12 Wall. (U. S.) 681; Tennessee River Transp. Co. v. Kavanaugh Bros., 101 Ala. 1; Leake v. Sutherland, 25 Ark. 219; Breed v. First Nat. Bank, 4 Colo. 506; Eagle Bank v. Smith, 5 Conn. 71, 13 Am. Dec. 37; Geylin v. De Villervi, 2 Houst. (Del.) 311; Hansell v. Levy, 5 Houst. (Del.) 407; State v. Foster, 1 Pen. (Del.) 289; Weaver v. Ogletree, 39 Ga. 586; Union M. L. Ins. Co. v. Slee, 110 Ill. 35; Morris v. Preston, 93 Ill. 215; Thurber v. Anderson, 88 Ill. 167; St. Louis & M. Packet Co. v. Parker, 59 Ill. 23; Noble v. Nugent, 89 Ill. 522; Day v. Dages, 17 Ind. App. 228; Pittsburgh, C., C. & St. L. R. Co. v. Berryman, 11 Ind. App. 640; Wilson v. Fones, 99 Iowa, 132; Dull v. Dumbauld, 7 Kan. App. 376; Atlantic & Pac. R. Co. v. Reinsner, 18 Kan. 458; Columbia Land & Min. Co. v. Tinsley, 22 Ky. L. R. 1082, 60 S. W. 10; Com. v. Holmes, 119 Mass. 195; Matteson v. Blackmer, 46 Mich. 393; Lyell v. Sanbourn, 2 Mich. 109; Adams Min. Co. v. Senter, 26 Mich. 73; Graves v. Horton, 38 Minn. 66; Rice v. Groffmann, 56 Mo. 434; Kiley v. Forsee, 57 Mo. 390; Summerville v. Hannibal & St. J. R. Co., 62 Mo. 391; Whelan v. Reilly, 61 Mo. 565; Starring v. Mason, 4 Neb. 367; Dickinson v. Salmon, 36 Misc. (N. Y.) 169; Gilbraith v. Lineberger, 69 N. C. 145; Kelsey v. Crawford County Nat. Bank, 69 Pa. 426; Land Mortg. Inv. & Agency Co. v. Gillam, 49 S. C. 345; McAlpin v. Cassidy, 17 Tex. 449; Elsner v. State, 30 Tex. 524; Tier v. Lampson, 35 Vt. 179, 82 Am. Dec. 634; Walsh v. Pierce, 12 Vt. 130; Fay v. Richmond, 43 Vt. 25; Hooe v. Oxley, 1 Wash. (Va.) 19, 1 Am. Dec. 425; Hardin v. Alexandria Ins. Co., 90 Va. 413; Ruffner v. Hewitt, 7 W. Va. 585. And see Gadmer v. Lent, 102 Iowa, 741; New England Loan & Trust Co. v. Browne, 157 Mo. 116; Walton v. Dore, 113 Iowa, 1.

<sup>33</sup> Post, § 55 et seq.

fact that he had done similar acts for the same principal on other occasions, and that it was his habit to do so, and to advise his principal thereof,<sup>34</sup> or that the performance of previous similar acts had been ratified by the principal.<sup>35</sup>

Authority to act as agent may also be implied, as we shall hereafter see more at length, from a particular relation occupied by the parties.<sup>36</sup>

#### § 46. Consideration—Gratuitous agency.

In so far as third persons are concerned, or in other words, where the agency has been executed, and a question arises as to the liability of the principal or agent to third persons, or the rights of the principal against third persons, it is altogether immaterial whether there was any consideration as between the principal and agent or not. The rights and liabilities growing out of the execution of an agency, as respects third persons, are precisely the same, whether, as between the principal and agent, the agency was gratuitous or not.<sup>37</sup> A contract between principal and agent, as distinguished from mere consent of the principal, is not necessary to authority on the part of the agent. As we have seen, a person who has no capacity to make a binding contract may nevertheless act as agent.<sup>38</sup>

The question of consideration, however, is material as between the principal and the agent. A contract of agency is governed by the same rules as other contracts. There can be no binding promise on the part of the principal to the agent, or on the part of the agent to the principal, unless there is a consideration, although liabilities may arise out of the execu-

<sup>34</sup> *Brockelbank v. Sugrue*, 5 Car. & P. 21.

<sup>35</sup> *Tennessee River Transp. Co. v. Kavanaugh Bros.*, 101 Ala. 1. Evidence offered to establish authority on the part of an alleged agent to make a given contract for an alleged principal, and which consisted solely of proof showing that the latter had, on previous occasions, ratified certain contracts made in his behalf by the former, is, in any event, incomplete unless those contracts were of a similar nature and made under substantially similar circumstances and conditions. *Smith v. Georgia & A. R. Co.*, 113 Ga. 625.

<sup>36</sup> See post, § 73 et seq.

<sup>37</sup> *Haluptzok v. Great Northern R. Co.*, 55 Minn. 446.

<sup>38</sup> Ante, § 26.

tion of a gratuitous agency. It is not essential that the consideration should be given in any particular form, or that it should be given by an express promise, as it may as well be promised by implication; but it is essential that there should be a sufficient consideration of some kind, or the contract of agency will be merely a nudum pactum.<sup>39</sup> If, as between the principal and agent, there is no contract, but merely a gratuitous agency, failure of the agent to perform the services which he has agreed to perform, resulting in damage to the principal, gives the principal no right of action against the agent, for the agent's promise to perform, being without consideration, is not binding on him; but if he enters upon the execution of the agency, and is guilty of misfeasance, resulting in damage to the principal, he is liable.<sup>40</sup>

Where a person intrusts property to an agent who is acting gratuitously, he may incur liability as bailee, or even as agent, for the bailment is a sufficient consideration to create an implied promise on the part of the agent to use reasonable care in the safe custody of the property, and will also support an express promise to undertake services in respect to it.<sup>41</sup>

As a general rule, a past consideration will not support a promise, unless the consideration was rendered under circumstances from which the law would imply a promise. Therefore, where a person renders services as agent for another without his request or knowledge, or on request or with knowledge, but with the understanding that they are gratuitous, a subsequent promise to pay for them, without

<sup>39</sup> *Coggs v. Bernard*, 2 Ld. Raym. 909; *Balfe v. West*, 13 C. B. 466; *Elsee v. Gateward*, 5 Term R. 143; *Low v. Connecticut & P. R. R. Co.*, 46 N. H. 284; *Thorne v. Deas*, 4 Johns. (N. Y.) 84. A mere verbal promise of A. to borrow money and purchase lands in the name of B., does not constitute an agency, as the promise is without consideration. *Cravens v. Cravens*, 1 Morris (Iowa) 285.

<sup>40</sup> *Wilkinson v. Coverdale*, 1 Esp. 74; *Elsee v. Gateward*, 5 Term R. 143; *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Passano v. Acosta*, 4 La. 26, 23 Am. Dec. 470; *Nixon v. Bogin*, 26 S. C. 611; *Balfe v. West*, 13 C. B. 466. And see post, § 433.

<sup>41</sup> *Coggs v. Bernard*, 2 Ld. Raym. 909; *Robinson v. Threadgill*, 35 N. C. (13 Ired.) 39.



any new consideration, is not binding.<sup>42</sup> This rule, however, does not apply where services are rendered on request or with the knowledge of the person for whom they are rendered, and not under such circumstances as to show that they were intended to be gratuitous, for in such a case the law will imply a promise to pay what the services are worth, and this liability will support the subsequent express promise to pay.<sup>43</sup>

## II. FORM OF CONTRACT OF AGENCY.

### § 47. In general.

The question of form in agency may arise (1) with respect to the contract of agency between the principal and the agent, or (2) with respect to the authority of the agent to bind the principal by a particular act. The first aspect of the question will be considered under this subdivision.

As a general rule a contract of agency, as a contract between the parties, may be entered into either by parol or in writing, or partly by parol and partly in writing, like most other contracts. Neither a seal nor writing is necessary to a valid contract of agency, unless it is required by statute.<sup>44</sup>

— **By corporations.**—It was formerly the rule at common law that a corporation aggregate could not appoint an agent except under corporate seal,<sup>45</sup> but this rule in modern time has been greatly, though gradually, relaxed, and in this country at least, and largely because of the inconvenience of applying the rule with technical strictness, it has been abandoned, so that it is now well settled that a corporation may appoint an agent for ordinary purposes in the same manner as a natural person, either by writing or verbally, and that neither the corporate seal nor a formal vote of the corporators or directors is necessary, unless it is expressly required.<sup>46</sup>

<sup>42</sup> *Allen v. Bryson*, 67 Iowa, 591, 56 Am. Rep. 358; *Mills v. Wyman*, 3 Pick. (Mass.) 207; *Osier v. Hobbs*, 33 Ark. 215.

<sup>43</sup> *Lampleigh v. Brathwait*, Hob. 105, 1 Smith's Lead. Cas. 141; *Dearborn v. Bowman*, 3 Metc. (Mass.) 155.

<sup>44</sup> See ante, § 40.

<sup>45</sup> See *Horne v. Ivy*, 1 Mod. 18; *East London Water Works Co. v. Bailey*, 4 Bing. 286; *Rex v. Bigg*, 3 P. Wms. 419.

<sup>46</sup> *England*: *Yarborough v. Bank of England*, 16 East, 6.

And, as we shall see hereafter, a corporation like a natural person may be estopped to deny the authority for a person

*United States:* Bank of Columbia v. Patterson's Adm'r, 7 Cranch, 299; Fleckner v. Bank of U. S., 8 Wheat. 338, 357; Osborn v. Bank of U. S., 9 Wheat. 738.

*Alabama:* Reynolds v. Collins, 78 Ala. 94; Everett v. United States, 6 Port. 166, 30 Am. Dec. 584.

*California:* Argenti v. San Francisco, 16 Cal. 266; Crowley v. Genesee Min. Co., 55 Cal. 273.

*Colorado:* Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248.

*Connecticut:* Savings Bank of New Haven v. Davis, 8 Conn. 191; Howe v. Keeler, 27 Conn. 538; Swazey v. Union Mfg. Co., 42 Conn. 556.

*Delaware:* John A. Bancroft & Co. v. Wilmington Conference Academy, 5 Houst. 577.

*Florida:* St. Andrews Bay Land Co. v. Mitchell, 4 Fla. 192, 54 Am. Dec. 340.

*Illinois:* Board of Education v. Greenebaum, 39 Ill. 609; Rockford, R. I. & St. L. R. Co. v. Wilcox, 66 Ill. 417; Gowen Marble Co. v. Tarrant, 73 Ill. 608.

*Indiana:* Hamilton v. Newcastle & D. R. Co., 9 Ind. 359.

*Iowa:* Merrick v. Burlington & W. Plank Road Co., 11 Iowa, 74.

*Kansas:* Atchison & N. R. Co. v. Reeher, 24 Kan. 228.

*Kentucky:* Lathrop v. Commercial Bank, 8 Dana, 114, 33 Am. Dec. 481; Garrison v. Combs, 7 J. J. Marsh. 84, 22 Am. Dec. 120.

*Maine:* Badger v. Bank of Cumberland, 26 Me. 428; Perkins v. Portland, S. & P. R. Co., 47 Me. 573, 74 Am. Dec. 507.

*Maryland:* Northern Cent. R. Co. v. Bastian, 15 Md. 494; Santa Clara Min. Ass'n v. Meredith, 49 Md. 389.

*Massachusetts:* Topping v. Bickford, 4 Allen, 120; Sherman v. Flitch, 98 Mass. 59.

*Michigan:* Detroit v. Jackson, 1 Doug. 106; Taymouth v. Koehler, 35 Mich. 22.

*Missouri:* Western Bank v. Gilstrap, 45 Mo. 419; Southgate v. Atlantic & P. R. Co., 61 Mo. 89.

*Nevada:* Steel v. Solid Silver G. & S. Min. Co., 13 Nev. 486.

*New Hampshire:* Goodwin v. Union Screw Co., 34 N. H. 378; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

*New York:* Randall v. Van Vechten, 19 Johns. 60, 10 Am. Dec. 193; American Ins. Co. v. Oakley, 9 Paige, 496, 38 Am. Dec. 561; Mumford v. Hawkins, 5 Denio, 355.

*North Carolina:* Buncombe Turnpike Co. v. McCarson, 18 N. C. (1 Dev. & B.) 306.

to act as its agent, by reason of knowingly allowing him to act as though he had authority.<sup>47</sup>

**§ 48. Application of the statute of frauds.**

A contract of agency, however, may be within the statute of frauds.

If a contract of agency is, by its terms, not to be performed within a year from the making thereof, it must, as an agreement not to be performed within a year, be in writing and signed by the party to be charged or his agent duly authorized, as required by the statute of frauds.<sup>48</sup> A contract of agency, however, like other contracts, is not within this clause of the statute of frauds, if by its terms it may be performed within a year, although its performance may extend, and does in fact extend, beyond the year. To bring it within the statute it must appear that "it is to be performed after the year."<sup>49</sup> The statute does not apply to a contract, which

*Pennsylvania:* Kelsey v. Crawford County Nat. Bank, 69 Pa. 426.

*South Carolina:* Planters' Bank v. Bivingsville Cotton Mfg. Co., 10 Rich. Law, 95.

*Tennessee:* Hopkins v. Gallatin Turnpike Co., 4 Humph. 403; Smiley v. Chattanooga, 6 Heisk. 604. This modern doctrine has been extended to the appointment of an agent to mortgage or convey realty. Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Cook v. Kuhn, 1 Neb. 472; Fitch v. Lewiston Steam Mill Co., 80 Me. 34, and to a power of attorney to confess judgment. Ford v. Hill, 92 Wis. 188.

<sup>47</sup> See post, § 57.

<sup>48</sup> Shumate v. Farlow, 125 Ind. 359; Smith v. Theobald, 86 Ky. 141; Tuttle v. Swett, 31 Me. 555; Bernier v. Cabot Mfg. Co., 71 Me. 506, 36 Am. Rep. 343; Marks v. Davis, 72 Mo. App. 557; Kansas City, W. & N. W. R. Co. v. Conlee, 43 Neb. 121; McElroy v. Ludlum, 32 N. J. Eq. 828; Hinckley v. Southgate, 11 Vt. 428; Lee's Adm'r v. Hill, 87 Va. 497, 24 Am. St. Rep. 666.

<sup>49</sup> Hammon, Cont., § 294; Warren Chemical & Mfg. Co. v. Holbrook, 118 N. Y. 586, 16 Am. St. Rep. 788; Niagara Fire Ins. Co. v. Greene, 77 Ind. 590; Franklin Sugar Co. v. Taylor, 37 Kan. 435; Blanding v. Sargent, 33 N. H. 239, 66 Am. Dec. 720; Cole v. Singerly, 60 Md. 348; Tatterson v. Suffolk Mfg. Co., 106 Mass. 56; Bartlett v. Mystic River Corp., 151 Mass. 433.

"The statute does not include an agreement which is simply not likely to be performed, nor yet one which is simply not expected to be performed within the space of a year. Neither does it include

is to be performed upon the happening of the contingency which may possibly happen within a year, or which is to be performed until the happening of a contingency which may happen within a year, or which either party may require to be performed within a year, or terminate by notice within a year, etc.<sup>50</sup> The statute does not apply to a contract which

an agreement which, fairly and reasonably interpreted, admits of a valid execution within that time, although it may not be probable that it will be." *Warren Chemical & Mfg. Co. v. Holbrook*, 118 N. Y. 586. A contract to be performed within a year, and which before the year expires is extended for a term not exceeding a year from the time of the extension, is not within the statute. *Ward v. Matthews*, 73 Cal. 13; *Donovan v. Richmond*, 61 Mich. 467. A contract for services for one year is not within the statute if it is to commence on the day the contract is made. *Cox v. Albany Brew. Co.*, 56 Hun, 489, 31 N. Y. State Rep. 666; *Aiken v. Nogle*, 47 Kan. 96; *Wolff v. Warrington*, 8 Ohio Dec. 219. But such a contract is within the statute if it is not to commence until a future day, although it may be the very day after the contract is entered into. *Townsend v. Minford*, 48 Hun (N. Y.) 617, 1 N. Y. Supp. 565; *Billington v. Cahill*, 51 Hun (N. Y.) 132; *Baker v. Coddington*, 18 N. Y. Supp. 159; *Lee's Adm'r v. Hill*, 87 Va. 497, 24 Am. St. Rep. 666; *Kansas City, W. & N. W. R. Co. v. Conlee*, 43 Neb. 121; *McElroy v. Ludlum*, 32 N. J. Eq. 828; *Berrien v. Southack*, 7 N. Y. Supp. 324; *Sutcliffe v. Atlantic Mills*, 13 R. I. 480, 43 Am. Rep. 39; *Bracegirdle v. Heald*, 1 Barn. & Ald. 722.

<sup>50</sup> *Hammon*, Cont. § 294; *Anon.*, 1 Salk. 280; *McPherson v. Cox*, 96 U. S. 404; *Russell v. Slade*, 12 Conn. 455; *Hutchinson v. Hutchinson*, 46 Me. 154; *Cole v. Singerly*, 60 Md. 348; *Bartlett v. Mystic River Corp.*, 151 Mass. 433; *Roberts v. Rockbottom Co.*, 7 Metc. (Mass.) 46; *Carr v. McCarthy*, 70 Mich. 258; *Kiene v. Shaeffing*, 33 Neb. 21; *Blanding v. Sargent*, 33 N. H. 239, 66 Am. Dec. 720; *Updike v. Ten Broeck*, 32 N. J. Law, 105; *Moore v. Fox*, 10 Johns. (N. Y.) 244, 6 Am. Dec. 338; *Kent v. Kent*, 62 N. Y. 560, 20 Am. Rep. 502; *Blake v. Voigt*, 134 N. Y. 69, 30 Am. St. Rep. 622; *Walker v. Wilmington, C. & A. R. Co.*, 26 S. C. 80; *Thomas v. Armstrong*, 86 Va. 323; *Heath v. Heath*, 31 Wis. 223; *Jilson v. Gilbert*, 26 Wis. 637, 7 Am. Rep. 100. If the term of employment is indefinite the contract is not within the statute. *Dobson v. Collis*, 1 Hurl. & N. 81; *Niagara Fire Ins. Co. v. Greene*, 77 Ind. 590; *Jagau v. Goetz*, 11 Misc. (N. Y.) 380; *Louisville & N. R. Co. v. Offutt*, 99 Ky. 427. A verbal contract whereby one of the parties agrees to procure consignments of goods to the other for the period of a year to commence in the future, and the other agrees to pay com-

by its terms, express or implied, will be performed, and not merely terminated or further performance excused, if either party shall die within a year.<sup>51</sup> But it is otherwise if the contract by its terms is not to be performed within a year, and will be merely terminated, and further performance excused, if either party die within the year.<sup>52</sup> In some jurisdictions, although not in others, a contract is not within the statute as an agreement not to be performed within a year, if all that one of the parties is to do is to be performed within a year, but it must contemplate nonperformance by both parties within the year.<sup>53</sup> But part performance by

missions on consignments procured, is not within the statute, where it is further agreed that either party may terminate the contract within a year from the time it is entered into. *Blake v. Voigt*, 134 N. Y. 69, 30 Am. St. Rep. 622.

<sup>51</sup> *Kent v. Kent*, 62 N. Y. 560, 20 Am. Rep. 502; *Doyle v. Dixon*, 97 Mass. 208, 93 Am. Dec. 80; *Jilson v. Gilbert*, 26 Wis. 637, 7 Am. Rep. 100; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289; *Updike v. Ten Broeck*, 32 N. J. Law, 105; *Bell v. Hewitt's Ex'rs*, 24 Ind. 280; *Riddle v. Backus*, 38 Iowa, 81. A contract to give a person employment for life, or permanent employment, is not within the statute, as it would be completely performed if the party should die within the year. *Pennsylvania Co. v. Dolan*, *supra*. The same is true of an agreement to render services to be paid for after the employer's death. *Kent v. Kent*, 62 N. Y. 560, 20 Am. Rep. 502.

<sup>52</sup> *Doyle v. Dixon*, 97 Mass. 208, 93 Am. Dec. 80; *Hill v. Hooper*, 1 Gray (Mass.) 131; *Bernier v. Cabot Mfg. Co.*, 71 Me. 506, 36 Am. Rep. 343; *Lee's Adm'r v. Hill*, 87 Va. 497, 24 Am. St. Rep. 666.

<sup>53</sup> *Bracegirdle v. Heald*, 1 Barn. & Ald. 722; *Wolke v. Fleming*, 103 Ind. 105, 53 Am. Rep. 495; *Smalley v. Greene*, 52 Iowa, 241, 35 Am. Rep. 267; *Jones v. Hardesty*, 10 Gill & J. (Md.) 404, 32 Am. Dec. 180; *Blanding v. Sargent*, 33 N. H. 239, 66 Am. Dec. 720; *Durfee v. O'Brien*, 16 R. I. 213; *McClellan v. Sanford*, 26 Wis. 609; *Washburn v. Dosch*, 68 Wis. 436, 60 Am. Rep. 873.

*Contra*, *Broadwell v. Getman*, 2 Denio (N. Y.) 87.

And see *Hammon*, Cont. § 297. In Vermont the doctrine is peculiar. It is there held that a contract is within the statute, although the party suing thereon may be liable to perform and may perform within a year, if the contract on the defendant's part is not to be performed within a year; but that a contract is not within the statute if it is to be performed by the defendant within a

one or both of the parties will not take a contract out of the statute as to the part remaining unperformed.<sup>54</sup>

A contract of agency, or particular terms thereof, may also be within the statute of frauds as a promise to answer for the debt, default, or miscarriage of another;<sup>55</sup> or as a con-

year, although not by the plaintiff. *Sheehy v. Adarene*, 41 Vt. 541, 98 Am. Dec. 623. And see *Pierce v. Paine*, 28 Vt. 34.

<sup>54</sup> *William Butcher Steel Works v. Atkinson*, 68 Ill. 421, 18 Am. Rep. 560; *Lee's Adm'r v. Hill*, 87 Va. 497, 24 Am. St. Rep. 666; *Baker v. Coddling*, 18 N. Y. Supp. 159; *Hartwell v. Young*, 67 Hun (N. Y.) 472; *Wolke v. Fleming*, 103 Ind. 105, 53 Am. Rep. 495; *Shumate v. Farlow*, 125 Ind. 359; *Osborne v. Kimball*, 41 Kan. 187.

<sup>55</sup> See *Hammon*, Cont. 548 et seq.; *Eastwood v. Kenyon*, 11 Adol. & El. 438. Since this clause of the statute, however, does not apply except where the promise is made to the creditor, it does not apply to a promise made by an agent to his principal to pay a debt of his principal. *Jones v. Hardesty*, 10 Gill & J. (Md.) 404, 32 Am. Dec. 180. The statute certainly does not apply to an agent's promise to his principal to pay a debt of the principal out of or in consideration of money or property placed or left in his hands by the principal. Such a promise, even where made to the creditor, is not within the statute, although, of course, there must be a consideration. *Hammon*, Cont. 549, 550; *Wait v. Wait*, 28 Vt. 350; *Fullam v. Adams*, 37 Vt. 391; *Farley v. Cleveland*, 4 Cow. (N. Y.) 432, 15 Am. Dec. 387; *Belknap v. Bender*, 75 N. Y. 446, 31 Am. Rep. 446; *Ackley v. Parmenter*, 98 N. Y. 425, 50 Am. Rep. 693; *McCraith v. National Mohawk Valley Bank*, 104 N. Y. 414; *Fehlinger v. Wood*, 134 Pa. 517. A promise by the chairman of citizens of a town to pay notes against such town is not a promise to answer for the debt of another within the statute of frauds. *Gist v. Harkrider* (Ark.) 15 S. W. 187. The statute does not apply to a promise by a principal to indemnify and save his agent harmless from any liability which he may incur as the result of a transaction into which he enters at the instance of the principal. This is a promise to answer for a prospective liability of the promisee,—the agent. *Hammon*, Cont. 556; *Anderson v. Spence*, 72 Ind. 315, 37 Am. Rep. 162; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Smith v. Delaney*, 64 Conn. 264, 42 Am. St. Rep. 181; *Kohn v. First Nat. Bank*, 15 Kan. 428; *Dewey v. Massingale*, 14 Mo. App. 579; *Ledbetter v. McGhees*, 84 Ga. 227. A promise by a del credere agent to his principal to guarantee the solvency of the person to whom he sells goods for the principal, is not within the statute, but is an original undertaking. *Sutton v. Grey* [1894] 1 Q. B. 285, 63 Law J. Q. B. 633; *Conturlier v. Hastie*, 8 Exch. 40, 5 H. L. Cas. 673; *Wolff v. Kop-*

tract or sale of lands or an interest in or concerning them;<sup>56</sup> or as a contract for the sale of goods, wares, or merchandises beyond a certain value.<sup>57</sup>

pel, 5 Hill (N. Y.) 458, 2 Denio, 368, 43 Am. Dec. 751; *Sherwood v. Stone*, 14 N. Y. 268; *Swan v. Nesmith*, 7 Pick. (Mass.) 220, 19 Am. Dec. 282.

<sup>56</sup> *Raub v. Smith*, 61 Mich. 543, 1 Am. St. Rep. 619; *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125. See *Hammon*, Cont. 558.

This clause of the statute, however, does not apply to a mere contract of agency, by which the agent agrees to perform services for his principal with respect to the purchase or sale of land. Thus, the statute does not apply to an agreement by which a person promises to pay another a certain sum per acre for all the land the latter shall examine and advise him to buy, *Wilson v. Morton*, 85 Cal. 598; nor does it apply to an agreement to pay for an examination of title with a view to purchasing land, or to furnish another with money with which to buy land, *Horner v. Frazier*, 65 Md. 1; or to a contract wherein the agent employed is to receive his compensation from the proceeds of sales, *Cotton v. Rand* (Tex. Civ. App.) 51 S. W. 55; or to an agreement by a person to buy land in his own name for the benefit of another; the latter promising orally to pay the purchase money, *Baker v. Wainwright*, 36 Md. 336, 11 Am. Rep. 495 (compare *Raub v. Smith*, 61 Mich. 543, 1 Am. St. Rep. 619); or to the employment of a broker to sell real estate, *Hannan v. Prentis*, 124 Mich. 417. And by the weight of authority the statute does not apply to partnership agreements to buy land for the purpose of selling it again, and dividing the profits and losses. *Van Housen v. Copeland*, 180 Ill. 74. The right to claim a mechanic's lien for building material is not an interest in land, which, under the statute of frauds, an agent of the material man cannot waive without written authority from the principal. *Hughes v. Lansing*, 34 Or. 118.

<sup>57</sup> *Warren Chemical & Mfg. Co. v. Holbrook*, 118 N. Y. 586, 16 Am. St. Rep. 788. See *Hammon*, Cont. 574. But a mere contract of agency for the purchase or sale of goods is not within the statute. The statute does not apply to a contract by which one party agrees to purchase goods for the other at a certain price, and the other agrees to receive and pay for them on delivery; it is a contract of agency, and not of bargain and sale, and is not within the statute. *Hatch v. McBrien*, 83 Mich. 159. Nor does the statute apply to a contract for a trading venture by which one of the parties agrees to account to the other for half the profits in consideration of the other's agreement to bear half the losses. *Coleman v. Eyre*, 45 N. Y. 41; *Green v. Brookins*, 23 Mich. 48, 9 Am.

The statute of frauds applies to executory contracts only, and therefore it can have no effect upon, nor prevent parol proof of, a contract of agency which has been fully executed on both sides.<sup>58</sup> Nor does the statute prevent quasi contractual obligations, or implied contracts, from arising out of part performance of oral contracts, including contracts of agency, which are within the statute. All of the courts no doubt agree that if money is paid or property delivered under a contract which is within the statute of frauds, and the other party refuses to perform, an action may be maintained to recover the money, or to recover the property or its value, as the case may be, and the contract cannot be set up as a defense; and some of the courts hold that such an action may be maintained, even when the other party, although he could not be compelled to perform the contract on his part, is willing and offers to perform. And the rule will apply, of course, to contracts of agency within the statute of frauds, as well as to other contracts.<sup>59</sup> Other courts, while they allow

Rep. 74. In some jurisdictions it is held that this section of the statute of frauds does not apply to a contract for the sale of goods to be afterwards manufactured and delivered. *Hammon*, *Cont.* § 299. In New York, where this rule obtains, it was held that an agreement between manufacturers of patent roofing and their agent, that the latter should be furnished materials with which to perform contracts for roofing obtained by him for them, under an arrangement by which he was to perform the contracts, pay a certain price for materials furnished by them, and receive the balance due on the contracts for obtaining and performing them, was not within the statute, and need not be in writing. *Warren Chemical & Mfg. Co. v. Holbrook*, *supra*.

<sup>58</sup> *Stone v. Dennison*, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; *Swansey v. Moore*, 22 Ill. 63, 74 Am. Dec. 134; *King v. Bushnell*, 121 Ill. 656; *Larsen v. Johnson*, 78 Wis. 300, 23 Am. St. Rep. 404. An oral promise by an attorney to prosecute a suit and pay all costs, in consideration of a contingent fee, is not within the statute, where the contract has been executed. *Wildey v. Crane*, 69 Mich. 17.

<sup>59</sup> *Nelson v. Shelby Mfg. & Imp. Co.*, 96 Ala. 515, 38 Am. St. Rep. 116; *Patten v. Hicks*, 43 Cal. 509; *Wolke v. Fleming*, 103 Ind. 105, 53 Am. Rep. 495; *Schoonover v. Vachon*, 121 Ind. 3; *Wonsettler v. Lee*, 40 Kan. 367; *Schroeder v. Loeber*, 75 Md. 195; *Williams v. Bemis*, 108 Mass. 91, 11 Am. Rep. 318; *Cook v. Doggett*, 2 Allen



such an action when the other party refuses to perform, hold that it cannot be maintained if he is willing and offers to perform.<sup>60</sup>

Where a person performs services as agent under an oral contract within the statute of frauds and the other party discharges him, or refuses to continue performance on his part, the agent may certainly maintain an action on implied contract to recover the value of the services rendered.<sup>61</sup> It is also held that the agent may quit the employment after part performance, without fault on the part of the principal, and though the principal may be willing to continue, and recover on the quantum meruit for the services rendered.<sup>62</sup> The contract, in so far as it is unperformed, being within the statute, cannot be set up as a defense to defeat an action on the quantum meruit for part performance.<sup>63</sup> In such cases the compensation fixed by the contract may be evidence on the question of the value of the services, but it is not controlling. The true value of the services may be recovered, whatever it may be.<sup>64</sup>

(Mass.) 439; *Basford v. Pearson*, 9 Allen (Mass.) 387, 85 Am. Dec. 764; *Scott v. Bush*, 26 Mich. 418, 12 Am. Rep. 311; *Raub v. Smith*, 61 Mich. 543, 1 Am. St. Rep. 619; *Cadman v. Markle*, 76 Mich. 448; *Springer v. Bien*, 10 N. Y. Supp. 530; *Gillet v. Maynard*, 5 Johns. (N. Y.) 85, 4 Am. Dec. 329; *Jeffery v. Walker*, 72 Hun (N. Y.) 628; *Sprague v. Haines*, 68 Tex. 215 (and money expended); *Koch v. Williams*, 82 Wis. 186.

<sup>60</sup> *Day v. Wilson*, 83 Ind. 463, 43 Am. Rep. 76; *Coughlin v. Knowles*, 7 Metc. (Mass.) 57, 39 Am. Dec. 759; *McKinney v. Harvie*, 38 Minn. 18, 8 Am. St. Rep. 640; *Sims v. Hutchins*, 8 Smedes & M. (Miss.) 331; *Galway v. Shields*, 66 Mo. 313, 27 Am. Rep. 351; *Lane v. Shackford*, 5 N. H. 130; *Collier v. Coates*, 17 Barb. (N. Y.) 473; *Shaw v. Shaw*, 6 Vt. 69; *Hawley v. Moody*, 24 Vt. 605.

<sup>61</sup> *Williams v. Bemis*, 108 Mass. 91, 11 Am. Rep. 318; *William Butcher Steel Works v. Atkinson*, 68 Ill. 421, 18 Am. Rep. 560; *Wolke v. Fleming*, 103 Ind. 105, 53 Am. Rep. 495; *Jeffery v. Walker*, 72 Hun (N. Y.) 628.

<sup>62</sup> *La Du-King Mfg. Co. v. La Du*, 36 Minn. 473; *Bernier v. Cabot Mfg. Co.*, 71 Me. 506, 36 Am. Rep. 343; *Hartwell v. Young*, 67 Hun (N. Y.) 472. And see *Kruger v. Leppel*, 42 Minn. 6.

<sup>63</sup> *Bernier v. Cabot Mfg. Co.*, 71 Me. 506, 36 Am. Rep. 343; *King v. Welcome*, 5 Gray (Mass.) 41.

<sup>64</sup> *William Butcher Steel Works v. Atkinson*, 68 Ill. 421, 18 Am. Rep. 560.

By the weight of authority, the statute of frauds applies to oral agreements modifying, extending, or discharging prior written contracts which are within the statute, whether made before or after a breach, unless the oral agreement has been fully executed.<sup>65</sup> But it has been held that the statute does not prevent evidence of an oral agreement waiving a particular provision of a written contract within the statute.<sup>66</sup> A written contract within the statute of frauds may be discharged by a subsequent oral agreement within the statute, where the oral agreement has been fully executed by both parties, for the statute does not apply to agreements which have been fully executed.<sup>67</sup>

### III. FORM OF AUTHORITY OF AGENT.

#### § 49. In general.

In the preceding sections, we have been considering the question of form with respect to the contract of agency as between principal and agent. We come now to consider the necessity for form, to confer authority upon an agent to bind his principal to third persons. On this subject it may be laid down as a general rule, that the authority of an agent may rest in parol, and may be either in writing or verbal, unless there is a statutory provision to the contrary, or unless the act to be done is required to be done under seal. "A verbal authority is sufficient to authorize the performance of any act, which is not of such a nature as to require that it be done under seal,"<sup>68</sup> unless a particular form of authority is required by the statute, as will presently be explained. Except in those cases where the authority is required to be under

<sup>65</sup> *Abell v. Munson*, 18 Mich. 306, 100 Am. Dec. 165; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; *Dana v. Hancock*, 30 Vt. 616; *Wilson's Assignee v. Beam*, 12 Ky. L. R. 367, 14 S. W. 362; *Noble v. Ward*, L. R. 2 Exch. 135. See, however, to the contrary, *Cummings v. Arnold*, 3 Metc. (Mass.) 486, 37 Am. Dec. 155; *Stearns v. Hall*, 9 Cush. (Mass.) 31; *McClelland v. Rush*, 150 Pa. 57.

<sup>66</sup> *Lee v. Hawks*, 68 Miss. 669.

<sup>67</sup> *Long v. Hartwell*, 34 N. J. Law, 116; *Norton v. Simonds*, 124 Mass. 19.

<sup>68</sup> *Ledbetter v. Walker*, 31 Ala. 175; *Handyside v. Cameron*, 21 Ill. 588, 74 Am. Dec. 119; and see cases hereafter cited.

seal, or where it is required by statute to be in writing, parol authority, either verbal or written, is sufficient to execute a written instrument.<sup>69</sup> In some cases, however, it is expressly required by statute, that authority to execute a written instrument should also be in writing;<sup>70</sup> but even in such cases, the authority may be given by parol, if the instrument is executed in the presence of and by the direction of the principal.<sup>71</sup> Thus, a contract for the sale and conveyance of land, as distinguished from a deed of conveyance, need not be under seal, and therefore, authority to make such a contract may be conferred upon an agent by a writing not under seal, or even verbally,<sup>72</sup> unless there is some statutory provision to the contrary.<sup>73</sup> So parol authority is suf-

<sup>69</sup> *Higgins v. Senior*, 8 Mees. & W. 844; *Welch v. Hoover*, 5 Cranch, C. C. 444, Fed. Cas. No. 17,368; *Small v. Ownings*, 1 Md. Ch. 363; *Shaw v. Nudd*, 8 Pick. (Mass.) 9; *Hawkins v. Chace*, 19 Pick. (Mass.) 502; *Ulen v. Kittredge*, 7 Mass. 233; *New England Marine Ins. Co. v. De Wolf*, 8 Pick. (Mass.) 56; *Webb v. Browning*, 14 Mo. 354; *Hammond v. Hannin*, 21 Mich. 374; *Wagoner v. Watts*, 44 N. J. Law, 126; and see cases hereafter cited.

<sup>70</sup> *Parrish v. Koonsh*, 1 Pars. Eq. Cas. (Pa.) 79; *Frailey v. Waters*, 7 Pa. 221.

<sup>71</sup> See post, § 52.

<sup>72</sup> *Waller v. Hendon*, 5 Vin. Abr. (Contracts) pl. 45; *Heard v. Pilley*, 4 Ch. App. 548; *Lyon v. Pollock*, 99 U. S. 668; *Ledbetter v. Walker*, 31 Ala. 175; *Morrow v. Higgins*, 29 Ala. 448; *Andrews v. Jones*, 10 Ala. 400; *Rutenberg v. Main*, 47 Cal. 213; *Johnson v. Dodge*, 17 Ill. 433; *Watson v. Sherman*, 84 Ill. 263; *Peabody v. Hoard*, 46 Ill. 242 (by letter); *Chappell v. McKnight*, 108 Ill. 570 (by telegram); *Rottman v. Wasson*, 5 Kan. 552; *Irvin v. Thompson*, 4 Bibb (Ky.) 296; *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; *Jackson v. Murray*, 5 T. B. Mon. (Ky.) 184, 17 Am. Dec. 53; *Minor v. Willoughby*, 3 Minn. 225; *Brown v. Eaton*, 21 Minn. 409; *Dickerman v. Ashton*, 21 Minn. 538; *Curtiss v. Blair*, 26 Miss. 309, 59 Am. Dec. 257; *Riley v. Minor*, 29 Mo. 439; *Smith v. Allen*, 86 Mo. 178; *Stadleman v. Fitzgerald*, 14 Neb. 290; *Force v. Dutcher*, 18 N. J. Eq. 401; *Doughaday v. Crowell*, 11 N. J. Eq. 201; *Long v. Hartwell*, 34 N. J. Law, 116; *Moody v. Smith*, 70 N. Y. 598; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Blacknall v. Parish*, 59 N. C. (6 Jones Eq.) 70, 78 Am. Dec. 239; *Miller v. Hayman*, 1 Yeates (Pa.) 23; *Baum v. Dubois*, 43 Pa. 260; *Yerby v. Grigsby*, 9 Leigh (Va.) 387; *Dodge v. Hopkins*, 14 Wis. 630.

<sup>73</sup> See post, § 50

ficient to execute a bill of sale of a mining claim,<sup>74</sup> to fill blanks in negotiable bills and notes,<sup>75</sup> to sign articles of association for the purpose of forming and becoming a subscriber for stock and member of a proposed corporation,<sup>76</sup> to execute or make a contract for a lease,<sup>77</sup> or a written lease not under seal,<sup>78</sup> but not a lease under seal.<sup>79</sup> And authority need not be either under seal or in writing, but may be verbal, to authorize an agent to execute or accept promissory notes and bills<sup>80</sup> or to sell chattels or assign notes, or an interest in an invention or patent,<sup>81</sup> or to mortgage or pledge chattels or choses in action.<sup>82</sup> A parol appointment is also sufficient to authorize an agent to pay taxes,<sup>83</sup> to pay money and redeem land sold for taxes,<sup>84</sup> to make an entry on land to toll the statute of limitations,<sup>85</sup> to confess judgment in a suit already brought,<sup>86</sup> to collect or demand payment of rent,<sup>87</sup> or to assign a claim.<sup>88</sup>

### § 50. Application of the statute of frauds.

In some jurisdictions it is expressly provided by the statute of frauds that where a contract is required by the

<sup>74</sup> *Patterson v. Keystone Min. Co.*, 30 Cal. 360.

<sup>75</sup> *Angle v. N. W. Mut. Life Ins. Co.*, 92 U. S. 331; *Boardman v. Gore*, 1 Stew. (Ala.) 517, 18 Am. Dec. 73.

<sup>76</sup> *In re Whitley's Partners*, 32 Ch. Div. 337, 55 Law J. Ch. 540, 54 Law T. 912.

<sup>77</sup> *Tayl. Landl. & Ten.* § 137; *Paley*, Ag. 159, 189.

<sup>78</sup> *Lake v. Campbell*, 18 Ill. 106.

<sup>79</sup> See post, § 52.

<sup>80</sup> *Handyside v. Cameron*, 21 Ill. 588, 74 Am. Dec. 119; *Avery v. Lauve*, 1 La. Ann. 457 (must be express); *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Rice v. Gove*, 22 Pick. (Mass.) 158, 33 Am. Dec. 724; *Long v. Colburn*, 11 Mass. 97, 6 Am. Dec. 160; *Brooks v. Jameson*, 55 Mo. 505; *Bank of North America v. Embury*, 33 Barb. (N. Y.) 323; *Pickett v. Pearsons*, 17 Vt. 470; *Piercy v. Hedrick*, 2 W. Va. 458, 98 Am. Dec. 774.

<sup>81</sup> *Reed v. Van Ostrand*, 1 Wend. (N. Y.) 424, 19 Am. Dec. 529; *Robinson v. Crowder*, 4 McCord (S. C.) 519, 17 Am. Dec. 762.

<sup>82</sup> *Tapley v. Butterfield*, 1 Metc. (Mass.) 515, 35 Am. Dec. 374.

<sup>83</sup> *Paris v. Lewis*, 85 Ill. 597.

<sup>84</sup> *Gracie v. White*, 18 Ark. 17.

<sup>85</sup> *Miles v. Cook*, 1 Grant's Cas. (Pa.) 58.

<sup>86</sup> *Dial v. Farrow*, 1 Speers (S. C.) 114.

<sup>87</sup> *Sheets v. Seldon's Lessee*, 2 Wall. (U. S.) 177.

<sup>88</sup> *Dingley v. McDonald*, 124 Cal. 90.

statute to be in writing and signed by the party to be charged or his agent, the authority of the agent must also be in writing; or that authority of an agent to bind a principal by a particular kind of contract within the statute, as a contract for the purchase or sale of land, shall be in writing; and in such a case an agent cannot bind his principal unless his authority is in writing, and signed by the principal as required by the statute.<sup>89</sup> In the absence of such a requirement in the statute, the authority of an agent to bind his principal by a contract which is within the statute of frauds, as a contract for the sale of land or goods, need not be in writing, but may be given by parol.<sup>90</sup>

<sup>89</sup> *Alabama G. S. R. Co. v. South & North Ala. R. Co.*, 84 Ala. 570, 5 Am. St. Rep. 401; *Hall v. Wallace*, 88 Cal. 434; *Zelmer v. Antisell*, 75 Cal. 509; *Castner v. Richardson*, 18 Colo. 496; *Malone v. McCullough*, 15 Colo. 460; *Chappell v. McKnight*, 108 Ill. 570; *Lasher v. Gardner*, 124 Ill. 441; *Kozel v. Dearlove*, 144 Ill. 23, 36 Am. St. Rep. 416; *Macarty v. New Orleans Canal & Banking Co.*, 8 Rob. (La.) 102; *Muggah v. Greig*, 2 La. 593; *Toan v. Pline*, 60 Mich. 385; *Gerhart v. Peck*, 42 Mo. App. 644 (in this case, however, this provision was waived). That such a requirement applies to contracts by officers and agents of corporations, see *Alabama G. S. R. Co. v. South & North Ala. R. Co.*, 84 Ala. 570, 5 Am. St. Rep. 401. That there may be an equitable estoppel by conduct to deny the existence of written authority, see *Alabama G. S. R. Co. v. South & North Ala. R. Co.*, *supra*. Where a statute requires authority of an agent to sell land to be in writing signed by the principal, an oral approval by a principal of a sale of land by his agent, who had written authority to sell but has sold on different terms from those authorized, is unavailing. To sell upon different terms requires a new and further authority, and such authority must be in writing and signed by the principal. *Kozel v. Dearlove*, 144 Ill. 23, 36 Am. St. Rep. 416. Where a writing, signed by the principal, states that the agent "can arrange for the sale of my ranch in Nevada, as per within memorandum," it is a sufficient memorandum of employment under the statute of frauds. *Toomy v. Dunphy*, 86 Cal. 639.

<sup>90</sup> *Mortlock v. Buller*, 10 Ves. 311; *Coles v. Trecothick*, 9 Ves. 234; *Emmerson v. Herlits*, 2 Taunt. 46; *Graham v. Musson*, 7 Scott, 769; *Maclean v. Dunn*, 4 Bing. 722; *Rutenberg v. Main*, 47 Cal. 213; *Johnson v. Dodge*, 17 Ill. 433; *Doty v. Wilder*, 15 Ill. 407, 60 Am. Dec. 756; *Watson v. Sherman*, 84 Ill. 263, 267; *Roehl v. Haumesser*, 114 Ind. 311; *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; *Jackson v. Murray*, 5 T. B. Mon. (Ky.) 184, 17 Am. Dec.

As we have elsewhere seen, if a person signs another's name to a writing in his presence and by his direction or authority, the act is not regarded as the act of an agent at all, but as the direct act of the person whose name is signed, just as if it had been done by his own hand.<sup>91</sup> In such a case, therefore, the statute of frauds, although it may require authority in writing in order that such a writing may be signed by an agent, has no application. There is no question of agency at all.<sup>92</sup>

### § 51. Contracts of suretyship.

In some jurisdictions by express statutory provision, no person can be bound as the surety of another by the act of an agent, unless the authority of the agent is in writing, signed by the principal.<sup>93</sup> Writing is not necessary, however, unless it is thus required by statute.

53; *Shaw v. Nudd*, 8 Pick. (Mass.) 9; *Hawkins v. Chace*, 19 Pick. (Mass.) 502; *Moreland v. Houghton*, 94 Mich. 548; *Hannan v. Prentis*, 124 Mich. 417; *Brown v. Eaton*, 21 Minn. 409; *Curtis v. Blair*, 26 Miss. 309, 59 Am. Dec. 257; *Johnson v. McGruder*, 15 Mo. 365; *Doughaday v. Crowell*, 11 N. J. Eq. 201; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; *McWhorter v. McMahan*, 10 Paige (N. Y.) 386; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Blacknall v. Parish*, 59 N. C. (6 Jones Eq.) 70, 78 Am. Dec. 239; *Johnson v. Somers*, 1 Humph. (Tenn.) 268; *Yerby v. Grigsby*, 9 Leigh (Va.) 387; *Kennedy v. Ehlen*, 31 W. Va. 540; *Conaway v. Sweeney*, 24 W. Va. 643. See, however, *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338; *Simpson v. Com.*, 89 Ky. 412. Thus parol authority is sufficient for an agent to contract with another to cut timber from his principal's land. *Columbia Land & Min. Co. v. Tinsley*, 22 Ky. L. R. 1082, 60 S. W. 10.

<sup>91</sup> Post, § 52.

<sup>92</sup> *Fitzpatrick v. Engard*, 175 Pa. 393; *Rockford, R. I. & St. L. R. Co. v. Shunick*, 65 Ill. 223; *Price v. Durin*, 56 Barb. (N. Y.) 647; *Durrell v. Evans*, 1 Hurl. & C. 174; *Wallace v. McCollough*, 1 Rich. Eq. (S. C.) 426; *Meyer v. King*, 29 La. Ann. 567; *Harvey v. Stevens*, 43 Vt. 653; *Croy v. Busenbark*, 72 Ind. 48.

<sup>93</sup> Gen. St. Ky. § 20, c. 22; *Dawson v. Lee*, 83 Ky. 49; *First Nat. Bank v. Gaines*, 87 Ky. 597; *Simpson v. Com.*, 89 Ky. 412; *Rogan v. Chenault*, 78 Ky. 546 (and a subsequent parol ratification by the principal of such act of his agent not thus authorized cannot make the original signing effective).

## § 52. Necessity for authority under seal.

(a) **In general.**—In the absence of a statute, authority under seal is not necessary to enable an agent to do any act which may be done without a seal, but a written authority, or generally, as we have seen, a mere verbal authority, is sufficient. This is true, for example, of authority to make a contract to sell and convey land, as distinguished from a deed of conveyance, for a seal is not necessary to such a contract; and it is true of authority to execute promissory notes, etc., to sell chattels, assign choses in action, mortgage or pledge chattels, etc. For none of these acts is a seal necessary, and therefore, a seal is not necessary to authority to do them as agent for another.<sup>94</sup> "A written or parol authority is sufficient to authorize a person to make a simple contract, as agent or attorney, and to bind his principal to the performance of it, without a formal letter of attorney under seal."<sup>95</sup>

On the other hand, however, authority under seal is necessary to enable an agent to bind his principal by an act under seal. It is a technical, but a thoroughly well settled rule of the common law, that an agent cannot bind his principal by a deed of conveyance, bond, or other instrument under seal, unless his authority to do so is also under seal; and this doctrine is still recognized and applied except in so far as it has been abrogated by statute.<sup>96</sup> "No man can bind

<sup>94</sup> See ante, § 40, and cases there cited.

<sup>95</sup> *Gordon v. Bulkeley*, 14 Serg. & R. (Pa.) 331.

<sup>96</sup> *England*: *Hibblewhite v. McMorine*, 6 Mees. & W. 200; *Steiglitz v. Egginton*, 1 Holt, 141; *Berkeley v. Hardy*, 5 Barn. & C. 355; *Harrison v. Jackson*, 7 Term R. 207; *Elliot v. Davis*, 2 Bos. & P. 338.

*United States*: *U. S. v. Nelson*, 2 Brock. 64, Fed. Cas. No. 15,862; *Platt's Heirs v. McCullough's Heirs*, 1 McLean, 69, Fed. Cas. No. 11,113.

*Alabama*: *Elliott v. Stocks*, 67 Ala. 336.

*Georgia*: *Rowe v. Ware*, 30 Ga. 278; *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549; *Drumright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738.

*Illinois*: *Maus v. Worthing*, 3 Scam. 26; *Johnson v. Dodge*, 17 Ill. 433; *Ingraham v. Edwards*, 64 Ill. 526; *Watson v. Sherman*, 84 Ill. 263; *Peabody v. Hoard*, 46 Ill. 242.

another by deed, unless he has been authorized by deed to do it, and if a person, however authorized, if not by an instrument under seal, make and execute a deed, expressed to

*Indiana:* Butterfield v. Beall, 3 Ind. 203; Rhode v. Louthain, 8 Blackf. 413.

*Kentucky:* Lockhart v. Roberts, 3 Bibb, 361; Jackson v. Murray, 5 T. B. Mon. 184, 17 Am. Dec. 53; Cummins v. Cassily, 5 B. Mon. 74; McMurtry v. Frank, 4 T. B. Mon. 39; Mitchell's Adm'r's v. Sproul, 5 J. J. Marsh. 264.

*Maine:* Heath v. Nutter, 50 Me. 378; Baker v. Freeman, 35 Me. 485; Wheeler v. Nevins, 34 Me. 54; Spofford v. Hobbs, 29 Me. 148, 48 Am. Dec. 521; Paine v. Tucker, 21 Me. 138, 38 Am. Dec. 255; Stetson v. Patten, 2 Greenl. 358, 11 Am. Dec. 111.

*Maryland:* Byers v. McClanahan, 6 Gill & J. (Md.) 250.

*Massachusetts:* Banorgie v. Hovey, 5 Mass. 11, 4 Am. Dec. 417; Hatch v. Smith, 5 Mass. 42.

*Minnesota:* Dickerman v. Ashton, 21 Minn. 538.

*Mississippi:* Williams v. Crutcher, 5 How. 71, 35 Am. Dec. 422; Adams v. Power, 52 Miss. 828.

*Missouri:* Shuetze v. Bailey, 40 Mo. 69.

*New Hampshire:* Gage v. Gage, 30 N. H. 420. And see Haydock v. Duncan, 40 N. H. 45.

*New Jersey:* Smith v. Perry, 29 N. J. Law, 74; Wagoner v. Watts, 44 N. J. Law, 126; Long v. Hartwell, 34 N. J. Law, 122.

*New York:* Reed v. Van Ostrand, 1 Wend. 424, 19 Am. Dec. 529; Hanford v. McNair, 9 Wend. 54; Blood v. Goodrich, 9 Wend. 68, 24 Am. Dec. 121; Livingston v. Peru Iron Co., 9 Wend. 511, 522; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Wells v. Evans, 20 Wend. 251; Williams v. Gillies, 75 N. Y. 202.

*North Carolina:* Kime v. Brooks, 31 N. C. (9 Ired.) 218; Graham v. Holt, 25 N. C. (3 Ired.) 300, 40 Am. Dec. 408; Humphreys v. Finch, 97 N. C. 303, 2 Am. St. Rep. 293; Harshaw v. McKesson, 65 N. C. 688; Delius v. Cowthorn, 13 N. C. (2 Dev.) 90.

*Ohio:* Ayres v. Harness, 1 Ohio, 368, 13 Am. Dec. 629; McNaughton v. Partridge, 11 Ohio, 223.

*Pennsylvania:* Gordon v. Bulkeley, 14 Serg. & R. 331; Cooper v. Rankin, 5 Bin. 613; Vanhorne v. Frick, 6 Serg. & R. 90.

*Tennessee:* Turbeville v. Ryan, 1 Humph. 113, 34 Am. Dec. 622; Smith v. Dickinson, 6 Humph. 261, 44 Am. Dec. 306; Cain v. Heard, 1 Cold. 163; Gilbert v. Anthony, 1 Yerg. 69, 24 Am. Dec. 439; Boyd v. Dodson, 5 Humph. 37; Mosby v. State, 4 Sneed, 324.

*Virginia:* Preston v. Hull, 23 Grat. (Va.) 600, 14 Am. Rep. 153. That a written instrument, though not in technical form, may be a good power of attorney for the sale and conveyance of land, see Phillips v. Hornsby, 70 Ala. 414.



be in behalf of his principal, the principal is not bound by the deed, although he who made it is bound."<sup>97</sup>

**(b) Parol enlargement or change of sealed authority.—**

It follows, of course, from this rule, that verbal directions or authority from a principal cannot enlarge or change an authority under seal, for which a seal is essential.<sup>98</sup> This does not apply, however, where the seal is unnecessary and may be rejected as surplusage.<sup>99</sup>

**(c) Instrument executed in the presence and by direction of another.**—Authority under seal is not necessary to enable a person to execute an instrument under seal for another, where he does so in his presence and by his direction or authority, for in such a case, as we have seen,<sup>100</sup> there is, in law, no agency at all, but the instrument is deemed just as much the direct and personal act of the party for whom and by whose direction it is executed, as if signed and sealed by his own hand.<sup>101</sup> "The name being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers,

<sup>97</sup> *Gordon v. Bulkeley*, 14 Serg. & R. (Pa.) 331.

<sup>98</sup> *Spofford v. Hobbs*, 29 Me. 148, 48 Am. Dec. 521; *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927.

<sup>99</sup> See post, § 53(f).

<sup>100</sup> Ante, § 15.

<sup>101</sup> *Rex v. Longnor*, 4 Barn. & Adol. 647; *Ball v. Dunsterville*, 4 Term R. 313; *Hudson v. Revett*, 5 Bing. 368; *Lewis v. Watson*, 98 Ala. 479, 39 Am. St. Rep. 82; *Jansen v. McCahill*, 22 Cal. 563, 83 Am. Dec. 84; *Videau v. Griffin*, 21 Cal. 390; *Reinhart v. Miller*, 22 Ga. 402, 68 Am. Dec. 506; *Croy v. Busenbark*, 72 Ind. 48; *Meyer v. King*, 29 La. Ann. 567; *Frost v. Deering*, 21 Me. 156; *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Johnson v. Van Velsor*, 43 Mich. 208; *Eggleston v. Wagner*, 46 Mich. 610; *McMurtry v. Brown*, 6 Neb. 368; *Kidder v. Prescott*, 24 N. H. 267; *Cushman v. Wooster*, 45 N. H. 410; *Mutual B. L. Ins. Co. v. Brown*, 30 N. J. Eq. 202; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; *Fitzpatrick v. Engard*, 175 Pa. 396; *Hart v. Withers*, 1 Pen. & W. (Pa.) 285, 21 Am. Dec. 382; *Ficht-horn v. Boyer*, 5 Watts (Pa.) 159, 30 Am. Dec. 300; *Kennedy v. Gramling*, 33 S. C. 367, 26 Am. St. Rep. 676. Compare *Rockford, R.*

and she merely uses the hand of another, \* \* \* instead of her own, to do the physical act of making a written sign."<sup>102</sup> This principle applies where a blank in a bond or deed of conveyance is filled up in the presence and by direction or authority of the obligor or grantor.<sup>103</sup>

(d) **Rejection of seal as surplusage.**—And if an agent, without authority under seal, executes under seal an instrument which is not required to be under seal, it will be valid as an unsealed instrument, for the seal will be disregarded as mere surplusage.<sup>104</sup>

*I. & St. L. R. Co. v. Shunick*, 65 Ill. 223; *Wallace v. McCollough*, 1 Rich. Eq. (S. C.) 426.

<sup>102</sup> Per Chief Justice Shaw in *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740.

<sup>103</sup> Post, § 53. Signing of the grantor's name to a deed by a stranger by direction of the grantor at the time is good, although the signing is not in the immediate view of the grantor. It was so held, for example, where a person took a deed to the grantor, to the room in which she was dressing, and by her direction immediately signed her name to the same on the gate post near the door, but not in her view. *Reinhart v. Miller*, 22 Ga. 402, 68 Am. Dec. 506. A deed signed "A. per B.," will be presumed to have been signed in the presence and by direction of A., where it appears that he was unable to read or write, and B. was in the habit of signing deeds for him, and the person claiming under the deed has been in the undisturbed possession of the land for years. *Kennedy v. Grambling*, 33 S. C. 367, 26 Am. St. Rep. 676.

<sup>104</sup> *Anderson v. Tompkins*, 1 Brock. 456, Fed. Cas. No. 365; *Morrow v. Higgins*, 29 Ala. 448; *Ledbetter v. Walker*, 31 Ala. 176; *Love v. Sierra Nevada Lake W. & M. Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765; *Drumright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738; *Ingraham v. Edwards*, 64 Ill. 526; *Walsh v. Lennon*, 98 Ill. 27; *Tapley v. Butterfield*, 1 Metc. (Mass.) 515, 35 Am. Dec. 374; *Milton v. Mosher*, 7 Metc. (Mass.) 244; *Dickerman v. Ashton*, 21 Minn. 538; *Thomas v. Joslin*, 30 Minn. 388; *Adams v. Power*, 52 Miss. 828; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Wagoner v. Watts*, 44 N. J. Law, 126; *Long v. Hartwell*, 34 N. J. Law, 116; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Reed v. Van Ostrand*, 1 Wend. (N. Y.) 424, 19 Am. Dec. 529; *Wood v. Auburn & R. R. Co.*, 8 N. Y. 160; *Everit v. Strong*, 5 Hill (N. Y.) 163; *Blacknall v. Parish*, 59 N. C. (6 Jones Eq.) 70, 78 Am. Dec. 239; *Baum v. Dubois*, 43 Pa. 260; *Robinson v. Crowder*, 4 McCord (S. C.) 519, 17 Am. Dec. 762; *Marshall v. Rugg*, 6 Wyo. 270. And see un-

(e) **Equities may arise from execution of an authority not under seal.**—Although the deed of attorney in fact authorized by parol to convey land will not pass the legal title, when authority under seal to convey land is necessary it is sufficient to raise an equity in the grantee which will entitle him to a deed, being treated as a contract for a deed, for which a seal is not necessary, and which will prevail, not only as against the principal, but also as against subsequent purchasers from the principal who do not occupy the position of bona fide purchasers for value and without notice.<sup>105</sup> Thus, if an agent who is only authorized to execute a contract for the sale of land sells the land, receives the purchase money, places the purchaser in possession, and executes an absolute deed for it, the transaction amounts to a valid verbal sale, and creates a valid equitable title in the purchaser and his successors in interest.<sup>106</sup>

(f) **Authority of partner.**—There is a direct conflict of authority as to the power of a partner to bind the firm by an instrument under seal, when his authority from the other partners to do so is not under seal. Perhaps all the courts agree that a partner has no implied authority to bind his co-partners by an instrument under seal, merely by virtue of the relation, but there must at the least be a special authority, in some form, from his co-partners, or else a ratification.<sup>107</sup> Some of the courts have gone further than this, and,

der the Missouri statute, *Lehman v. Nolting*, 56 Mo. App. 549. This applies where a partner, without special authority under seal, executes a contract under seal which is not required to be under seal, and which may be sustained as an unsealed instrument within his general authority as partner. See the cases above cited.

<sup>105</sup> *Irvin v. Thompson*, 4 Bibb (Ky.) 296; *Jackson v. Murray*, 5 T. B. Mon. (Ky.) 184, 17 Am. Dec. 53; *Watson v. Sherman*, 84 Ill. 263; *Groff v. Ramsey*, 19 Minn. 44; *Hersey v. Lambert*, 50 Minn. 373; *Jones v. Marks*, 47 Cal. 242; *Ledbetter v. Walker*, 31 Ala. 175; *Morrow v. Higgins*, 29 Ala. 448. Compare *Allis v. Goldsmith*, 22 Minn. 123.

<sup>106</sup> *Jones v. Marks*, 47 Cal. 243.

<sup>107</sup> *England*: *Harrison v. Jackson*, 7 Term R. 207.

*Illinois*: *Walsh v. Lennon*, 98 Ill. 27.

*Kentucky*: *Trimble v. Coons*, 2 A. K. Marsh. 375, 12 Am. Dec. 411.

applying the general common-law rule, have held that a partner cannot bind his co-partners by an instrument under seal, even though he may be specially authorized by them to do so, unless such special authority is under seal.<sup>108</sup> The weight of authority, however, is against this view, and to the effect that an instrument under seal executed by one partner in the firm name will bind the firm, if an express authority from or confirmation by the other partners can be established, whether such authority or confirmation be verbal,

*Maryland:* *Williams v. Hodgson*, 2 Har. & J. 474, 3 Am. Dec. 563.

*Massachusetts:* *Van Deusen v. Blum*, 18 Pick. 229, 29 Am. Dec. 582; *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665; *Cady v. Shepherd*, 11 Pick. 400, 22 Am. Dec. 379.

*Michigan:* *Koch v. Endriss*, 97 Mich. 444.

*New York:* *Skinner v. Dayton*, 19 Johns. 513, 10 Am. Dec. 286. See, also, *Wells v. Evans*, 20 Wend. 251, 255; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330.

*Ohio:* *McNaughten v. Partridge*, 11 Ohio, 223, 38 Am. Dec. 731.

*Pennsylvania:* *Gerard v. Basse*, 1 Dall. 119, 1 Am. Dec. 226; *Hart v. Withers*, 1 Pen. & W. 285, 21 Am. Dec. 382; *Schmertz v. Shreeve*, 62 Pa. 457, 1 Am. Rep. 439.

*South Carolina:* *Robinson v. Crowder*, 4 McCord, 519, 17 Am. Dec. 762.

*Tennessee:* *Turbeville v. Ryan*, 1 Humph. 113, 34 Am. Dec. 622. A partner, however, may appoint another, by an instrument under seal, as attorney to discharge a debt due the firm, an act which he might himself do alone, for the rule stated in the text only applies where the firm is sought to be charged by an instrument under seal. *Wells v. Evans*, 20 Wend. (N. Y.) 251, 255. And a partner may transfer the whole stock in trade of the partnership bona fide in payment of debts of the firm, especially where his partner has absconded and the fact that the assignment is under seal is immaterial. *Deckard v. Case*, 5 Watts (Pa.) 22, 30 Am. Dec. 287; *Robinson v. Crowder*, 4 McCord (S. C.) 519, 17 Am. Dec. 762.

<sup>108</sup> *Steiglitz v. Egginton*, 1 Holt, N. P. 141; *Turbeville v. Ryan*, 1 Humph. (Tenn.) 113, 34 Am. Dec. 622; *Napier v. Catron*, 2 Humph. (Tenn.) 534; *Hart v. Withers*, 1 Pen. & W. (Pa.) 285, 21 Am. Dec. 382. See, also, *Trimble v. Coons*, 2 A. K. Marsh. (Ky.) 375, 12 Am. Dec. 411.

or in writing not under seal, or implied from the circumstances.<sup>109</sup>

In all jurisdictions, no doubt, the fact that a partner has no authority under seal to execute a sealed instrument on behalf of the firm does not render invalid an instrument under seal executed by one partner in the presence and by the direction or verbal authority of his co-partners.<sup>110</sup> And where a partner, authorized by parol, or acting in pursuance

<sup>109</sup> Story, Partn. §§ 121, 122.

*England:* Brutton v. Burton, 1 Chit. 707.

*United States:* Darst v. Roth, 4 Wash. C. C. 471, Fed. Cas. No. 3,582.

*Georgia:* Drumright v. Philpot, 16 Ga. 424, 60 Am. Dec. 738.

*Illinois:* Edwards v. Dillon, 147 Ill. 14, 37 Am. St. Rep. 199; Peine v. Weber, 47 Ill. 41.

*Massachusetts:* Cady v. Shepherd, 11 Pick. 400, 22 Am. Dec. 379; Van Deusen v. Blum, 18 Pick. 229, 29 Am. Dec. 582; Russell v. Annable, 109 Mass. 72, 12 Am. Rep. 665; Holbrook v. Chamberlin, 116 Mass. 161, 17 Am. Rep. 146.

*Michigan:* Koch v. Endriss, 97 Mich. 444; Fox v. Norton, 9 Mich. 207.

*New York:* Skinner v. Dayton, 19 Johns. 513, 10 Am. Dec. 286; Pettis v. Bloomer, 21 How. Pr. 317; Gram v. Seton, 1 Hall, 293; Renwick v. McAllister, 5 N. Y. Leg. Obs. 16. Among the New York cases which are sometimes cited to the contrary are Blood v. Goodrich, 9 Wend. 68, 24 Am. Dec. 121, 12 Wend. 525, 27 Am. Dec. 152; Wells v. Evans, 20 Wend. 251; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330. But these cases are not in point. In Blood v. Goodrich, the court expressly called attention to the fact that the parties were not partners, but tenants in common merely. In Wells v. Evans, there is a mere dictum, or rather a mere assumption, that a partner cannot bind another partner by seal, and, further than this, on a careful consideration of the case it is evident that the learned judge was referring merely to the implied power of a partner. Worrall v. Munn was not a case of partners at all.

*Pennsylvania:* Bond v. Aitkin, 6 Watts & S. 165, 40 Am. Dec. 550; Johns v. Battin, 30 Pa. 84, 89. Compare Hart v. Withers, 1 Pen. & W. (Pa.) 285, 21 Am. Dec. 382.

<sup>110</sup> Ball v. Dunsterville, 4 Term R. 313; Mackay v. Bloodgood, 9 Johns. (N. Y.) 285; Fox v. Norton, 9 Mich. 207; Koch v. Endriss, 97 Mich. 444; Hart v. Withers, 1 Pen. & W. (Pa.) 285, 21 Am. Dec. 382; Fichthorn v. Boyer, 5 Watts (Pa.) 159, 30 Am. Dec. 300; Overton v. Tozer, 7 Watts (Pa.) 333.

of his implied authority, unnecessarily affixes a seal to an instrument which is not required to be under seal, this does not altogether invalidate the instrument, for the seal may be rejected as surplusage, and the instrument treated as an unsealed instrument.<sup>111</sup> An appointment of an agent by a partner does not come within this common-law rule merely because his seal is affixed, if the appointment is not required by law to be under seal.<sup>112</sup>

**(g) Authority of tenant in common.**—The rule in relation to partners does not apply to a mere tenant in common. In order that a tenant in common may bind his co-tenant by a conveyance under seal, he must not only be authorized by the co-tenant to bind him, but his authority must be under seal.<sup>113</sup>

**(h) Agents of corporations.**—The common-law rule, that authority to execute as agent a contract or conveyance under seal must also be under seal does not apply to the execution of sealed instruments for a corporation. Such authority may be conferred, without the corporate seal, and without any writing at all, by the mere vote of the directors or trustees.<sup>114</sup>

**(i) Ratification and adoption of instruments.**—The question of parol ratification of an instrument under seal, executed by an agent without authority under seal, will be

<sup>111</sup> *Tapley v. Butterfield*, 1 Metc. (Mass.) 515, 35 Am. Dec. 374; *Drumright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738; *Robinson v. Crowder*, 4 McCord (S. C.) 519, 17 Am. Dec. 762. Compare, however, *Schmertz v. Shreeve*, 62 Pa. 457, 1 Am. Rep. 439.

<sup>112</sup> *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280; *Edwards v. Dillon*, 147 Ill. 14, 37 Am. St. Rep. 199.

<sup>113</sup> *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121.

<sup>114</sup> *Columbia Bank v. Patterson*, 7 Cranch (U. S.) 305; *Beckwith v. Windsor Mfg. Co.*, 14 Conn. 603; *Nobleboro v. Clark*, 68 Me. 87, 28 Am. Rep. 22; *Fitch v. Steam Mill Co.*, 80 Me. 34; *Burrill v. Nahant Bank*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; *Cook v. Kuhn*, 1 Neb. 472; *Tenney v. East Warren Lumber Co.*, 43 N. H. 355; *Atkinson v. Bemis*, 11 N. H. 44; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193.

As to power to execute a deed under authority given by the vote of a religious society, see *Stanwood v. Laughlin*, 73 Me. 112.

considered in a subsequent chapter. As we shall there see, the general rule is that a parol ratification is not sufficient, but the ratification must be under seal.<sup>115</sup> There is a distinction, however, between ratification and adoption of an instrument under seal. Where a person whose name has been signed to a deed in his absence appears before an officer and duly acknowledges its execution, he thereby adopts the signature as his own, and there is no question of agency or ratification.<sup>116</sup> The same is true when a person delivers as his own an instrument signed and sealed by another in his name.<sup>117</sup>

(j) **Parol authority to deliver instrument.**—When a grantor or obligor has himself executed an instrument under seal, authority to deliver the same may be given by parol.<sup>118</sup>

**§ 53. Parol authority to fill blanks in sealed instruments.**

(a) **In general.**—It would seem to follow from the doctrine that authority under seal is essential to the execution of a deed by an agent, that parol authority cannot be given to fill blanks after execution and delivery of an instrument under seal by the grantor or obligor, where the matter inserted is material. On this question, however, the decisions are in irreconcilable conflict, and there are so many decisions on each side that it is difficult, if not impossible, to say which view is supported by the weight of authority.

In an early English case Lord Mansfield held that a bond was valid where it was delivered by the obligor to a broker with blanks for the name of the obligee and the amount, with parol authority to fill in the blanks and obtain money upon it, and the agent borrowed the money and filled in the blanks and delivered it to the obligee. The decision was based on the ground that the parol authority was sufficient, and

<sup>115</sup> See post, § 132.

<sup>116</sup> *Bartlett v. Drake*, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386; *Lovejoy v. Richardson*, 68 Me. 386; *Lewis v. Watson*, 98 Ala. 479, 39 Am. St. Rep. 82.

<sup>117</sup> *Pequawkett Bridge v. Mathes*, 7 N. H. 230, 26 Am. Dec. 737.

<sup>118</sup> *White v. Duggan*, 140 Mass. 18, 54 Am. Rep. 437.

not on the ground that there was any estoppel.<sup>119</sup> This decision has been followed by many of the courts in this country, and not on the ground of estoppel but on the ground that the technical doctrine requiring sealed authority to execute an instrument under seal does not apply.<sup>120</sup>

<sup>119</sup> *Texira v. Evans*, 1 Anstr. 228.

<sup>120</sup> *United States*: See the dictum in *Drury v. Foster*, 2 Wall. 24, and in *Allen v. Withrow*, 110 U. S. 119. In *McClung v. Steen*, 32 Fed. 373, it was held that if the agent filled out the blanks in the way authorized, before the deed was delivered, it would be a valid deed.

*Alabama*: *Boardman v. Gore*, 1 Stew. 517, 18 Am. Dec. 73 (where the name of the payee in a bond was filled in by him after delivery); *Gibbs v. Frost*, 4 Ala. 720.

*Arkansas*: *Adamson v. Hartman*, 40 Ark. 58 (holding that authority to fill such blank must be in writing); *Lemay v. Johnson*, 35 Ark. 225. Compare *Cross v. State Bank*, 5 Ark. 525.

*Connecticut*: *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 274.

*Georgia*: *Brown v. Colquitt*, 73 Ga. 59, 54 Am. Rep. 867 (in effect overruling *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549); *Dedge v. Branch*, 94 Ga. 37. Compare *Willis v. Rivers*, 80 Ga. 556.

*Illinois*: *City of Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182, in effect overruling *People v. Organ*, 27 Ill. 27, 79 Am. Dec. 391.

*Indiana*: *Richmond Mfg. Co. v. Davis*, 7 Blackf. 412.

*Iowa*: *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *Owen v. Perry*, 25 Iowa, 412, 96 Am. Dec. 49; *McCleery v. Wakefield*, 76 Iowa, 529; *McClain v. McClain*, 52 Iowa, 272.

*Maine*: *South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535.

*Minnesota*: *State v. Young*, 23 Minn. 551.

*Missouri*: *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *Burnside v. Wayman*, 49 Mo. 357; *Farmers' Bank of Concordia v. Worthington*, 145 Mo. 91; *Otis v. Browning*, 59 Mo. App. 326.

*Nebraska*: *Reed v. Morton*, 24 Neb. 760, 8 Am. St. Rep. 247; *Garland v. Wells*, 15 Neb. 298.

*New Jersey*: *Camden Bank v. Hall*, 14 N. J. Law, 583.

*New York*: *Wooley v. Constant*, 4 Johns. 54, 4 Am. Dec. 246; *Ex parte Kerwin*, 8 Cow. 118; *Forster v. Moore*, 79 Hun, 472; *Campbell v. Smith*, 71 N. Y. 26, 27 Am. Rep. 5. And see *Richards v. Day*, 137 N. Y. 183, 33 Am. St. Rep. 704; *Chauncey v. Arnold*, 24 N. Y. 330.

*Oregon*: *Cribben v. Deal*, 21 Or. 211, 28 Am. St. Rep. 746.

*Pennsylvania*: *Wiley v. Moor*, 17 Serg. & R. 438, 17 Am. Dec.



The later cases in England, however, and many of the courts in this country, have repudiated and refused to follow Lord Mansfield's decision in the case above referred to, and have held, at least in the absence of elements of estoppel,<sup>121</sup> that a deed of conveyance, bond, or other instrument under seal, executed with blanks left for the name of the grantee or obligee, or the amount, etc., and delivered either to obligee or grantee, or to an agent to be delivered by him, is void, and that it cannot be rendered valid by the subsequent filling in of the blanks under parol authority, express or implied,<sup>122</sup> since "to allow it to be afterwards filled

696; *Stahl v. Berger*, 10 Serg. & R. 170, 13 Am. Dec. 666; *Sigfried v. Levan*, 6 Serg. & R. 308, 9 Am. Dec. 427; *Bell v. Kennedy*, 100 Pa. 215. But in *Wallace v. Harmstad*, 15 Pa. 462, Chief Justice Gibson, speaking for the court, expressed grave doubts as to the correctness of Lord Mansfield's decision in *Texira v. Evans*, supra, and said that the case could not be sustained unless on the ground that the obligor was estopped.

*South Carolina*: *Duncan v. Hodges*, 4 McCord, 239, 17 Am. Dec. 734; *Lamar's Ex'rs v. Simpson*, 1 Rich. Eq. 71.

*Texas*: *Threadgill v. Butler*, 60 Tex. 599.

*West Virginia*: *Lafferty v. Lafferty*, 42 W. Va. 783.

*Wisconsin*: *Vliet v. Camp*, 13 Wis. 198; *Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 486; *Schintz v. McManamy*, 33 Wis. 301; *Nelson v. McDonald*, 80 Wis. 605, 27 Am. St. Rep. 71.

<sup>121</sup> See *infra*, this section, n. 31.

<sup>122</sup> *England*: *Hibblewhite v. McMorine*, 6 Mees. & W. 200; *Enthoven v. Hoyle*, 13 C. B. 373, 9 Eng. Law & Eq. 434; *Davidson v. Cooper*, 11 Mees. & W. 793; *Squire v. Whitton*, 1 H. L. Cas. 333.

*United States*: *United States v. Nelson*, 2 Brock. 64, Fed. Cas. No. 15,862. Compare the dictum to the contrary in *Drury v. Foster*, 2 Wall. 24.

*California*: *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Wunderlin v. Cadogan*, 50 Cal. 613; *Dolbeer v. Livingston*, 100 Cal. 617, holding a surety estopped to deny the authority of his principal to fill certain blanks in a bond.

*Colorado*: See dictum in *Palacios v. Brasher*, 18 Colo. 598.

*Georgia*: *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549. This case, however, has been in effect overruled by *Brown v. Colquitt*, 73 Ga. 59, 54 Am. Rep. 867, and *Dedge v. Branch*, 94 Ga. 37.

*Kansas*: *Ayres v. Probasco*, 14 Kan. 175.

*Kentucky*: *Lockart v. Roberts*, 3 Bibb, 361; *Bank of Limestone v. Penick*, 5 T. B. Mon. 25.

*Maryland*: *Byers v. McClanahan*, 6 Gill & J. 250.

up by an agent appointed by parol, and then delivered in the absence of the principal, as a deed, would be in violation of the principle that an attorney to execute and deliver a deed for another must himself be appointed by deed."<sup>123</sup> According to this doctrine, an agent authorized by parol merely cannot annex, after delivery of a deed, a schedule

*Massachusetts:* Burns v. Lynde, 6 Allen, 305; Basford v. Pearson, 9 Allen, 387, 85 Am. Dec. 764; Vose v. Dolan, 108 Mass. 155, 11 Am. Rep. 331. Compare, however, White v. Duggan, 140 Mass. 18, 54 Am. Rep. 437; Phelps v. Sullivan, 140 Mass. 36, 54 Am. Rep. 442.

*Michigan:* Lockwood v. Bassett, 49 Mich. 546.

*Mississippi:* Williams v. Crutcher, 5 How. 71, 35 Am. Dec. 422.

*North Carolina:* Graham v. Holt, 25 N. C. (3 Ired.) 300, 40 Am. Dec. 408; Davenport v. Sleight, 19 N. C. (2 Dev. & B.) 381, 31 Am. Dec. 420; McKee v. Hicks, 13 N. C. (2 Dev.) 379; Bland v. O'Hagan, 64 N. C. 471; Barden v. Southerland, 70 N. C. 528; Humphreys v. Finch, 97 N. C. 303, 2 Am. St. Rep. 293; Martin v. Buffalo, 121 N. C. 36.

*Ohio:* State v. Boring, 15 Ohio, 507; Famulener v. Anderson, 15 Ohio St. 478. The court in this case expressed the opinion that the law as decided in State v. Boring, *supra*, "may call for the reforming hand of legislation; but we cannot legislate."

*Tennessee:* Gilbert v. Anthony, 1 Yerg. 69, 24 Am. Dec. 439; Wynne v. Governor, 1 Yerg. 149, 24 Am. Dec. 448; Mosby v. State, 4 Sneed, 327.

*Texas:* McCown v. Wheeler, 20 Tex. 372; Viser v. Rice, 33 Tex. 139; Ragsdale v. Robinson, 48 Tex. 379.

*Virginia:* Preston v. Hull, 23 Grat. 600, 14 Am. Rep. 153; Asberry v. Calloway, 1 Wash. 73; Harrison v. Tiernans, 4 Rand. 177; Penn v. Hamlett, 27 Grat. 337.

*Washington:* Walla Walla County v. Ping, 1 Wash. T. 339.

As to the competency of parol evidence, including admissions, to show authority under seal, see post, § 64 et seq.

<sup>123</sup> Hibblewhite v. McMorine, 6 Mees. & W. 200.

In Hibblewhite v. McMorine, *supra*, decided in 1840, Baron Parke said: "The only case cited in favor of the validity of a deed in blank, afterwards filled in, is that of Texira v. Evans, cit. 1 Anst. 228, where Lord Mansfield held that a bond was valid which was given with the name of the obligee and sum in blank to a broker to obtain money upon it, and he borrowed a sum from the plaintiff, and then inserted his name and the sum. But this case is justly questioned by Mr. Preston in his edition of Shepp. Touch. 68, 'as it assumes there could be an attorney without deed'; and we think it cannot be considered to be law."

referred to in the deed as annexed, but not annexed before delivery.<sup>124</sup>

(b) **Instruments entirely blank.**—By the weight of authority, even in those jurisdictions in which it is held that authority to fill blanks in a deed may be given by parol, the rule cannot apply when a paper which has nothing of substance written thereon, but is entirely blank except for a signature and seal, is delivered by the signer to an agent with parol authority to fill it up and deliver it; and in such a case, at least if there are no elements of estoppel, the instrument, when filled up and delivered by the agent, is not a valid deed.<sup>125</sup>

(c) **Filling blanks in presence of obligor or grantor.**—The rule that authority under seal is necessary in order that an agent may fill blanks in a deed after its execution and delivery by the grantor or obligor, where such rule is recognized, does not apply when blanks are filled up in the presence and by direction or authority of the grantor or obligor, for in such a case it is regarded in law as his own act.<sup>126</sup>

(d) **Immaterial matters.**—Nor does the rule apply where the blanks filled up are in no way material to the operation of the deed, so that without them it is complete as to the grantor or obligor.<sup>127</sup> A complete bond is not rendered

<sup>124</sup> *Weeks v. Maillardet*, 14 East, 568.

<sup>125</sup> *Perminter v. McDaniel*, 1 Hill (S. C.) 267, 26 Am. Dec. 179; *Ayres v. Harness*, 1 Ohio, 368, 13 Am. Dec. 629; *Smith v. Dickenson*, 6 Humph. (Tenn.) 261, 44 Am. Dec. 306; *Gilbert v. Anthony*, 1 Yerg. (Tenn.) 69, 24 Am. Dec. 439; *Lockart v. Roberts*, 3 Bibb. (Ky.) 361; *Simms v. Hervey*, 19 Iowa, 273; *Byers v. McClanahan*, 6 Gill & J. (Md.) 250. Contra, *Wiley v. Moor*, 17 Serg. & R. (Pa.) 438, 17 Am. Dec. 696.

<sup>126</sup> *Hudson v. Revett*, 5 Bing. 368; *Hibblewhite v. McMorine*, 6 Mees. & W. 200; *People v. Organ*, 27 Ill. 27, 79 Am. Dec. 391; *Burns v. Lynde*, 6 Allen (Mass.) 305.

<sup>127</sup> *Doe d. Lewis v. Bingham*, 4 Barn. & Ald. 672; *Vose v. Dolan*, 108 Mass. 155, 11 Am. Rep. 331; *Murray v. Klinzing*, 64 Conn. 78; *Martin v. Buffaloe*, 121 N. C. 34. A complete and operative power of attorney under seal is not invalidated by the insertion of the attorney's Christian name in the absence of the principal. *Eagleton v. Gutteridge*, 11 Mees. & W. 465.

void by the subsequent addition of another obligor with the consent of all the parties.<sup>128</sup>

(e) **Adoption and redelivery by the grantor or obligor.**—Nor does the rule apply where, after blanks in a deed are filled in by an agent under parol authority, the grantor or obligor adopts it as completed and redelivers it; and he may authorize an agent by parol to redeliver it, or impliedly deliver it himself by recognizing it as his deed in the hands of the grantee or obligee.<sup>129</sup>

(f) **Rejection of seal as surplusage.**—Nor does the rule apply where the seal on the instrument is not necessary, so that it may be disregarded as surplusage; and even where the seal is necessary it may be disregarded in equity, and the instrument treated as a parol contract.<sup>130</sup>

(g) **Estoppel of obligor or grantor.**—Assuming, as held by many courts, that a person cannot properly deliver an incomplete bond, deed of conveyance, or other instrument under seal, to his agent, with parol authority to fill blanks therein and deliver it, there is no good reason why the grantor or obligor should not be held estopped to deny the validity of the instrument, as completed and delivered by the agent, if there are sufficient grounds for applying the doctrine of equitable estoppel. According to the decided weight of authority, therefore, if a person delivers to his agent a bond or deed executed in blank, with parol authority to fill in the blanks and deliver the instrument to a lender of money or purchaser of land, etc., and the agent fills in the blanks and delivers the instrument to one who parts with money or otherwise changes his position on the faith of the instrument, the obligor or grantor will be estopped, as against him, or bona fide purchasers from him, to deny that the instrument was completely and validly executed by him before its de-

<sup>128</sup> *Matson v. Booth*, 5 Maule & S. 223.

<sup>129</sup> *Wester v. Bailey*, 118 N. C. 193; *Tucker v. Allen*, 16 Kan. 312; *Pequawkett Bridge v. Mathes*, 7 N. H. 230, 26 Am. Dec. 737; *Lockart v. Roberts*, 3 Bibb (Ky.) 361; *Lockwood v. Bassett*, 49 Mich. 546; *Bassett v. Bassett*, 55 Me. 127; *Duncan v. Hodges*, 4 McCord (S. C.) 239, 17 Am. Dec. 734. See *supra*, this section.

<sup>130</sup> *Blacknall v. Parish*, 59 N. C. (6 Jones Eq.) 70, 78 Am. Dec. 239; *McCown v. Wheeler*, 20 Tex. 372; *Viser v. Rice*, 33 Tex. 139.

livery.<sup>131</sup> And this is true even when the agent inserts a larger amount in filling the blank, or otherwise departs from his instructions.<sup>132</sup> Of course no estoppel can properly arise where the obligee or grantee takes the instrument with actual knowledge that the blanks have been filled in by the agent under parol authority,<sup>133</sup> or, it would seem, if he knows that they have been filled by the agent, whether he knows the nature of his authority or not, for he should require evidence of his authority.<sup>134</sup>

(h) **Implied authority.**—We are here dealing with the filling of blanks in deeds on the assumption that there is parol authority, and merely with regard to the sufficiency of such authority. The question whether and when such authority is to be implied will be considered in subsequent sections.<sup>135</sup>

#### § 54. Acknowledgment and recording of powers of attorney.

A power of attorney need not be acknowledged or recorded, unless it is so required by some statute. This is true of powers of attorney to confess judgment,<sup>136</sup> to convey, mortgage, or lease lands,<sup>137</sup> or to do any other act. It is not nec-

<sup>131</sup> *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *McCleery v. Wakefield*, 76 Iowa, 529; *White v. Duggan*, 140 Mass. 18, 54 Am. Rep. 437; *Phelps v. Sullivan*, 140 Mass. 36, 54 Am. Rep. 442; *Reed v. Morton*, 24 Neb. 760, 8 Am. St. Rep. 247; *Bangs v. Bangs*, 41 Hun (N. Y.) 41, 54 Am. Rep. 440, note; *Russell v. Freer*, 56 N. Y. 67, 71; *Campbell v. Smith*, 71 N. Y. 26, 27 Am. Rep. 5; *Humphreys v. Finch*, 97 N. C. 303, 2 Am. St. Rep. 293; *Ragsdale v. Robinson*, 48 Tex. 397; *Nelson v. McDonald*, 80 Wis. 605, 27 Am. St. Rep. 71. See, also, *Davis v. Lee*, 26 Miss. 505, 59 Am. Dec. 267. Contra, *Preston v. Hull*, 23 Grat. (Va.) 600, 14 Am. Rep. 153. And see *United States v. Nelson*, 2 Brock. 64, Fed. Cas. No. 15,862; *People v. Bostwick*, 43 Barb. 9, 32 N. Y. 445.

<sup>132</sup> *White v. Duggan*, 140 Mass. 18, 54 Am. Rep. 437; *Nelson v. McDonald*, 80 Wis. 605, 27 Am. St. Rep. 71; and other cases cited in the note preceding.

<sup>133</sup> *Basford v. Pearson*, 9 Allen (Mass.) 387, 85 Am. Dec. 764 (as construed in *White v. Duggan*, 140 Mass. 18, 54 Am. Rep. 437).

<sup>134</sup> See *White v. Duggan*, *supra*; *Preston v. Hull*, 23 Grat. (Va.) 600, 14 Am. Rep. 153.

<sup>135</sup> See post, § 225 et seq.

<sup>136</sup> *Boos v. Morgan*, 130 Ind. 305, 30 Am. St. Rep. 237.

<sup>137</sup> *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715;

essary to the validity of a power of attorney authorizing an agent to agree in writing to sell lands, and bind his principal to convey them, that it shall be proved or acknowledged and recorded.<sup>138</sup> In some jurisdictions, however, it is expressly required that powers of attorney for particular purposes, as a power of attorney to convey or mortgage lands, for example, should be acknowledged and recorded like deeds of land.<sup>139</sup> It has been held, however, that a power of attorney to convey or mortgage land is none the less valid as between the parties and as against the party executing it, because it was not recorded as required by statute, the requirement being intended for the benefit and protection of purchasers.<sup>140</sup>

#### IV. AGENCY BY ESTOPPEL

##### § 55. In general.

It is a well established doctrine that if a person by his words or conduct expressly or impliedly represents to another that a certain state of facts exists, and thereby induces the other to act in reliance on such representation, he will be

*Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; *Tyrrell v. O'Connor*, 56 N. J. Eq. 448.

<sup>138</sup> *Tyrrell v. O'Connor*, 56 N. J. Eq. 448; *Moore v. Pendleton*, 16 Ind. 481.

<sup>139</sup> *Carnall v. Duval*, 22 Ark. 136; *Du Val v. Johnson*, 39 Ark. 182; *Doe d. Tenant v. Blacker*, 27 Ga. 418; *Moore v. Farrow*, 3 A. K. Marsh. (Ky.) 41; *Montgomery v. Dorion*, 6 N. H. 250; *Gage v. Gage*, 30 N. H. 420. It is not necessary that a power of attorney shall be executed in the presence of the officer before whom it is acknowledged, or that he shall know that the signature was written by the grantor. If the grantor acknowledges before the officer the due execution of the instrument, he thereby recognizes and adopts the signature as his own. *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273.

As to the sufficiency of the acknowledgment of a deed executed by a person as attorney in fact for the grantor, see post, § 293 et seq.

<sup>140</sup> *Bergen v. Bennett*, 1 Caines' Cas. (N. Y.) 17, 2 Am. Dec. 281; *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; *Delano v. Jacoby*, 96 Cal. 275, 31 Am. St. Rep. 201. Although a mortgage executed under a power of attorney is void as to subsequent purchasers of the mortgagor's estate, unless the power of attorney is recorded with the mortgage, yet, as between the parties to it, the mortgage is good. *Du Val v. Johnson*, 39 Ark. 182.

estopped to deny the truth of the representation to the other's prejudice. And by the application of this doctrine, an agency may be created or arise by estoppel, irrespective of the actual intention, and even though it may be conceded that there was no agency in fact. The general rule is this: If a person knowingly permits another to act for him in a particular transaction, or otherwise clothes him, either intentionally or by negligence, with apparent authority to act for him therein, he will be estopped to deny the agency as against third persons who, in good faith and in the exercise of reasonable prudence, deal with the apparent agent in the belief that his apparent authority is real.<sup>141</sup> "Where one,

*141 England:* Pole v. Leask, 9 Jur. (N. S.) 829, 33 Law J. Ch. 155; Brockelbank v. Sugrue, 5 Car. & P. 21; Pickering v. Busk, 15 East, 38; Debenham v. Mellon, 5 Q. B. Div. 403; Thompson v. Bell, 10 Exch. 10.

*United States:* Bronson's Ex'r v. Chappell, 12 Wall. 681; Kirk v. Hamilton, 102 U. S. 68; Martin v. Webb, 110 U. S. 7, 15; Traveler's Ins. Co. v. Edwards, 122 U. S. 457, 468; Johnson v. Christian, 128 U. S. 374; Pennsylvania R. Co. v. Atha, 22 Fed. 920.

*Alabama:* Reynolds v. Collins, 78 Ala. 94; Gibson v. Snow Hardware Co., 94 Ala. 346; Burke v. Taylor, 94 Ala. 530; Tennessee River Transportation Co. v. Kavanaugh Bros., 101 Ala. 1.

*Arkansas:* Leake v. Sutherland, 25 Ark. 219.

*California:* Quinn v. Dresbach, 75 Cal. 159, 7 Am. St. Rep. 138; Goetz v. Goldbaum (Cal.) 37 Pac. 646; Heald v. Hendy, 89 Cal. 632. And see Ruddock Co. v. Johnson, 135 Cal. xix, 67 Pac. 680.

*Colorado:* Gauthier Decorating Co. v. Ham, 3 Colo. App. 559; Farrer v. Caster (Colo. App.) 67 Pac. 171.

*Connecticut:* Eagle Bank v. Smith, 5 Conn. 71, 13 Am. Dec. 37; Paine v. Tillinghast, 52 Conn. 532; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384.

*Georgia:* Weaver v. Ogletree, 39 Ga. 586; Florida Midland & G. R. Co. v. Varnedoe, 81 Ga. 175.

*Idaho:* Morgan v. Neal (Idaho) 65 Pac. 66.

*Illinois:* St. Louis & Memphis Packet Co. v. Parker, 59 Ill. 23; Thurber v. Anderson, 88 Ill. 167; Morris v. Preston, 93 Ill. 215; Pardridge v. La Pries, 84 Ill. 51.

*Indiana:* Pursley v. Morrison, 7 Ind. 356, 63 Am. Dec. 424; Pittsburgh, C. & St. L. R. Co. v. Berryman, 11 Ind. App. 640; Croy v. Busenbark, 72 Ind. 48; Lake Shore & M. S. R. Co. v. Foster, 104 Ind. 293, 54 Am. Rep. 319.

*Iowa:* Sax v. Drake, 69 Iowa, 760.

*Kansas:* Hill v. Wand, 47 Kan. 340, 27 Am. St. Rep. 288.

without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exists, in all re-

*Louisiana:* Meyer v. King, 29 La. Ann. 567.

*Maryland:* Rimmey v. Getterman, 63 Md. 424.

*Massachusetts:* Arnold v. Spurr, 130 Mass. 347; Com. v. Holmes, 119 Mass. 195.

*Michigan:* Lyell v. Sanbourn, 2 Mich. 109; Simon v. Brown, 38 Mich. 552; Cooper v. Mulder, 74 Mich. 374.

*Minnesota:* Wilcox v. Chicago, M. & St. P. R. Co., 24 Minn. 269; Stevens v. Ludlum, 46 Minn. 160; Graves v. Horton, 38 Minn. 66; Western Land Ass'n v. Banks, 80 Minn. 317; Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224.

*Missouri:* De Baun v. Atchison, 14 Mo. 543; Cupples v. Whelan, 61 Mo. 583; Johnson v. Hurley, 115 Mo. 513; Rice v. Groffmann, 56 Mo. 434; Summerville v. Hannibal & St. J. R. Co., 62 Mo. 391; Hoppe v. Saylor, 53 Mo. App. 4; Suddarth v. Empire Lime Co., 79 Mo. App. 592.

*Nebraska:* Starring v. Mason, 4 Neb. 367; Allsman v. Richmond, 55 Neb. 540.

*New Jersey:* Columbia Del. Bridge Co. v. Geisse, 38 N. J. Law, 39; Morris v. Joyce, 63 N. J. Eq. 549.

*New York:* Bickford v. Menier, 107 N. Y. 490; Brookhaven v. Smith, 118 N. Y. 634; Crane v. Gruenewald, 120 N. Y. 274, 17 Am. St. Rep. 643; Anderson v. Supreme Council, 135 N. Y. 107; Han-non v. Siegel-Cooper Co., 167 N. Y. 244; Cosmopolitan Range Co. v. Midland Railroad Terminal Co., 44 App. Div. 467.

*North Carolina:* James v. Russell, 92 N. C. 194.

*Pennsylvania:* Hubbard v. Ten Brook, 124 Pa. 291, 10 Am. St. Rep. 585; Franklin Fire Ins. Co. v. Bradford, 201 Pa. 32, 88 Am. St. Rep. 770; Emerson v. Miller, 27 Pa. 278. And see Hill v. National Trust Co., 108 Pa. 1, 56 Am. Rep. 189.

*Texas:* Collins v. Cooper, 65 Tex. 464; McAlpin v. Cassidy, 17 Tex. 449; Morgan v. Darragh, 39 Tex. 171; Elsner v. State, 30 Tex. 524.

*Utah:* Garner v. Fisher Brew. Co., 6 Utah, 332.

*Vermont:* Tier v. Lampson, 35 Vt. 179, 82 Am. Dec. 634; Walsh v. Pierce, 12 Vt. 130; Fay v. Richmond, 43 Vt. 25.

*Virginia:* Hooe v. Oxley, 1 Wash. 19, 1 Am. Dec. 425; Hardin v. Alexandria Ins. Co., 90 Va. 413.

*Washington:* Hart v. Niagara Fire Ins. Co., 9 Wash. 620, 27 L. R. A. 86.

*Wisconsin:* Lavassar v. Washburne, 50 Wis. 200; Chicago & N. W. R. Co. v. James, 22 Wis. 194.



spects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion. He is estopped to take refuge in such a defense. If a loss is to be borne, the author of the error must bear it."<sup>142</sup>

This principle also applies, as we shall hereafter see more at length, when the relation of principal and agent is conceded, but it is contended by the principal that the agent exceeded his authority in a particular transaction; the general rule being that a principal is bound by the acts of his agent within the apparent scope of his authority, although the agent may in fact have exceeded his authority, where he was clothed with such apparent authority by the principal, and the other party acted in good faith and in the exercise of reasonable prudence, and in reliance on such apparent authority.<sup>143</sup>

An agency by estoppel may sometimes be confused with an agency by an implied appointment, and though in some cases the evidence which establishes an agency by estoppel will be sufficient to establish an agency by implication, there is a distinction between the two, which may be briefly stated to be this: In an implied agency the principal in fact intends to appoint the agent to do the acts in question though this intention is implied from the acts and conduct of the principal. In an agency by estoppel the principal does not in fact intend to appoint the agent, for the acts in question, but by his acts or conduct, in permitting the agent to have such authority, which another has acted upon in good faith, the law implies that he intends to appoint such agent, and estops him to deny it, to the prejudice of one dealing with him.<sup>144</sup>

<sup>142</sup> *Bronson's Ex'r v. Chappell*, 12 Wall. (U. S.) 681.

<sup>143</sup> See post, § 195 et seq.

<sup>144</sup> *Columbia Mill Co. v. National Bank of Commerce*, 52 Minn. 224.

**§ 56. Illustrations of agency by estoppel.**

If a person knowingly allows another to carry on a particular business in his name, as his agent, without anything to show that the property and business is not in fact his, he will become liable by estoppel to persons who may deal with such other person in reliance on the apparent agency.<sup>145</sup> If a person allows another to habitually sign his name to notes or make other contracts in his name, and recognizes them as binding, persons may assume the existence of a continuous agency for this purpose, and the person in whose name such contracts are made will be liable, although there may have been no authority in fact in the particular transaction.<sup>146</sup> A person is bound by a contract made by another in his name if he stood by and knowingly allowed him to do so without objection.<sup>147</sup> If a person knowingly allows another to collect moneys for him, he will be estopped to deny his authority, and will be bound by a payment to the apparent agent although there may have been no authority in fact.<sup>148</sup>

And if one places another in possession of his realty,<sup>149</sup> or gives him custody of his personalty,<sup>150</sup> he will be estopped to deny the agency of such other to do acts in reference to such property within the apparent scope of his authority.

<sup>145</sup> *Thomas v. Moody*, 57 Cal. 215; *Goetz v. Goldbaum* (Cal.) 37 Pac. 646; *Parker v. Freeman*, 11 Colo. 576; *Florida Midland & G. R. Co. v. Varnedoe*, 81 Ga. 175; *Pursley v. Morrison*, 7 Ind. 356, 63 Am. Dec. 424; *Thomas v. Wells*, 140 Mass. 517; *White v. Leighton*, 15 Neb. 424; *Gilbraith v. Lineberger*, 69 N. C. 145; *Garner v. A. Fisher Brew. Co.*, 6 Utah, 332; *Hardin v. Alexandria Ins. Co.*, 90 Va. 413.

<sup>146</sup> *Weaver v. Ogletree*, 39 Ga. 586; *Thurber v. Anderson*, 88 Ill. 167; *Pursley v. Morrison*, 7 Ind. 356, 63 Am. Dec. 424; *Hill v. National Trust Co.*, 108 Pa. 1, 56 Am. Rep. 189; *Tier v. Lampson*, 35 Vt. 179, 82 Am. Dec. 634; *Hooe v. Oxley*, 1 Wash. (Va.) 19, 1 Am. Dec. 425; *Abeel v. Seymour*, 6 Hun (N. Y.) 656; *Columbia Mill Co. v. National Bank of Commerce*, 52 Minn. 224.

<sup>147</sup> *James v. Russell*, 92 N. C. 194.

<sup>148</sup> *Quinn v. Dresbach*, 75 Cal. 159, 7 Am. St. Rep. 138; *Sax v. Drake*, 69 Iowa, 760; *Simon v. Brown*, 38 Mich. 552.

<sup>149</sup> *Johnson v. Johnson*, 80 Ga. 260; *Goss v. Helbing*, 77 Cal. 190; *Hill v. Wand*, 47 Kan. 340, 27 Am. St. Rep. 288.

<sup>150</sup> *Bynum v. Miller*, 89 N. C. 393; *Hansell v. Levy*, 5 Houst. (Del.) 407.

If the principal send his personalty to one who is accustomed to sell such property, it must be intended that the personalty was sent thither for the purpose of sale; and where it is sent in such a way as to exhibit an apparent purpose of sale, the principal will be estopped to deny the authority of such person to sell as his agent.<sup>151</sup>

Authority to receive payment of a note, mortgage, or other debt may be implied, and the creditor estopped to deny the same, if he intrusts another with the possession of the note, mortgage, or other evidence of the debt, and there are other circumstances tending to show that the possession is so intrusted to the other for the purpose of collection, as where he is the same person who, as agent, negotiated a loan for which the security was given, or where he has been in the habit of making such collections, etc.<sup>152</sup> So where one intrusts another with necessary papers, he may be estopped to deny the agency of such other to make a loan thereon, and to deliver them to the indorser, either absolutely or as collateral.<sup>153</sup>

**§ 57. Application of this doctrine to private corporations.**

The doctrine of estoppel is as applicable to private corporations as to individuals, and a corporation like a natural person may be estopped to deny the authority of a person to act as its agent, by reason of knowingly allowing him to act as having authority.<sup>154</sup> Thus, if a person acts on

<sup>151</sup> *Pickering v. Busk*, 15 East, 38; *First Nat. Bank v. Schween*, 127 Ill. 573. But a person is not estopped by negligence, as a matter of law, from asserting his ownership of bonds, which he has intrusted for safekeeping only, to brokers whose business it is to buy and sell securities, where the bonds were not intrusted to them in that capacity, and where a sale by the brokers could only be accomplished through the commission of a felony. *Scolans v. Rollins*, 173 Mass. 275, 73 Am. St. Rep. 284.

<sup>152</sup> *Crane v. Grunewald*, 120 N. Y. 274, 17 Am. St. Rep. 643; *Stiger v. Bent*, 111 Ill. 328; *Haines v. Pohlmann*, 25 N. J. Eq. 179. Compare *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502.

<sup>153</sup> *Morris v. Joyce*, 63 N. J. Eq. 549.

<sup>154</sup> *Smith v. Hull Glass Co.*, 11 C. B. 897; *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623; *Home Life Ins. Co. v. Pierce*, 75 Ill. 426; *Sherman Center Town Co. v. Swigart*, 43 Kan.

behalf of a corporation with its knowledge and acquiescence, or what is the same thing, with the knowledge and assent of its directors or officers, it is bound by the acts and contracts of such person in like manner as if he had acted under an appointment by formal vote, or by an instrument under the corporate seal.<sup>155</sup>

**§ 58. Application of this doctrine where a state or municipality is principal.**

This doctrine of estoppel, however, has no application where a sovereign state is principal. Equitable estoppel rests upon an implication of fraud in the party sought to be estopped, and fraud ought not to be imputed to the sovereign. The state can act only under its constitution and through its legislative enactments pursuant thereto, and if it could be estopped to assert the truth, the effect might be to fix upon the state responsibilities in conflict with its constitution and laws. All men are bound to take notice of this special authority of a state's officers or agents, and when dealing with them outside their authority they assume the peril with their eyes open, and cannot be heard to say that they placed reliance upon the state. The question is not one of intention, but of power; and if the officer or agent has not power to act, his action is not state action, and so affords no basis upon which to predicate estoppel against the state;<sup>156</sup> and the fact that the unauthorized acts are

292, 19 Am. St. Rep. 137; *Badger v. Cumberland Bank*, 26 Me. 428; *Santa Clara Min. Ass'n v. Meredith*, 49 Md. 389, 33 Am. Rep. 264; *Goodwin v. Union Screw Co.*, 34 N. H. 378; *Henderson v. San Antonio & M. G. R. Co.*, 17 Tex. 560, 67 Am. Dec. 675. And see *Clark & M. Corp.*, 507.

<sup>155</sup> *Sherman v. Fitch*, 98 Mass. 59; *Goodwin v. Union Screw Co.*, 34 N. H. 378.

<sup>156</sup> *State v. Brewer*, 64 Ala. 287; *Pulaski County v. State*, 42 Ark. 118; *Mullan v. State*, 114 Cal. 578; *People v. Brown*, 67 Ill. 435; *Dement v. Rokker*, 126 Ill. 174; *State v. Jones*, 95 Ind. 175, 179; *McCaslin v. State*, 99 Ind. 428; *State v. Portsmouth Sav. Bank*, 106 Ind. 435; *Casey v. Inloes*, 1 Gill (Md.) 430, 39 Am. Dec. 658; *Attorney General v. Marr*, 55 Mich. 446; *Taylor v. Shufford*, 11 N. C. (4 Hawks) 116, 15 Am. Dec. 512; *Doe d. Wallace v. Maxwell*, 32 N. C. (10 Ired.) 110, 51 Am. Dec. 380; *State v. Bevers*, 86 N.

beneficial to the state will not estop it to deny their invalidity.<sup>157</sup> Thus, the unauthorized act of a state officer in accepting, indorsing, and negotiating a note, and placing the proceeds to the credit of the state, does not estop the latter from showing that his act was unauthorized.<sup>158</sup> The only way in which a state may be estopped is by her own legislative enactment or resolution.<sup>159</sup> In some of the cases cited in the last note, it is said that the state, as well as individuals, may be estopped by its acts, conduct, silence, and acquiescence, but this statement must be taken in a limited sense only. The cases in which this language was used, were cases in which the state was estopped by reason of some legislative enactment or resolution, or some other act equivalent thereto. It is not correct to broadly say that the state is estopped to deny an agency, which is apparently authorized by it, as in the case of individuals, but such agency must have been brought about by a legislative enactment or resolution, or equivalent act, and the acts performed thereunder.

This exception to the general rule also applies to municipal corporations when in the discharge of governmental functions or duties. A municipal corporation while discharging its governmental functions, is in fact an agent of the gov-

C. 538; *Salem Improvement Co. v. McCourt*, 26 Or. 93; *Carolina Nat. Bank v. State*, 60 S. C. 465, 85 Am. St. Rep. 865; *State v. Chilton*, 49 W. Va. 453.

<sup>157</sup> *Filor v. United States*, 9 Wall. (U. S.) 45; *State v. Portsmouth Sav. Bank*, 106 Ind. 436. The state cannot be estopped from asserting title to its lands by the unauthorized acts of ministerial officers, in assessing taxes upon such lands and collecting the amounts from those claiming them, even though the sums collected have been appropriated to the public use. *State v. Portsmouth Sav. Bank*, 106 Ind. 436, and cases cited.

<sup>158</sup> *Carolina Nat. Bank v. State*, 60 S. C. 465, 85 Am. St. Rep. 865.

<sup>159</sup> *United States v. Missouri, K. & T. R. Co.*, 37 Fed. 68; *United States v. McLaughlin*, 30 Fed. 147; *United States v. Dalles Military Road Co.*, 41 Fed. 493; *United States v. Scott*, 38 Fed. 393; *Alexander v. State*, 56 Ga. 478; *McCaslin v. State*, 99 Ind. 428; *State v. New Orleans, C. & L. R. Co.*, 104 La. 685; *State v. Ober*, 34 La. Ann. 359; *State v. Taylor*, 28 La. Ann. 462; *Com. v. Andre's Heirs*, 3 Pick. (Mass.) 224; *State v. Flint & P. M. R. Co.*, 89 Mich. 481; *Attorney General v. Ruggles*, 59 Mich. 124.

ernment, and what it does in such capacity is in fact acts of the government. It is a general rule, therefore, that a municipal corporation cannot be estopped by the unauthorized acts of its officers or agents while in the discharge of governmental functions.<sup>160</sup> As has been said: "It is a fundamental principle that a governmental corporation is not estopped by the act of an officer in cases where the act is beyond the scope of his authority."<sup>161</sup> A municipal corporation, however, occupies a dual capacity, and there are certain duties it has to perform, which, although public in their nature, are not duties owing to the government, or in other words are not duties which it has to perform as an agent of the government. In the discharge of these duties it may enter into contracts, and may delegate to others the power to perform such duties. In reference to these duties, then, a municipal corporation, by its acts, may be estopped to deny that it delegated to an agent the power of binding it.<sup>162</sup>

**§ 59. Limitations of the doctrine of agency by estoppel.**

(a) **Intent and knowledge.**—To give rise to an agency by estoppel, in accordance with the doctrine above stated, it is not at all necessary that there shall have been any fraud or intent to deceive on the part of the alleged principal.<sup>163</sup> Such an estoppel may be based upon negligence. It is necessary, however, that some fault shall be imputable to him, or rather, that the false appearance of authority shall be attributable to him. He must have held out the alleged agent or allowed him to appear as having authority, and therefore he must have had some knowledge of the facts, or be charge-

<sup>160</sup> *Rissing v. Ft. Wayne*, 137 Ind. 427; *McGillivray v. District Township of Barton*, 96 Iowa, 629; *New Orleans v. Tulane Educational Fund*, 46 La. Ann. 861; *Lincoln v. Stockton*, 75 Me. 141; *St. Louis v. Gorman*, 29 Mo. 593, 77 Am. Dec. 586; *Huron Waterworks Co. v. Huron*, 7 S. D. 9, 58 Am. St. Rep. 817; *Nashville v. Hagan*, 9 Baxt. (Tenn.) 495.

<sup>161</sup> *Union School Tp. v. First Nat. Bank*, 102 Ind. 464.

<sup>162</sup> *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495; *New Haven, M. & W. R. Co. v. Chatham*, 42 Conn. 465; *Chicago v. Sexton*, 115 Ill. 230; *Allegheny City v. McClurkan*, 14 Pa. 81.

<sup>163</sup> *Johnson v. Christian*, 128 U. S. 374; *Trustees of Brookhaven v. Smith*, 118 N. Y. 634; *Stevens v. Ludlum*, 46 Minn. 160.

able with knowledge. If a person holds himself out as the agent of another, without authority, or assumes to act as agent without authority, but without the consent or knowledge of the person for whom he acts, the latter is not estopped and cannot be held liable in the absence of a ratification.<sup>164</sup>

(b) **Necessity for appearance of authority.**—Of course, a person cannot be estopped to deny that another was his agent merely because a third person has dealt with the latter as such, if the circumstances were not such as to clothe the alleged agent with an apparent authority.<sup>165</sup> The doctrine in relation to agency by estoppel does not apply unless the person dealing with the pretended agent and invoking the doctrine, relied upon and was misled by his apparent authority, or, in other words, unless he was misled by the representation or conduct of the alleged principal. It does not apply, therefore, if he relied upon and was misled by false representations of authority made to him by the agent.<sup>166</sup> He must have been actually misled and induced to act to his prejudice by reason of the principal's conduct, he having on his part exercised due diligence to ascertain the truth.<sup>167</sup> If a person falsely assumes authority to collect a debt as agent for the creditor, and the debtor pays the same merely on his representation that he has authority, the pretended agent not having possession of the evidence of the debt, and the

<sup>164</sup> *Edwards v. Dooley*, 120 N. Y. 540; *First Nat. Bank v. Council Bluffs City Water-Works Co.*, 56 Hun (N. Y.) 412; *Empire State Nail Co. v. Faulkner*, 55 Fed. 819; *St. Louis, I. M. & S. R. v. Bennett*, 53 Ark. 208, 22 Am. St. Rep. 187.

<sup>165</sup> *Coleman v. Riches*, 24 Law J. C. P. 125; *Smith v. McGuire*, 3 Hurl. & N. 554; *Thurber v. Cecil Nat. Bank*, 52 Fed. 513; *Warren v. Tinsley*, 53 Fed. 689; *Owings v. Hull*, 9 Pet. (U. S.) 607; *Harris v. San Diego Flume Co.*, 87 Cal. 526; *Robinson v. Nevada Bank*, 81 Cal. 106; *Gosliner v. Grangers' Bank*, 124 Cal. 225; *Plant v. McEwen*, 4 Conn. 544; *Williams v. Merritt*, 23 Ill. 623; *Ruppe v. Edwards*, 52 Mich. 411; *Eckart v. Roehm*, 43 Minn. 271; *McGoldrick v. Willits*, 52 N. Y. 612; *Crane v. Gruenewald*, 120 N. Y. 274, 17 Am. St. Rep. 643; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Wooding's Ex'r v. Bradley's Ex'r*, 76 Va. 614.

<sup>166</sup> *Crane v. Gruenewald*, 120 N. Y. 274, 17 Am. St. Rep. 643; *Rathbun v. Snow*, 123 N. Y. 343; *Harris v. San Diego Flume Co.*, 87 Cal. 526. And see *McGoldrick v. Willits*, 52 N. Y. 612.

<sup>167</sup> *Davidson v. Jennings*, 27 Colo. 187, 83 Am. St. Rep. 49.

creditor having done nothing to clothe him with apparent authority, the creditor is not bound, for there are no elements of estoppel.<sup>168</sup> The creditor is not estopped in such a case by the mere fact that the debt was originally contracted through the pretended agent, or by the fact that, in special cases, he has previously been authorized to collect other debts.<sup>169</sup> The mere fact that the pretended agent had previously had possession of the particular securities, and had received payments thereon of principal or interest, does not estop the creditor with respect to payments made after revocation of the prior authority and withdrawal of the securities.<sup>170</sup> It has even been held that mere possession of a note by another than the payee is not sufficient to give him implied authority to collect the same, so as to estop the holder, where the note is not indorsed by the latter and there are no circumstances other than the bare possession to clothe him with apparent authority.<sup>171</sup> Authority to collect a debt is not implied, so as to estop the creditor, merely from possession of a copy of the account by the person claiming to have such authority.<sup>172</sup> An officer receiving a writ of attachment for service is not thereby clothed with any apparent authority to receive payment on the demand, and if he does receive a payment he holds the money as the agent of the debtor until he actually pays it to the creditor.<sup>173</sup>

<sup>168</sup> *Wooding's Ex'r v. Bradley's Ex'r*, 76 Va. 614; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Cooley v. Willard*, 34 Ill. 68, 85 Am. Dec. 296.

<sup>169</sup> *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Werth v. Ollis*, 70 Mo. App. 318.

<sup>170</sup> *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157.

<sup>171</sup> *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502; *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325.

<sup>172</sup> *Dutcher v. Beckwith*, 45 Ill. 460, 92 Am. Dec. 232. See, also, *Emerson v. Miller*, 27 Pa. 278. The fact that a person had in his possession an account or statement of goods sold by defendant to the plaintiff, of which he was demanding payment, was not sufficient proof of agency upon which to charge defendants with tortious acts and declarations respecting the same. *Swofford Bros. Dry Goods Co. v. Berkowitz*, 7 Kan. App. 24.

<sup>173</sup> *Wainwright v. Webster*, 11 Vt. 576, 34 Am. Dec. 707.



(c) **Necessity for reliance on apparent authority.**—Although there may have been an appearance of authority, the person seeking to hold the alleged principal liable must have acted in good faith, and must have believed in the existence of the alleged agency.<sup>174</sup> Thus, if the alleged agency was for an illegal purpose, there can be no presumption that the agent was appointed for such a purpose, and there would be no estoppel if the third party relied on such appearance of authority, for he would not be acting in good faith.<sup>175</sup>

**§ 60. Implied authority to fill blanks in written instruments.**

(a) **In general.**—Some courts, as we have seen, hold that parol authority is not sufficient to authorize an agent to fill a blank in a deed, but that such authority must be under seal, while other courts hold that parol authority is sufficient.<sup>176</sup> Where the latter doctrine obtains, authority to fill blanks in a deed may be implied, and the grantor or obligor may be estopped by his conduct from denying such authority. In all jurisdictions this is true of promissory notes and other instruments not under seal. Whether such authority is to be implied in a particular case depends upon the circumstances. Where authority to fill blanks may be given by parol, and implied from circumstances, a person may be estopped by his conduct from denying such authority. And, aside from any question of agency at all, a person who intrusts another with or issues an instrument containing blanks, may be estopped, as against innocent third persons, from asserting that the blanks were not filled at the time the instrument left his hands.

(b) **Instruments not under seal.**—If a person signs his name to a bill or note or other instrument containing blanks

<sup>174</sup> Norton v. Richmond, 93 Ill. 367; Gosliner v. Grangers' Bank, 124 Cal. 225; Bickford v. Menier, 107 N. Y. 490; Crane v. Gruenewald, 120 N. Y. 274, 17 Am. St. Rep. 643; Western Land Ass'n v. Banks, 80 Minn. 317; Dugan v. Lyman (N. J. Eq.) 23 Atl. 657; Clark v. Dillman, 108 Mich. 625; Ladd v. Grand Isle, 67 Vt. 172; Friedlander v. Hillcoat (Tex.) 14 S. W. 786.

<sup>175</sup> Empire State Nall Co. v. Faulkner, 55 Fed. 819; Owings v. Hull, 9 Pet. (U. S.) 607.

<sup>176</sup> Ante, § 53.

which must be filled up to perfect the instrument, and delivers it in that condition to another, he impliedly authorizes the other to fill it up in any manner he pleases, not inconsistent with the character of the instrument, and he will be liable accordingly to any person who takes the instrument, after it is filled out, for value and without notice of any limitations upon such apparent authority. And if a person signs a blank piece of paper and delivers it to another, for the purpose of enabling the latter to fill it out by writing thereon a note or other contract, he will be liable, by estoppel, to innocent third persons who take the instrument after it has been filled up, notwithstanding it may have been filled up contrary to instructions and in excess of the actual authority conferred. These propositions are abundantly supported by authority.<sup>177</sup> "The principle running through all the

<sup>177</sup> *England*: Russel v. Langstaffe, 2 Doug. 514; Awde v. Dixon, 6 Exch. 869; Cruchley v. Clarence, 2 Maule & S. 90; Collis v. Emmett, 1 H. Bl. 312; In re Tahiti Cotton Co., L. R. 17 Eq. 273.

*United States*: Violet v. Patton, 5 Cranch, 142; Bank of Pittsburgh v. Neal, 22 How. 107.

*Alabama*: Roberts v. Adams, 8 Port. 297, 33 Am. Dec. 291; Herbert v. Huie, 1 Ala. 18, 34 Am. Dec. 755; Robertson v. Smith, 18 Ala. 220.

*California*: Visher v. Webster, 8 Cal. 109.

*Connecticut*: Norwich Bank v. Hyde, 13 Conn. 279; Bridgeport Bank v. New York & N. H. R. Co., 30 Conn. 231.

*Georgia*: Moody v. Threlkeld, 13 Ga. 55.

*Illinois*: Canon v. Grigsby, 116 Ill. 151, 56 Am. Rep. 769; Yocum v. Smith, 63 Ill. 321, 14 Am. Rep. 120; White v. Alward, 35 Ill. App. 195; Merritt v. Boyden, 191 Ill. 136.

*Indiana*: Spitler v. James, 32 Ind. 202, 2 Am. Rep. 334; Gillaspie v. Kelley, 41 Ind. 158, 13 Am. Rep. 318; Marshall v. Drescher, 68 Ind. 359; De Pauw v. Salem Bank, 126 Ind. 553; Elchelberger v. Old Nat. Bank, 103 Ind. 401. Compare Cronkhite v. Nebeker, 81 Ind. 319, 42 Am. Rep. 127.

*Iowa*: Rainbolt v. Eddy, 34 Iowa, 440, 11 Am. Rep. 152; McDonald v. Muscatine Nat. Bank, 27 Iowa, 319; Quinn v. Brown, 71 Iowa, 376.

*Kansas*: Lowden v. Schoharie County Nat. Bank, 38 Kan. 533; Joseph v. First Nat. Bank, 17 Kan. 256.

*Kentucky*: Yocum v. Barnes, 8 B. Mon. 496; Blakey v. Johnson, 13 Bush, 197, 26 Am. Rep. 254; Bank of Com. v. Curry, 2 Dana,

cases," said the Mississippi court, "is that where a party signs blank paper he makes the holder his agent, as upon a general letter of credit, to fill up the paper as he thinks

142; *Smith v. Lockridge*, 8 Bush, 423; *Cason v. Grant County Deposit Bank*, 97 Ky. 487, 53 Am. St. Rep. 418.

*Maine*: *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427; *Inhabitants of South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535.

*Massachusetts*: *Putnam v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206; *Androscoggin Bank v. Kimball*, 10 Cush. 373; *Whitmore v. Nickerson*, 125 Mass. 496, 28 Am. Rep. 257. See, also, *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67. *Compare Scolans v. Rollins*, 173 Mass. 275, 73 Am. St. Rep. 284.

*Michigan*: *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Weidman v. Symes*, 120 Mich. 657, 77 Am. St. Rep. 603.

*Mississippi*: *Johnson v. Blasdale*, 1 Smedes & M. 17, 40 Am. Dec. 85; *Wilson v. Henderson*, 9 Smedes & M. 375, 48 Am. Dec. 716; *Torrey v. Fisk*, 10 Smedes & M. 590; *Davis v. Lee*, 26 Miss. 505, 59 Am. Dec. 267.

*Missouri*: *Green v. Kennedy*, 6 Mo. App. 577; *Roe v. Town Mut. Fire Ins. Co.*, 78 Mo. App. 452.

*New York*: *Mitchell v. Culver*, 7 Cow. 336; *Mechanics' & Farmers' Bank v. Schuyler*, 7 Cow. 337, note; *Ledwich v. McKim*, 53 N. Y. 307; *Dean v. Hall*, 17 Wend. 214; *Van Duzer v. Howe*, 21 N. Y. 531; *Chemung Canal Bank v. Bradner*, 44 N. Y. 680; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Weyerhauser v. Dun*, 100 N. Y. 150.

*North Carolina*: *Lawrence v. Mabry*, 13 N. C. (2 Dev.) 473, 21 Am. Dec. 346.

*Ohio*: *Fullerton v. Sturges*, 4 Ohio St. 529; *Schryver v. Hawkes*, 22 Ohio St. 308.

*Oregon*: *Cox v. Alexander*, 30 Or. 438.

*Pennsylvania*: *Stahl v. Berger*, 10 Serg. & R. 170, 13 Am. Dec. 666; *Bugger v. Cresswell (Pa.)* 12 Atl. 829; *Bechtel's Estate*, 133 Pa. 367; *Hepler v. Mt. Carmel Savings Bank*, 97 Pa. 420, 39 Am. Rep. 813; *Wessell v. Glenn*, 108 Pa. 104.

*South Carolina*: *Diereks v. Roberts*, 13 S. C. 338.

*Tennessee*: *Grissom v. Fite*, 1 Head, 331; *Waldron v. Young*, 9 Heisk. 777; *Nichol v. Bate*, 10 Yerg. 429.

*Vermont*: *Michigan Ins. Co. v. Leavenworth's Estate*, 30 Vt. 11.

*Virginia*: *Jordan v. Neilson*, 2 Wash. 164; *Orrick v. Colston*, 7 Grat. 189; *Douglass v. Scott*, 8 Leigh, 43.

*Wisconsin*: *Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 486; *Johnson Harvester Co. v. McLean*, 57 Wis. 258, 46 Am. Rep. 39. Where a person indorsed a blank note and delivered it to the maker, stipulating that it should not be made payable at a bank,

proper. If it is signed in blank in any material respect, whether as maker or indorser, it makes no difference. The principle seems to be that if anything is necessary to be done in order to give validity to the paper, the blank signature carries with it authority to the holder to render it perfect and effectual. If that act can be done in several ways, the blank signature gives to the bearer the authority to use his discretion so far as the rights of parties taking it without notice are concerned, and if a loss occurs, the familiar principle applies, that where one of two innocent parties must suffer, he who has been the cause of the loss must bear it."<sup>178</sup>

The fact that the instrument is not a negotiable instrument is immaterial. The rule applies to nonnegotiable as well as to negotiable instruments.<sup>179</sup> In a late Massachusetts case, however, it was held that the owner of a nonnegotiable instrument is not estopped from asserting his ownership, where the instrument has been assigned by a blank indorsement on the back, and has been intrusted to another for safekeeping only, in the absence of evidence of showing a custom for such instruments to pass from hand to hand like negotiable instruments.<sup>180</sup>

Of course there is no implied authority on the part of one to whom a bill, note, or other written instrument is intrusted, to alter any of its terms in a material respect. Nor is there any implied authority to fill blanks with stipulations which are repugnant to what is clearly expressed in the instrument, or to add or insert special agreements or other matter which is not necessary to perfect the instrument.<sup>181</sup>

and the maker in filling it up made it payable at a bank and negotiated it, the indorser was held liable to a bona fide purchaser. *Spitler v. James*, 32 Ind. 202, 2 Am. Rep. 334. And so it is where the instrument is filled up for a larger amount than was authorized. *Fullerton v. Sturges*, 4 Ohio St. 529; *Van Duzer v. Howe*, 21 N. Y. 531, and other cases above cited.

<sup>178</sup> *Davis v. Lee*, 26 Miss. 505, 59 Am. Dec. 267.

<sup>179</sup> *Johnson Harvester Co. v. McLean*, 57 Wis. 258, 46 Am. Rep. 39.

<sup>180</sup> *Scollans v. Rollins*, 173 Mass. 275, 73 Am. St. Rep. 284.

<sup>181</sup> *Angle v. Northwestern Mut. Life Ins. Co.*, 92 U. S. 330; *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722; *McCoy v. Lockwood*, 71 Ind. 319; *Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15; *De Pauw v. Salem Bank*, 126 Ind. 553; *Knoxville Nat. Bank v.*

(c) **Instruments under seal.**—Where the doctrine that authority may be given by parol to fill blanks in an instrument under seal is recognized,<sup>182</sup> it has been held that where parol authority has been given to fill such blanks, and the agent exceeds his authority in this respect and delivers the instrument to an innocent third person, the principal will nevertheless be bound.<sup>183</sup> This rule was applied in a late Wisconsin case, where a wife signed and delivered to her husband a mortgage with a blank for the description of the land, relying on his statement that it was to cover certain land belonging to him, and he inserted in the blank a description of their homestead. It was held that the mortgage was binding upon the wife in the hands of an innocent third person.<sup>184</sup> It has also been held that authority to fill blanks in a mortgage or other deed may be implied from the circumstances, as where a person signs and delivers to another a mortgage containing a blank as to the amount, or the name of the payee, etc., to enable him to borrow money thereon,<sup>185</sup> or where the owner of land delivers to an agent a deed of conveyance containing blanks for the name of the grantee and the amount of consideration, with instructions to negotiate a sale of the land and deliver the deed to the purchaser,<sup>186</sup> or

Clarke, 51 Iowa, 264, 33 Am. Rep. 129; Blakey v. Johnson, 13 Bush (Ky.) 197, 26 Am. Rep. 254; Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67; Holmes v. Trumper, 22 Mich. 427, 7 Am. Rep. 661; Ivory v. Michael, 33 Mo. 398; Weyerhauser v. Dun, 100 N. Y. 150; McGrath v. Clark, 56 N. Y. 34, 15 Am. Rep. 372; Jones v. Bangs, 40 Ohio St. 139, 48 Am. Rep. 664. And see Cronkhite v. Nebeker, 81 Ind. 319, 42 Am. Rep. 127; Meise v. Doscher, 83 Hun (N. Y.) 580; Farmers' Nat. Bank v. Thomas, 79 Hun (N. Y.) 595.

<sup>182</sup> Ante, § 53.

<sup>183</sup> Nelson v. McDonald, 80 Wis. 605, 27 Am. St. Rep. 71; Schintz v. McManamy, 33 Wis. 299; Reed v. Morton, 24 Neb. 760, 8 Am. St. Rep. 247; Garland v. Wells, 15 Neb. 298; State v. Young, 23 Minn. 551; Greene County v. Wilhite, 29 Mo. App. 459; Bank of St. Clairsville v. Smith, 5 Ohio, 222; Villet v. Camp, 13 Wis. 198. Compare Clendaniel v. Hastings, 5 Har. (Del.) 408.

<sup>184</sup> Nelson v. McDonald, 80 Wis. 605, 27 Am. St. Rep. 71.

<sup>185</sup> Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep. 486. And see Reed v. Morton, 24 Neb. 760, 8 Am. St. Rep. 247.

<sup>186</sup> Owen v. Perry, 25 Iowa, 412, 96 Am. Dec. 49.

where a person delivers to another a bond or conveyance containing blanks which must be filled in to perfect the instrument.<sup>187</sup> In those jurisdictions in which it is held that authority to fill blanks in a sealed instrument must be under seal, and that parol authority is not sufficient, a person who delivers to his agent a sealed instrument, with authority under seal to fill in the blanks, cannot be estopped by the mere act of his agent in exceeding his authority, for persons who deal with the agent, being chargeable with notice that there must be authority under seal, are chargeable with notice of the extent of such authority. This, of course, is on the assumption that the principal has not said or done anything to mislead them as to the extent of the authority. And, of course, since parol authority is not sufficient in these jurisdictions, mere words or conduct of the principal, not amounting to a representation that the agent has authority under seal, as the mere fact that he has intrusted the agent with possession of the instrument, cannot estop him to deny the agent's authority to fill the blanks, or to fill out the instrument where it is entirely blank.<sup>188</sup> Even in these jurisdictions, however, a person who intrusts another with an instrument in blank, may, when the latter fills out the instrument and negotiates or delivers it to an innocent third person, be estopped to deny that the instrument was filled out by himself before he delivered it.<sup>189</sup> This is not a question of agency at all. The grantor or obligor is estopped in such a case to deny, not that the person to whom he intrusted the instrument had authority to fill the same out, but that the instrument was incomplete when he himself intrusted it to such person.

<sup>187</sup> *Inhabitants of South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535; *Stahl v. Berger*, 10 Serg. & R. (Pa.) 170, 13 Am. Dec. 666; *Sigfried v. Levan*, 6 Serg. & R. (Pa.) 308, 9 Am. Dec. 427; *Wooley v. Constant*, 4 Johns. (N. Y.) 59, 4 Am. Dec. 246; *Boardman v. Gore*, 1 Stew. (Ala.) 517, 18 Am. Dec. 73; *Dedge v. Branch*, 94 Ga. 37.

<sup>188</sup> *Blacknall v. Parish*, 59 N. C. (6 Jones Eq.) 70, 78 Am. Dec. 239; *Basford v. Pearson*, 9 Allen (Mass.) 387, 85 Am. Dec. 764. And see ante, § 53.

<sup>189</sup> *White v. Duggan*, 140 Mass. 18, 54 Am. Rep. 437; *Humphreys v. Finch*, 97 N. C. 303, 2 Am. St. Rep. 293.

(d) **Cases in which no fault is imputable to the alleged principal or maker.**—An estoppel can arise against one who signs a blank piece of paper, or an instrument containing blanks, in favor of an innocent third person, who takes the instrument after it has been filled up or altered by another without authority, only where the signer can be regarded as in fault. Thus if the possession of such paper is obtained from the signer without authority, and without negligence on his part, there is no estoppel to repudiate the paper, even when it has come into the hands of an innocent third person, for there is then no ground for application of the doctrine that, where one of two innocent parties must suffer for the fraudulent act of a third person, the loss must fall upon the party who put it in the power of such third person to perpetrate the fraud.<sup>190</sup>

Some of the courts have held that, even though a note is complete on its face, yet if the maker or indorser delivers it to another to be negotiated, with blanks therein which may easily be filled in, he is guilty of such negligence as will estop him, if the blanks are fraudulently filled in contrary to his instructions or without authority, and the note is delivered to an innocent third person.<sup>191</sup> On this point, however, the authorities are conflicting, and the decisions to the contrary seem to be founded on the sounder reasoning. The better opinion is that where a note or other instrument is perfect on its face, the mere fact that there are blank spaces sufficient to admit of an alteration of the instrument by increasing the amount payable, or adding unauthorized stipula-

<sup>190</sup> *Nance v. Lary*, 5 Ala. 370; *Lenheim v. Willmarding*, 55 Pa. 73. See, also, *Caulkins v. Whisler*, 29 Iowa, 495, 4 Am. Rep. 236. Where a person writes his name on a blank piece of paper, to be used merely for the purpose of identifying his signature, and the person to whom it is given writes a promissory note above the signature, and negotiates it, there is no estoppel and he is not liable. *First Nat. Bank v. Zeims*, 93 Iowa, 140.

<sup>191</sup> *Young v. Grote*, 4 Bing. 253; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Garrard v. Hadden*, 67 Pa. 82, 5 Am. Rep. 412; *Brown v. Reed*, 79 Pa. 370, 21 Am. Rep. 75; *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120; *Blakey v. Johnson*, 13 Bush (Ky.) 197, 26 Am. Rep. 254. Compare *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372.

tions, etc., does not constitute such negligence as to estop the signer when the instrument is so altered without his authority and comes into the hand of an innocent third person.<sup>192</sup> "The negligence," said the Michigan court, "if such it can be called, is of the same kind as might be claimed if any man, in signing a contract, were to place his name far enough below the instrument to permit another line to be written above his name in apparent harmony with the rest of the instrument, or, as if an instrument were written with ink, the material of which would admit of easy and complete obliteration or fading out by some chemical application which would not affect the face of the paper, or by failing to fill any blank at the end of any line which might happen to end far enough from the side of the page to admit the insertion of a word. \* \* \* Whenever a party, in good faith, signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery in whatever mode it may be accomplished; and unless, perhaps, when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered, as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it, and of the intermediate holders."<sup>193</sup>

**(e) Persons not occupying the position of innocent third persons.**—When a person signs an instrument in blank, or

<sup>192</sup> *Burrows v. Klunk*, 70 Md. 451, 14 Am. St. Rep. 371; *Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18; *Cronkhite v. Nebeker*, 81 Ind. 319, 42 Am. Rep. 127; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Knoxville Nat. Bank v. Clarke*, 51 Iowa, 264, 33 Am. Rep. 129; *Swan v. North British Australasian Co.*, 2 Hurl. & C. 175 (per Chief Justice Cockburn, distinguishing and explaining *Young v. Grote*, 4 Bing. 253).

<sup>193</sup> *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661, 666, approved and adopted in *Burrows v. Klunk*, 70 Md. 451, 14 Am. St. Rep. 371.



an instrument containing blanks, and delivers it to another with particular authority as to filling up the same, and the latter exceeds his authority, it is only binding when it has come into the hands of innocent third persons, for as between the original parties, and when the instrument is in the hands of third persons who had notice of the actual authority, or who have parted with nothing on the faith of the instrument, there is no estoppel.<sup>194</sup> It has been held, however, that a person who takes a note, with knowledge that an agent of the maker has filled it up for a larger amount than he is authorized to insert, may enforce the note for the amount authorized, as it is only invalid as to the excess.<sup>195</sup>

#### V. AGENCY OF NECESSITY.

##### § 61. In general.

An agency may be created or arise, irrespective of the actual intention, from necessity. Thus, as we shall hereafter see more at length, if a husband, who is under a legal obligation to support his wife, wrongfully leaves her without the means of subsistence, she becomes, as a matter of law, and irrespective of his intention, "an agent of necessity to supply her wants on his credit."<sup>196</sup> The same doctrine applies, by the weight of authority, where a father wrongfully neglects to provide a support for his minor child, the child in such a case becoming his agent of necessity to procure necessities on his credit.<sup>197</sup> With agencies of necessity, implied or created by law irrespective of the question of actual authority,

<sup>194</sup> *Davidson v. Lanier*, 4 Wall. (U. S.) 447; *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722; *Little Rock Trust Co. v. Martin*, 57 Ark. 277; *Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9; *Luel-len v. Hare*, 32 Ind. 211; *Bank of Limestone v. Penick*, 2 T. B. Mon. (Ky.) 98, 15 Am. Dec. 136; *Johnson v. Blasdale*, 1 Smedes & M. (Miss.) 17, 40 Am. Dec. 85; *Goss v. Whitehead*, 33 Miss. 213; *Wagner v. Diedrich*, 50 Mo. 484; *Goodman v. Simonds*, 19 Mo. 106; *Richards v. Day*, 137 N. Y. 183, 33 Am. St. Rep. 704.

<sup>195</sup> *Johnson v. Blasdale*, 1 Smedes & M. (Miss.) 17, 40 Am. Dec. 85; *Good v. Hart's Adm'rs*, 8 Smedes & M. (Miss.) 787. And see *Clover v. Wynn*, 59 Ga. 246.

<sup>196</sup> *Eastland v. Burchell*, 3 Q. B. Div. 436. And see post, § 80 et seq., where this doctrine is fully treated.

<sup>197</sup> See post, § 77, and cases there cited.

are also classed the agency of the master of a ship to pledge the credit of his employer for money borrowed or necessities furnished in order to equip the vessel properly or carry on the voyage,<sup>198</sup> and the implied agency of a consignee of goods which have not been ordered by him, or which he is not bound to accept because they do not correspond with samples, to sell the same in the interest of the consignor.<sup>199</sup>

This mode of constituting an agency will be more fully considered in the following chapter in treating of agencies in the cases of "persons occupying particular relations."

### § 62. Agency to employ medical or surgical assistance.

Another common illustration of agency of necessity arises in cases of personal injuries by railroad accidents. The well recognized rule seems to be, although there is some conflict in the authorities, that if an employe or passenger of a railroad company is injured in an accident on such road, and it becomes necessary that the one so injured should have immediate medical or surgical aid, the highest official then present, or in close communication, is constituted an agent by necessity of the railroad company for the purpose of employing such medical or surgical aid as may be necessary for the proper treatment of those injured.<sup>200</sup> The reason for

<sup>198</sup> *Stearns v. Doe*, 78 Mass. 482, 74 Am. Dec. 608; *McCready v. Thorn*, 51 N. Y. 454. See post, § 94.

<sup>199</sup> *Kemp v. Pryor*, 7 Ves. 246.

<sup>200</sup> *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752; *Bedford Belt R. Co. v. McDonald*, 17 Ind. App. 492, 60 Am. St. Rep. 172; *Ohio & M. R. Co. v. Early*, 141 Ind. 73; *Louisville, N. A. & C. R. Co. v. Smith*, 121 Ind. 353; *Arkansas S. R. Co. v. Loughridge*, 65 Ark. 300; *Mount Wilson Gold & Silver Min. Co. v. Burbridge*, 11 Colo. App. 487; *Chicago & A. R. Co. v. Davis*, 94 Ill. App. 54; *Toledo, W. & W. R. Co. v. Rodrigues*, 47 Ill. 188; *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Atlantic & Pac. R. Co. v. Reisner*, 18 Kan. 458; *Atchison & Neb. R. Co. v. Reeher*, 24 Kan. 228; *Hanscom v. Minneapolis St. R. Co.*, 53 Minn. 119; *McCarthy v. Missouri R. Co.*, 15 Mo. App. 385; *Walker v. Great Western R. Co.*, L. R. 2 Exch. 228. But see *Marquette & O. R. Co. v. Taft*, 28 Mich. 289; *Sevier v. Birmingham, S. & T. R. R. Co.*, 92 Ala. 258; *Brown v. Missouri, K. & T. R. Co.*, 67 Mo. 122; *Mayberry v. Chicago, R. I. & P. R. Co.*, 75 Mo. 492.

this rule is that by reason of the extreme necessities of the case, the law confers upon the highest official present, or in close communication, the authority to employ the required medical or surgical aid. This authority does not continue indefinitely, however, but ceases when the emergency or necessity, which called for its exercise, has ceased.<sup>201</sup> It does not extend to services rendered in a protracted illness, although caused by the accident, nor does it extend to other services than those of medical or surgical aid, though board and lodging has been held to be included in such aid;<sup>202</sup> or the services of a nurse, where employed by a surgeon of the company, who was authorized to contract, or by the assistant superintendent who had authority to employ such aid;<sup>203</sup> nor does it extend to persons injured, other than employes or passengers. It does not extend to trespassers;<sup>204</sup> nor to injuries suffered by an employe of the company otherwise than while in the course of his business, as where he was injured in a private brawl.<sup>205</sup> Even where the employment of medical or surgical aid may have been unwarranted in the first instance, if the company knowing of such services being rendered to one injured recognizes or fails to disaffirm them it may be held liable therefor.<sup>206</sup>

<sup>201</sup> *Sevier v. Birmingham, S. & T. R. Co.*, 92 Ala. 258; *St. Louis, A. & T. R. Co. v. Hoover*, 53 Ark. 377; *Terre Haute & I. R. Co. v. Brown*, 107 Ind. 336; *Louisville, N. A. & C. R. Co. v. Smith*, 121 Ind. 353.

<sup>202</sup> *Toledo, St. L. & K. C. R. Co. v. Mylott*, 6 Ind. App. 438, where it was held that a contract by a conductor with a boardinghouse keeper to care for a brakeman, who had had his skull crushed, where the conductor is the chief officer at that point, and there is an immediate necessity for such care, is binding on the company. And see *Langan v. Great Western R. Co.*, 30 Law T. (N. S.) 173.

<sup>203</sup> *Bigham v. Chicago, M. & St. P. R. Co.*, 79 Iowa, 534. But not services and meals furnished to the nurses. *Bushnell v. Chicago & N. W. R. Co.*, 69 Iowa, 620.

<sup>204</sup> *Adams v. Southern R. Co.*, 125 N. C. 565.

<sup>205</sup> *Dale v. Donaldson Lumber Co.*, 48 Ark. 188, 3 Am. St. Rep. 224; *Chase v. Swift & Co.*, 60 Neb. 696.

<sup>206</sup> *Terre Haute & I. R. Co. v. Stockwell*, 118 Ind. 98; *Indianapolis & St. L. R. Co. v. Morris*, 67 Ill. 295.

A general manager or superintendent of a railroad company seems to have this authority to employ a physician or surgeon when the necessity arises by virtue of his office;<sup>207</sup> but there is no such authority in a mere roadmaster, station agent, conductor, or other subordinate officer, except in cases of great emergency when the dictates of humanity and justice will so extend his powers as to authorize him to employ medical or surgical aid for those injured in the employment of the company or while traveling on its train,<sup>208</sup> and such subordinate is the highest representative of the company on the ground. And if a conductor has employed a competent physician in such a case for an injured person, he cannot employ additional physicians or surgeons for the same party.<sup>209</sup>

<sup>207</sup> *Louisville, E. & St. L. R. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770; *Terre Haute & I. R. Co. v. Pierce*, 95 Ind. 496; *New Pittsburgh Coal & Coke Co. v. Shaley*, 25 Ind. App. 282; *Cincinnati, I., St. L. & C. R. Co. v. Davis*, 126 Ind. 99; *Toledo, W. & W. R. Co. v. Rodrigues*, 47 Ill. 188; *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Indianapolis & St. L. R. Co. v. Morris*, 67 Ill. 295; *Atlantic & P. R. Co. v. Reisner*, 18 Kan. 458; *Atchison & N. R. Co. v. Reeher*, 24 Kan. 228; *Mount Wilson Gold & Silver Min. Co. v. Burbridge*, 11 Colo. App. 487; *Walker v. Great Western R. Co.*, L. R. 2 Exch. 228; *Hanscom v. Minneapolis St. R. Co.*, 53 Minn. 119; *Southern R. Co. v. Humphries*, 79 Miss. 761; *McCarthy v. Missouri R. Co.*, 15 Mo. App. 385. But see *Stephenson v. New York & H. R. Co.*, 2 Duer (N. Y.) 341; *Melsenbach v. Southern Cooperage Co.*, 45 Mo. App. 232. See *Clark & M. Corp.* § 700.

<sup>208</sup> *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752; *Toledo, St. L. & K. C. R. Co. v. Mylott*, 6 Ind. App. 438; *Cincinnati, I., St. L. & C. R. Co. v. Davis*, 126 Ind. 99; *Evansville & R. R. Co. v. Freeland*, 4 Ind. App. 207 (though the company has a local physician at that place, but the demands are so great that one physician cannot attend to all the injured). And see *Cox v. Midland Counties R. Co.*, 3 Exch. 268; *Sevier v. Birmingham, S. & T. R. R. Co.*, 92 Ala. 258; *St. Louis, A. & T. R. Co. v. Hoover*, 53 Ark. 377; *Peninsular R. Co. v. Gary*, 22 Fla. 356, 1 Am. St. Rep. 194; *Tucker v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 177; *Stephenson v. New York & H. R. Co.*, 2 Duer (N. Y.) 341. It has been held that a conductor cannot bind a railroad company to pay for services of a surgeon, in attending to an injured employe of the company, where no authority is shown. *St. Louis & K. C. R. Co. v. Olive*, 40 Ill. App. 82.

<sup>209</sup> *Louisville, N. A. & C. R. Co. v. Smith*, 121 Ind. 353.

The above doctrine, however, generally extends to railroad corporations only.<sup>210</sup> Thus it has been held not to apply to the employment of a physician by the forewoman of a laundry to attend an employe of the laundry who had seriously injured her hand;<sup>211</sup> nor to the employment of medical services for an injured employe by a foreman engaged by a contractor to superintend workmen engaged in constructing a building.<sup>212</sup>

This subject is more properly one to be considered in a work on corporations, and for that reason it has been the author's intention to give here only a general, and not an extended treatment of the subject. For a fuller treatment the reader must consult some work on corporations, especially works treating of railroads.

#### VI. PROOF OF AGENCY, AND CONSTRUCTION OF POWERS OF ATTORNEY.

##### § 63. Presumptions and burden of proof.

It is a general rule in civil cases that the burden of proving the existence of the relation of principal and agent is upon one who alleges its existence; and this is true whether a third person seeks to hold one liable for the contract or act of another on the ground of agency, or whether a person seeks to recover compensation, or to enforce any other right, or to escape a liability, on the ground of his agency for another, or whether a person asserts that another was his agent for the purpose of asserting a right as principal.<sup>213</sup> But

<sup>210</sup> *Chaplin v. Freeland*, 7 Ind. App. 676; *New Pittsburgh Coal & Coke Co. v. Shaley*, 25 Ind. App. 282; *Swazey v. Union Mfg. Co.*, 42 Conn. 556.

<sup>211</sup> *Holmes v. McAllister*, 123 Mich. 493.

<sup>212</sup> *Godshaw v. Struck's Ex'r*, 22 Ky. L. R. 820, 58 S. W. 781.

<sup>213</sup> *Pole v. Leask*, 33 Law J. Ch. 155; *Russ v. Telfener*, 57 Fed. 973; *Sellers v. Commercial Fire Ins. Co.*, 105 Ala. 282; *George v. Ross*, 128 Ala. 666; *Harris v. San Diego Flume Co.*, 87 Cal. 526; *Schmidt v. Shaver*, 196 Ill. 108; *McCarty v. Straus*, 21 La. Ann. 592; *Whitaker v. Ballard*, 178 Mass. 584; *Johnson v. Hurley*, 115 Mo. 513; *Alexander v. Rollins*, 14 Mo. App. 109, 84 Mo. 657; *Knoche v. Whiteman*, 86 Mo. App. 568; *Chatzkelson v. State of California S. S. Co.*, 7 Misc. (N. Y.) 240; *Mensing v. Birnbaum*, 5 Misc. (N. Y.) 414; *Wooding's Ex'r v. Bradley's Ex'r*, 76 Va. 614; *Kelly v. Strong's Estate*, 68 Wis. 152. If the maker of a power of attorney

where a person assumes to act as agent for another, it will be presumed as against him that the relation existed, so as to cast upon him the burden of proving that it did not exist, if he afterwards takes such a position.<sup>214</sup>

Under some circumstances a power of attorney under seal will be presumed from the circumstances.<sup>215</sup>

#### § 64. Competency and sufficiency of evidence in general.

When parol authority is relied upon and is sufficient, proof of the existence of the relation of principal and agent may be either direct or circumstantial, for the existence of the relation may be and often is inferred as a matter of fact from the relation of the parties, their conduct, and other circumstances.<sup>216</sup> Thus it may be inferred that a person was the

is not the same person who acts under it, the names being identical, it is incumbent upon the party objecting to show that fact. *Springer v. Orr*, 82 Ill. App. 558.

<sup>214</sup> *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122.

<sup>215</sup> See post, § 65.

<sup>216</sup> *Brown v. Prude*, 97 Ala. 639; *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196; *Bergtholdt v. Porter Bros. Co.*, 114 Cal. 681; *State Bank v. Waterhouse*, 70 Conn. 76, 66 Am. St. Rep. 82; *Geylin v. De Villeroi*, 2 Houst. (Del.) 311; *Weaver v. Ogletree*, 39 Ga. 586; *Florida Midland & G. R. Co. v. Varnedoe*, 81 Ga. 175; *Doan v. Duncan*, 17 Ill. 272; *Thurber v. Anderson*, 88 Ill. 167; *Rice & B. Malting Co. v. International Bank*, 185 Ill. 422; *Fouch v. Wilson*, 59 Ind. 93; *Kaufman Bros. & Co. v. Farley Mfg. Co.*, 78 Iowa, 679, 16 Am. St. Rep. 462; *Milligan v. Davis*, 49 Iowa, 126; *Bird v. Phillips*, 115 Iowa, 703; *Gregg v. Berkshire*, 10 Kan. App. 579, 62 Pac. 550; *Dull v. Dumbauld*, 7 Kan. App. 376, 51 Pac. 936; *Forsyth v. Day*, 41 Me. 382; *Thompson v. Clay*, 60 Mich. 627 (evidence of the pecuniary circumstances of the alleged agent is irrelevant to establish agency, *North v. Metz*, 57 Mich. 612); *Bonner v. Lisenby*, 86 Mo. App. 666; *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436; *Hull v. Jones*, 69 Mo. 587; *Mitchum v. Dunlap*, 98 Mo. 418; *Franklin v. Globe M. L. Ins. Co.*, 52 Mo. 461; *Davis v. Benedict*, 49 Neb. 119 (lease admitted as evidence); *Hatch v. Taylor*, 10 N. H. 538; *Perry v. Dwelling House Ins. Co.*, 67 N. H. 291, 68 Am. St. Rep. 668; *Nutting v. King's County El. R. Co.*, 21 App. Div. (N. Y.) 72; *Thiry v. Taylor Brew. & Malting Co.*, 37 App. Div. (N. Y.) 391; *Dickinson v. Salmon*, 36 Misc. (N. Y.) 169; *Gilbraith v. Lineberger*, 69 N. C. 145; *Bynum v. Miller*,

authorized agent of a common carrier in giving a receipt for goods, where it appears that he acted as such in the proper place for receiving goods for the carrier, and was in possession of the carrier's stamp to be used on such receipts, and that the carrier took possession of the goods and caused them to be shipped.<sup>217</sup> But an agency cannot be established by hearsay evidence,<sup>218</sup> nor can it be established by proof of similar transactions between the agent and others in no way connected with the transaction in question, where such agency has not even been partially established by other evidence.<sup>219</sup> And while it is true that parol authority may be sufficient

89 N. C. 393; *Anderson v. State*, 22 Ohio St. 305; *Foste v. Standard Ins. Co.*, 34 Or. 125; *Strimpf v. Roberts*, 18 Pa. 283, 57 Am. Dec. 606; *Patterson v. Van Loon*, 186 Pa. 367; *Cunningham v. Mathews* (Tex. Civ. App.) 57 S. W. 1114; *McCormick v. Queen of Sheba Gold Min. & Mill. Co.*, 23 Utah, 71; *Daggett v. Champlain Mfg. Co.*, 71 Vt. 370; *Hansen v. Flint & P. M. R. Co.*, 73 Wis. 346, 9 Am. St. Rep. 791. Greater latitude is allowed in admission of evidence to prove an implied agency than in proving an express agency. *Patterson v. Van Loon*, 186 Pa. 367. Conversations between the alleged principal and agent on the subject of an arrangement to be entered into, before the agency arose, not shown to be related to the subsequent arrangement, are not proper evidence of the agency. *Irving v. Shethar*, 71 Conn. 434. Compare *Rice & B. Malting Co. v. International Bank*, 185 Ill. 422. The fact that some money belonging to the alleged principal had been paid to the party sought to be proved an agent, and the alleged agent had done sundry acts of kindness for the alleged principal, is not sufficient evidence to establish an agency. *Fortescue v. Makeley*, 92 N. C. 56. Letters between the parties are admissible for the purpose of establishing the agency. *Barbar v. Martin* [Neb.] 93 N. W. 722.

Where a contract for the purchase of land is made by a husband in his own name, the fact that he was agent for his wife may be shown by parol evidence. *Brodhead v. Reinhold*, 200 Pa. 618, 86 Am. St. Rep. 735.

<sup>217</sup> *Hansen v. Flint & P. M. R. Co.*, 73 Wis. 346, 9 Am. St. Rep. 791.

<sup>218</sup> *Ft. Worth Live-Stock Commission Co. v. Hitson* (Tex. Civ. App.) 46 S. W. 915; *Brown v. Prude*, 97 Ala. 639. And see post, § 67.

<sup>219</sup> *Murphy v. Gumaer*, 12 Colo. App. 472; *Forsyth v. Day*, 41 Me. 382; *North v. Metz*, 57 Mich. 612; *Molt v. Baumann*, 65 App. Div. (N. Y.) 445.

to constitute an agency for the sale of, or to charge, real estate or other property, yet the proof to establish such power of an agent must be clear, certain, and explicit.<sup>220</sup> So evidence to establish an agency to pay the principal's debts out of the agent's resources must be clear and convincing, and cannot be established by evidence which is doubtful and conflicting.<sup>221</sup> Proof that a person assumed to act as agent for another is sufficient *prima facie* proof as against him that he was authorized to act and was in fact the other's agent;<sup>222</sup> but mere proof that a person assumed to act as the agent of another is not alone sufficient to establish the agency as against the alleged principal.<sup>223</sup> It is otherwise, of

<sup>220</sup> *Union M. L. Ins. Co. v. Masten*, 3 Fed. 881; *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Sullivan v. Leer*, 2 Colo. App. 141; *Proudfoot v. Wightman*, 78 Ill. 553 (a bare preponderance of evidence will not be sufficient); *Taylor v. Merrill*, 55 Ill. 52; *Albertson v. Ashton*, 102 Ill. 50; *Stadleman v. Fitzgerald*, 14 Neb. 290; *Barrett & Co. v. Franklin*, 14 R. I. 241; *Lauer v. Bandow*, 43 Wis. 556; *Challoner v. Bouck*, 56 Wis. 652. The fact that one person constitutes another his "general and special agent to do and transact all manner of business," does not necessarily authorize the agent to sell stocks or other property of the principal. *Hodge v. Combs*, 1 Black (U. S.) 192.

<sup>221</sup> *Angle v. Manchester* (Neb.) 91 N. W. 501.

<sup>222</sup> *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122. Where a party conveys land as agent and attorney in fact for another, reciting therein that he was such agent and attorney in fact, he is estopped from denying that he was such agent and attorney in fact. *Walters v. Bray* (Tex. Civ. App.) 70 S. W. 443.

<sup>223</sup> *Huntsville Belt Line & M. S. R. Co. v. Corpening & Co.*, 97 Ala. 681; *McDougald's Adm'r v. Dawson's Ex'r*, 30 Ala. 553; *Walsh v. St. Paul Trust Co.*, 39 Minn. 23; *International & G. N. R. Co. v. Prince*, 77 Tex. 560, 19 Am. St. Rep. 795; *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *Gore v. Canada Life Assur. Co.*, 119 Mich. 136; *Whiting v. Lake*, 91 Pa. 349. Thus agency is not proved by merely showing that the person, who assumes to be agent, signed a receipt as such agent. *Doonan v. Mitchell*, 26 Ga. 472. And see *Coburn v. Paine*, 36 Me. 105. The mere fact that the party to whom a guardian delivered an assignment of his ward's judgment for safe keeping assumes to act as agent of the guardian in delivering the assignment and receiving the proceeds therefor does not establish the fact of his agency, in the absence of proof of his



course, if it is further proved that the alleged principal knew of the acts of the alleged agent and made no objection, or if the acts were so open and notorious that it may be fairly presumed that he knew of them.<sup>224</sup>

**§ 65. Authority under seal or in writing.**

When the appointment of an agent is by a formal power of attorney under seal or by an instrument in writing not under seal, the written instrument itself is the best evidence both of the existence of the agency and of the extent of the agent's authority, and parol evidence is not admissible, as a general rule, except in accordance with the rules governing the admission of secondary evidence.<sup>225</sup> But parol evidence of an agency is admissible, though such agency exists by

appointment, or that the guardian ratified his acts or held him out as agent. *Schmidt v. Shaver*, 196 Ill. 108. But where the fact of agency is established, the power which the agent actually exercised in the principal's business may be looked to on the question of the extent of his authority. *International & G. N. R. Co. v. Prince*, 77 Tex. 560, 19 Am. St. Rep. 795.

<sup>224</sup> *Reynolds v. Collins*, 78 Ala. 94; *Minturn v. Burr*, 16 Cal. 107; *Quinn v. Dresbach*, 75 Cal. 159, 7 Am. St. Rep. 138; *Weaver v. Ogletree*, 39 Ga. 586; *Rockford, R. I. & St. L. R. Co. v. Wilcox*, 66 Ill. 417; *Proctor v. Tows*, 115 Ill. 138; *Indiana, B. & W. R. Co. v. Adamson*, 114 Ind. 282; *Barnett v. Gluting*, 3 Ind. App. 415; *Sax v. Drake*, 69 Iowa, 760; *Forsyth v. Day*, 41 Me. 382; *Simon v. Brown*, 38 Mich. 552; *Franklin v. Globe Mut. Life Ins. Co.*, 52 Mo. 461.

<sup>225</sup> *Whart. Ag. §§ 44, 225*; *Greenl. Ev. (16th Ed.) 97a et seq., 563a*; *Nicoll v. American Ins. Co.*, 3 Woodb. & M. 529, Fed. Cas. No. 10,259; *Elliott v. Stocks*, 67 Ala. 336; *McNeill v. Arnold*, 17 Ark. 155; *Neal v. Patten*, 40 Ga. 363; *Rawson v. Curtiss*, 19 Ill. 456; *Hovey v. Deane*, 13 Me. 31; *Lee v. Agricultural Ins. Co.*, 79 Iowa, 379; *Walsh v. Pierce*, 12 Vt. 130. An unsigned memorandum, intended merely to assist the memory of an agent as to articles to be purchased, is not an authority defining or limiting his powers, so as to exclude evidence of parol directions of the principal. *Snow v. Warner*, 10 Metc. (Mass.) 132, 43 Am. Dec. 417. But although a bill purports to have been drawn by an agent under a special written authority, other evidence is admissible to establish his authority, so as to relieve him from personal liability on the bill, as a person acting without authority. *Page v. Lathrop*, 20 Mo. 589.

virtue of a power in writing, when the party offering to prove the fact is a stranger to the instrument,<sup>226</sup> or where the question of authority is only incidentally involved.<sup>227</sup> Some of the courts have held that a parol acknowledgment or admission of an alleged principal is admissible, and is *prima facie* evidence as against him, to show the existence of an agency created by an appointment under seal or in writing.<sup>228</sup> Other courts have held the contrary.<sup>229</sup> The fact that a person assumed to act as agent for another in a matter for which authority under seal or in writing was necessary is, as against him, *prima facie* proof that he had such authority.<sup>230</sup> The presence of a person at the time another executed a sealed instrument in his name, and his assent thereto, may be proved by his admissions or other parol evidence, for in such a case, the act being regarded as his own direct act, and not the act of the other as his agent, no authority under seal need be shown.<sup>231</sup> Authority of an agent to execute a deed for his principal may be presumed from circumstances. Thus it has been held that it may be presumed from proof that the principal received the purchase money, and that the vendee went into possession under the deed, which on its face purports to have been executed by such agent, and has held such possession for a number of years.<sup>232</sup>

#### § 66. Competency of parties as witnesses.

Either party to an alleged relation of principal and agent is a competent witness to testify as to whether the relation

<sup>226</sup> *Kaskaskia Bridge Co. v. Shannon*, 1 Gilm. (Ill.) 15.

<sup>227</sup> *Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. Law, 39.

<sup>228</sup> *Blood v. Goodrich*, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152; *Weed Sew. Mach. Co. v. Kaulback*, 3 Thomp. & C. (N. Y.) 304; *Greenl. Ev.* (16th Ed.) §§ 563k, 563l. Thus the defendant, having paid money to the plaintiff's agent, may prove the agency by the confessions of the plaintiff, that he had given a power of attorney to such agent, without notice to produce such power. *Curtis v. Ingham*, 2 Vt. 287.

<sup>229</sup> *Paine v. Tucker*, 21 Me. 138, 38 Am. Dec. 255.

<sup>230</sup> *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122.

<sup>231</sup> *Fitchthorn v. Boyer*, 5 Watts (Pa.) 159, 30 Am. Dec. 300. And see ante, §§ 15, 52.

<sup>232</sup> *Bias v. Cockrum*, 37 Miss. 509, 75 Am. Dec. 76.

existed or not, and although, as we shall presently see, the declarations and admissions of the alleged agent are inadmissible to prove the agency, yet the agent himself is competent to testify as to the alleged agency and its extent,<sup>233</sup> unless the authority is of such a nature that it cannot be proved by parol evidence.<sup>234</sup> And the agent's testimony cannot be restricted to the mere words used by the principal, but is admissible generally on the whole subject,<sup>235</sup> or it may involve only a statement of the fact of agency without going

<sup>233</sup> *Ilderton v. Atkinson*, 7 Term R. 480; *State v. Bristol Sav. Bank*, 108 Ala. 3, 54 Am. St. Rep. 141; *Parker v. Bond*, 121 Ala. 529; *Quertermous v. Taylor*, 62 Ark. 598; *McRae v. Argonaut Land & Development Co. (Cal.)* 54 Pac. 743; *Collins v. Lester*, 16 Ga. 410; *Armour & Co. v. Ross*, 110 Ga. 403; *Thayer v. Meeker*, 86 Ill. 470; *St. Louis S. W. R. Co. v. Elgin Condensed-Milk Co.*, 74 Ill. App. 619; *Indianapolis Chair Mfg. Co. v. Swift*, 132 Ind. 197; *O'Neill v. Wilcox*, 115 Iowa, 15; *O'Leary v. German-American Ins. Co.*, 100 Iowa, 390; *White v. Elgin Creamery Co.*, 108 Iowa, 522; *Van Sickle v. Keith*, 88 Iowa, 9; *Howe Mach. Co. v. Clark*, 15 Kan. 492; *Cowles v. Burns*, 28 Kan. 32; *Dowell v. Williams*, 33 Kan. 319; *French v. Wade*, 35 Kan. 391; *Methuen Co. v. Hayes*, 33 Me. 169; *Rice v. Gove*, 22 Pick. (Mass.) 158, 33 Am. Dec. 724; *Gould v. Norfolk Lead Co.*, 9 Cush. (Mass.) 338, 57 Am. Dec. 50; *Cleveland Co-operative Stove Co. v. Mallery*, 111 Mich. 43; *Nyhart v. Pennington*, 20 Mont. 158; *Smith v. Delaware & A. Tel. & Tel. Co.*, 64 N. J. Eq. 770; *Commercial Bank v. Norton*, 1 Hill (N. Y.) 501; *Joseph v. Struller*, 25 Misc. (N. Y.) 173; *New Home Sew. Mach. Co. v. Seags*, 128 N. C. 158; *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338; *Lawall v. Groman*, 180 Pa. 532, 57 Am. St. Rep. 662; *McGunnagle v. Thornton*, 10 Serg. & R. (Pa.) 251; *Miles v. Cook*, 1 Grant's Cas. (Pa.) 58; *Connor v. Johnson*, 59 S. C. 115; *Cunningham v. Mathews* (Tex. Civ. App.) 57 S. W. 1114; *American Tel. & Tel. Co. v. Kersh* (Tex. Civ. App.) 66 S. W. 74; *McCornick v. Queen of Sheba Gold Min. & Mill. Co.*, 23 Utah, 71; *Piercy v. Hedrick*, 2 W. Va. 458, 98 Am. Dec. 774; *Garber v. Blatchley*, 51 W. Va. 147; *O'Conner v. Hartford Fire Ins. Co.*, 31 Wis. 160; *Roberts v. Northwestern Nat. Ins. Co.*, 90 Wis. 210. This right of the agent to testify as to his agency is not barred, after the death of his principal, by a statutory provision against any person interested in any proceeding being a witness in regard to any personal transactions between such witness and a deceased person. Code of Iowa, § 4604; *O'Neill v. Wilcox*, 115 Iowa, 15.

<sup>234</sup> See ante, § 40 et seq.

<sup>235</sup> *Lawall v. Groman*, 180 Pa. 532, 57 Am. St. Rep. 662.

into details as to how the relation was brought about, or as to particular facts upon which it rests.<sup>236</sup> But where the question of agency is directly involved, an agent, as a witness, cannot give his opinion or state his conclusion as to the alleged agency, or in other words the fact of the agency cannot be established upon his testimony alone. He may merely state the facts and circumstances concerning the various transactions between him and his alleged principal, leaving the court and jury to determine, under the facts disclosed, whether or not he was such agent.<sup>237</sup>

The reason for the rule that the declarations of an alleged agent cannot be admitted to establish his agency on the ground that they are hearsay evidence does not apply here, because his testimony is being given under oath, and subject to cross-examination. Nor does the rule, making an interested witness incompetent to testify on the side of his interest, apply. As has been said: "Nothing is better settled than that the cases of agents, carriers, factors, brokers, and other servants of this description, in consideration of public convenience and necessity of trade and commerce, and to prevent a failure of justice, constitute a class of special exceptions to the general rule that a witness interested in the subject of the suit or in the record is not competent to testify on the side of his interest."<sup>238</sup>

#### § 67. Declarations and admissions.

(a) **Of alleged principal.**—The declarations and admissions of an alleged principal are competent evidence against him to prove the existence of the relation;<sup>239</sup> and the alleged agent may testify as to such declarations and admissions.<sup>240</sup>

<sup>236</sup> *Parker v. Bond*, 121 Ala. 529.

<sup>237</sup> *McCornick v. Queen of Sheba Gold Min. & Mill. Co.*, 23 Utah, 71; *State v. Harris*, 51 La. Ann. 1105; *McCluskey v. Minek*, 18 Misc. (N. Y.) 565. Where one assumes to act as subagent of another, he cannot establish his right to act for the principal by his own testimony. *Lucas v. Roder*, 29 Ind. App. 287.

<sup>238</sup> By *Starnes, J.*, in *Collins v. Lester*, 16 Ga. 410.

<sup>239</sup> *Blood v. Goodrich*, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152; *Wild v. New York & A. Silver Min. Co.*, 59 N. Y. 644; *Wallace v. Nodine*, 57 Hun (N. Y.) 239, 242; *Haughton v. Maurer*, 55 Mich. 323;

(b) *Of alleged agent.*—The same rule does not apply to admissions and declarations of an alleged agent. As we shall hereafter see, when an agency is established by other evidence, direct or circumstantial, declarations and admissions of the agent touching the matter of the agency may be admissible as evidence against the principal.<sup>241</sup> But the admissions, acts, and declarations of an alleged agent, not shown to have been known to and acquiesced in by the alleged principal, are not admissible in evidence, as against the alleged principal, to prove either the existence of the agency or its extent.<sup>242</sup> A newspaper publication, wherein one advertises

*Phleger v. Ivins*, 5 Har. (Del.) 118; *Irvine v. Buckaloe*, 12 Serg. & R. (Pa.) 35; *Arthur v. Gard*, 3 Colo. App. 133; *Leary v. Albany Brew. Co.*, 77 App. Div. (N. Y.) 6; *Norton v. Richmond*, 93 Ill. 367. And see *Steel v. Solid Silver Gold & Silver Min. Co.*, 13 Nev. 486.

A party claiming lands by deed executed under an alleged power of attorney from the owner to the person executing the deed may, in proof of the power, give in evidence the declarations of the owner of the land and alleged grantor of the power made prior to the accrual of the interest of the person denying the power, and claiming under such former owner, that such power of attorney existed, that its contents were as alleged in the deed, and that it had been subsequently lost, canceled, or destroyed. *Corbin v. Jackson*, 14 Wend. (N. Y.) 619.

<sup>240</sup> *Wallace v. Nodine*, 57 Hun (N. Y.) 239, 242; *Lawall v. Groman*, 180 Pa. 532, 57 Am. St. Rep. 662.

<sup>241</sup> See post, § 465 et seq.

<sup>242</sup> *United States: Union Guaranty & Trust Co. v. Robinson*, 79 Fed. 420; *James v. Stookey*, 1 Wash. C. C. 330, Fed. Cas. No. 7,184.

*Alabama: Tanner & De Laney Engine Co. v. Hall*, 86 Ala. 305; *Foxworth v. Brown*, 120 Ala. 59; *Parker v. Bond*, 121 Ala. 529; *Huntsville Belt Line & M. S. R. Co. v. Corpening & Co.*, 97 Ala. 681.

A telegram from defendant to a third party saying that a certain person named "will draw with certificates attached" is inadmissible to prove that defendant was acting as agent for the latter in contracting with plaintiff. *Manly v. Sperry*, 115 Ala. 524.

*Arkansas: Carter v. Burnham*, 31 Ark. 212; *Howcott v. Kilbourn*, 44 Ark. 213.

*California: Van Dusen v. Star Quartz Min. Co.*, 36 Cal. 571, 95 Am. Dec. 209; *Santa Cruz Butchers' Union v. I X L Lime Co.* (Cal.) 46 Pac. 382; *Petterson v. Stockton & T. R. Co.*, 134 Cal. 244.

*Colorado: Omaha & G. Smelting & Refining Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185; *Murphy v. Gumaer*, 12 Colo. App. 472.

*Connecticut: Fitch v. Chapman*, 10 Conn. 8.

himself to be the agent of another, is inadmissible to prove his agency, unless it appears that the alleged principal caused

*Georgia*: Nelson v. Tumlin, 74 Ga. 171; Abel v. Jarratt, 100 Ga. 732; Wynne v. Stevens, 101 Ga. 808; Americus Oil Co. v. Gurr, 114 Ga. 624; Grand Rapids School Furniture Co. v. Morel, 110 Ga. 321; Armour & Co. v. Ross, 110 Ga. 403, 414.

*Illinois*: Proctor v. Tows, 115 Ill. 138; Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 25 Am. St. Rep. 401; McClure v. D. M. Osborne & Co., 86 Ill. App. 465; Currie v. Syndicate Des Cultivators Des Oignons a' Fleur, 104 Ill. App. 165.

*Iowa*: Butler v. Chicago, B. & Q. R. Co., 37 Iowa, 206; Wood Mowing & Reaping Mach. Co. v. Crow, 70 Iowa, 340; Joseph Schlitz Brew. Co. v. Barlow, 107 Iowa, 252; Mentzer v. Sargeant, 115 Iowa, 527.

*Kansas*: Leu v. Mayer, 52 Kan. 419; Kane v. Barstow, 42 Kan. 465, 16 Am. St. Rep. 490; Howe Mach. Co. v. Clark, 15 Kan. 492.

*Louisiana*: Dawson v. Landreaux, 29 La. Ann. 363; State v. Harris, 51 La. Ann. 1105; Lafourche Transp. Co. v. Pugh, 52 La. Ann. 1517.

*Maine*: Eaton v. Granite State Provident Ass'n, 39 Me. 58.

*Maryland*: Harker v. Dement, 9 Gill, 7, 52 Am. Dec. 670.

*Massachusetts*: Stollenwerck v. Thacher, 115 Mass. 224; Nowell v. Chipman, 170 Mass. 340; Mussey v. Beecher, 3 Cush. 511.

*Michigan*: Bond v. Pontiac, O. & P. A. R. Co., 62 Mich. 643, 4 Am. St. Rep. 885; Three Rivers Nat. Bank v. Gilchrist, 83 Mich. 253; McPherson v. Pinch, 119 Mich. 36; Gore v. Canada Life Assur. Co., 119 Mich. 136.

*Minnesota*: Sencerbox v. McGrade, 6 Minn. 484 (Gil. 334).

*Mississippi*: Kinnare v. Gregory, 55 Miss. 612; Memphis & V. R. Co. v. Cocke, 64 Miss. 713.

*Missouri*: Mitchum v. Dunlap, 98 Mo. 418; Peck v. Ritchey, 66 Mo. 114 (nor are declarations, tending to disprove the fact of agency, admissible in favor of the person alleged to be his principal); State v. Henderson, 86 Mo. App. 482.

*Montana*: Nyhart v. Pennington, 20 Mont. 158.

*Nebraska*: Anheuser-Busch Brew. Ass'n v. Murray, 47 Neb. 627.

*New Hampshire*: Bohanan v. Boston & M. R. R., 70 N. H. 526.

*New Jersey*: Gifford v. Landrine, 37 N. J. Eq. 127.

*New York*: Stringham v. St. Nicholas Ins. Co., 4 Abb. Dec. 315; Roberge v. Monheimer, 21 Misc. 491; Reid v. Horn, 25 Misc. 523; Lyon v. Brown, 31 App. Div. 67; Booth v. Newton, 46 App. Div. 175.

*North Carolina*: Taylor v. Hunt, 118 N. C. 168.

*North Dakota*: Gordon v. Vermont Loan & Trust Co., 6 N. D. 454; O. W. Loverin-Browne Co. v. Bank of Buffalo, 7 N. D. 569.

*Pennsylvania*: Baltimore & O. Employees' Relief Ass'n v. Post, 122 Pa. 579, 9 Am. St. Rep. 147; Pepper v. Cairns, 133 Pa. 114, 19

or knew of such publication.<sup>243</sup> But acts of an alleged agent tending to show the exercise of control and authority over the business of the principal, and declarations and statements of agency made in the presence of other known agents, are admissible to establish the agency.<sup>244</sup> And it is competent to prove the declaration of a person that he was an agent, not to show the agency, but to show that he held himself out as such.<sup>245</sup> The declaration of an agent made to a third person is inadmissible, in behalf of the principal, to prove that the third person was not also his agent, or to support the agent's testimony that such third person was not an agent.<sup>246</sup>

*Am. St. Rep.* 625; *Lawall v. Groman*, 180 Pa. 532, 57 *Am. St. Rep.* 662; *Whiting v. Lake*, 91 Pa. 349.

*South Carolina*: *Renneker v. Warren*, 17 S. C. 139; *Ehrhardt v. Breeland*, 57 S. C. 142.

*Texas*: *Coleman v. Colgate*, 69 Tex. 88; *Ft. Worth Live-Stock Commission Co. v. Hitson* (Tex. Civ. App.) 46 S. W. 915.

*Vermont*: *Dickerman v. Quincy M. F. Ins. Co.*, 67 Vt. 609.

*Virginia*: *Fisher v. White*, 94 Va. 236; *Hoge v. Turner*, 96 Va. 624.

*Washington*: *Comegys v. American Lumber Co.*, 8 Wash. 661; *Gregory v. Loose*, 19 Wash. 599.

*West Virginia*: *Rosendorf v. Poling*, 48 W. Va. 621; *Garber v. Blatchley*, 51 W. Va. 147.

*Wisconsin*: *Newell v. Clapp*, 97 Wis. 104. Proof that a certain person had prepared a catalogue of the cattle belonging to the estate of a deceased person, and that he had answered plaintiff's letter addressed to such estate in relation to such cattle, and sent one of his catalogues, and that he afterwards received money for the purchase of the cattle selected by the plaintiff and bid them in for him at the administrator's sale, is not sufficient to establish that he was agent for the administrators. *Newell v. Clapp*, *supra*.

But the acts of a person tending to show whom he represented on a particular occasion are competent evidence of the agency. *Land Mortg. Co. v. Gilliam*, 49 S. C. 345.

As to the competency of admissions to prove an authority under seal, see ante, § 65.

<sup>243</sup> *Joseph Schlitz Brew. Co. v. Barlow*, 107 Iowa, 252.

<sup>244</sup> *Southern Exp. Co. v. Platten*, 93 Fed. 936.

<sup>245</sup> *Parker v. Bond*, 121 Ala. 529, 25 So. 898. Evidence is competent to show that, in what the agent said and did, he purported to act for the defendant, and not for another. *Nowell v. Chipman*, 170 Mass. 340.

<sup>246</sup> *Short Mountain Coal Co. v. Hardy*, 114 Mass. 197; *Peck v. Ritchey*, 66 Mo. 114.

The reason for this rule is that testimony as to such declarations is merely hearsay evidence, they being made at a time when the alleged agent was not under oath and there was no opportunity of cross-examination. But, as we have seen in a previous section, there is nothing in the law that renders the alleged agent himself an incompetent witness to testify on the trial of the case to any fact showing what the relation is between him and his alleged principal.

#### § 68. General reputation.

The existence of the relation of principal and agent cannot be shown by proof of mere general reputation, unless it is further shown that there was knowledge and acquiescence on the part of the alleged principal.<sup>247</sup>

#### § 69. Custom and usage.

Proof of the custom and usage in a particular business cannot be sufficient, without anything more, to show that the relation of principal and agent exists, but such proof may be material, when the fact of agency is otherwise proved, or admitted, to show what the contract of agency was, and to show the extent of the agent's authority. When the rights, duties, and liabilities as between an acknowledged agent and his principal are in question, or when the authority of an acknowledged agent to do a particular act or make a particular contract is in question, an established custom or usage in the particular business or place may be proved and taken into consideration, either for the purpose of construing the contract of agency as between the parties, or for the purpose of determining the extent of the agent's authority; for, unless expressly excluded, such a custom or usage enters into a contract of agency, as it does into other contracts, and also enters into the authority of the agent as respects persons dealing with him.<sup>248</sup>

<sup>247</sup> *Blevins v. Pope*, 7 Ala. 371; *Central R. & Banking Co. v. Smith*, 76 Ala. 572; *Saussey v. South Fla. R. Co.*, 22 Fla. 327; *Graves v. Horton*, 38 Minn. 66; *Litchfield Iron Co. v. Bennett*, 7 Cow. (N. Y.) 234; *Clark v. Farmer's Woollen Mfg. Co.*, 15 Wend. (N. Y.) 256; *Perkins v. Stebbins*, 29 Barb. (N. Y.) 523.

<sup>248</sup> *England*: *Bayliffe v. Butterworth*, 1 Exch. 425; *Graves v. Legg*,



Of course, as between the parties themselves, and as against persons with notice, the principal may, by his instructions to the agent, exclude customs and usages, however well established.<sup>249</sup> But such secret instructions cannot be set

2 Hurl. & N. 210; Sutton v. Tatham, 10 Adol. & E. 27; Russel v. Hankey, 6 Term R. 12; Pickering v. Busk, 15 East, 38; Young v. Cole, 3 Bing. N. C. 724; Wiltshire v. Sims, 1 Camp. 258; Dickinson v. Lilwall, 4 Camp. 279.

*United States:* Columbian Ins. Co. v. Lawrence, 2 Pet. 49; Collings v. Hope, 3 Wash. C. C. 150, Fed. Cas. No. 3,003.

*Alabama:* Guesnard v. Louisville & N. R. Co., 76 Ala. 453; Cawthorn v. Lusk, 97 Ala. 674.

*Arkansas:* Walsh v. Frank, 19 Ark. 270.

*Colorado:* Savage v. Pelton, 1 Colo. App. 148.

*Connecticut:* Leach v. Beardslee, 22 Conn. 404; Jones v. Warner, 11 Conn. 40.

*Georgia:* Mott v. Hall, 41 Ga. 117.

*Illinois:* Deshler v. Beers, 32 Ill. 368, 83 Am. Dec. 274; United States Life Ins. Co. v. Advance Co., 80 Ill. 549; Bailey v. Bensley, 87 Ill. 556; Phillips v. Moir, 69 Ill. 156; Corbett v. Underwood, 83 Ill. 324, 25 Am. Rep. 392; National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427.

*Indiana:* Rapp v. Grayson, 2 Blackf. 130; Rich v. Johnson, 61 Ind. 246. And see Morningstar v. Cunningham, 110 Ind. 328, 59 Am. Rep. 211.

*Iowa:* Kaufman Bros. & Co. v. Farley Mfg. Co., 78 Iowa, 679, 16 Am. St. Rep. 462.

*Kansas:* American Cent. Ins. Co. v. McLanathan, 11 Kan. 533.

*Kentucky:* Wallace v. Bradshaw, 6 Dana, 382.

*Louisiana:* Tonge v. Kennett, 10 La. Ann. 800.

*Maine:* Greely v. Bartlett, 1 Greenl. 172, 10 Am. Dec. 54; Gleason v. Walsh, 43 Me. 397; Randall v. Kehlor, 60 Me. 37.

*Maryland:* Jackson v. Union Bank, 6 Har. & J. 146; Rosenstock v. Tormey, 32 Md. 169, 3 Am. Rep. 125; Appleman v. Fisher, 34 Md. 540; Kraft v. Fancher, 44 Md. 204.

*Massachusetts:* Goodenow v. Tyler, 7 Mass. 36, 5 Am. Dec. 22; Dwight v. Whitney, 15 Pick. 179; Upton v. Suffolk County Mills, 11 Cush. 586, 59 Am. Dec. 163; Bucknam v. Chaplin, 1 Allen, 70; Goldsmith v. Manheim, 109 Mass. 187; Talcott v. Smith, 142 Mass. 542.

*Missouri:* Phillips v. Scott, 43 Mo. 86, 97 Am. Dec. 369; Long Bros. v. The J. K. Armsby Co., 43 Mo. App. 253.

*New Hampshire:* Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 Am. Rep. 45; Town of Lebanon v. Heath, 47 N. H. 353; Haven v. Wentworth, 2 N. H. 93.

*New York:* Wallis v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407;

up as against persons dealing with the agent without notice of them, for they have a right to assume, in the absence of notice to the contrary, that the agent's authority is in accordance with established customs and usages.<sup>250</sup> This subject will be more fully treated in subsequent chapters, in treating of the "Nature and Extent of an Agent's Authority," and the "Construction of Agent's Authority."<sup>251</sup>

### § 70. Province of court and jury.

When the existence of the relation of principal and agent is disputed, and there is any evidence tending to prove its existence, the question is one of fact for the jury, under proper instructions from the court.<sup>252</sup> But the court may take

*Smith v. Tracy*, 36 N. Y. 79; *Easton v. Clark*, 35 N. Y. 225; *White v. Fuller*, 67 Barb. 267; *McMorris v. Simpson*, 21 Wend. 610; *Andrews v. Kneeland*, 6 Cow. 354.

*Pennsylvania*: *Sumner v. Stewart*, 69 Pa. 321; *Carter v. Philadelphia Coal Co.*, 77 Pa. 286.

*South Carolina*: *Fraser v. Tenants*, 5 Rich. Law, 375.

*Texas*: *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

*Vermont*: *Fay v. Richmond*, 43 Vt. 25.

*Wisconsin*: *Pickert v. Marston*, 68 Wis. 465, 60 Am. Rep. 877.

<sup>249</sup> *Parsons v. Martin*, 11 Gray (Mass.) 111; *Hatcher v. Comer*, 73 Ga. 418; *Clark v. Cumming*, 77 Ga. 64; *Hall v. Storrs*, 7 Wis. 253; *Wootters v. Kaufman*, 73 Tex. 395; *Wanless v. McCandless*, 38 Iowa, 20; *Barksdale v. Brown*, 1 Nott & McC. (S. C.) 519, 9 Am. Dec. 720; *Porter v. Patterson*, 15 Pa. 229.

<sup>250</sup> See the cases in note 248, *supra*.

<sup>251</sup> See post, §§ 207, 218.

<sup>252</sup> *United States*: *Nicoll v. American Ins. Co.*, 3 Woodb. & M. 533, Fed. Cas. No. 10,259.

*Alabama*: *South & N. Ala. R. Co. v. Henlein*, 52 Ala. 606; *Sellers v. Commercial Fire Ins. Co.*, 105 Ala. 282; *McClung's Ex'rs v. Spotswood*, 19 Ala. 165.

*Arkansas*: *Vahlberg v. Keaton*, 51 Ark. 534, 4 L. R. A. 462.

*Georgia*: *Whitman v. Bolling*, 47 Ga. 125; *Armour & Co. v. Ross*, 110 Ga. 415.

*Illinois*: *Hankinson v. Lambard*, 25 Ill. 572, 79 Am. Dec. 348.

*Indiana*: *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566.

*Iowa*: *Kaufman Bros. & Co. v. Farley Mfg. Co.*, 78 Iowa, 679, 16 Am. St. Rep. 462.

*Maryland*: *York County Bank v. Stein*, 24 Md. 448; *National Mechanics' Bank v. National Bank*, 36 Md. 5; *Morrison v. White-*

the case from the jury if there is not sufficient evidence of agency to go to the jury.<sup>253</sup> Where the facts are undisputed, the question whether an agent had the requisite authority to bind his principal by a particular act or contract is a question of law for the court.<sup>254</sup> And where the contract of agency is in writing, the construction of such writing is a question of law for the court to determine.<sup>255</sup>

### § 71. Order of proof.

Where an instrument under seal purports to have been executed by an attorney, and the authority of the attorney is disputed, before the instrument goes to the jury, the letter of attorney must be produced to the court, which is to judge

side, 17 Md. 452, 79 Am. Dec. 661; *Henderson v. Mayhew*, 2 Gill, 393, 41 Am. Dec. 434.

*Massachusetts*: *Lovell v. Williams*, 125 Mass. 439; *Hood v. Adams*, 128 Mass. 207; *Thomas v. Wells*, 140 Mass. 517.

*Michigan*: *Haughton v. Maurer*, 56 Mich. 323; *Roberts v. Pepple*, 55 Mich. 367.

*Missouri*: *Hull v. Jones*, 69 Mo. 587; *Brooks v. Jameson*, 55 Mo. 505; *Rice v. Groffman*, 56 Mo. 434; *Seehorn v. Hall*, 130 Mo. 257, 51 Am. St. Rep. 562.

*Nebraska*: *Walsh v. Peterson*, 59 Neb. 645.

*New Jersey*: *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728; *Columbia Delaware Bridge Co. v. Gelsse*, 38 N. J. Law, 39.

*New York*: *Dickinson v. Salmon*, 36 Misc. 169.

*North Carolina*: *Gates v. Max*, 125 N. C. 139.

*Pennsylvania*: *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. 498, 78 Am. Dec. 390; *Irvine v. Buckaloe*, 12 Serg. & R. 36; *Central Pa. Tel. & Supply Co. v. Thompson*, 112 Pa. 48.

*Tennessee*: *Willcox v. Hines*, 100 Tenn. 524, 66 Am. St. Rep. 761.

*Texas*: *Bradstreet Co. v. Gill*, 72 Tex. 115, 13 Am. St. Rep. 768.

*Utah*: *Garner v. Fisher Brew. Co.*, 6 Utah, 332; *McCornick v. Queen of Sheba Gold Min. & Mill. Co.*, 23 Utah, 71.

<sup>253</sup> *National Mechanics' Bank v. National Bank*, 36 Md. 5; *Coe v. Johnson*, 6 Houst. (Del.) 9; *Lamb v. Irwin*, 69 Pa. 436; *McClung's Ex'rs v. Spotswood*, 19 Ala. 165.

<sup>254</sup> *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728; *Seehorn v. Hall*, 130 Mo. 257, 51 Am. St. Rep. 562; *Willcox v. Hines*, 100 Tenn. 524, 66 Am. St. Rep. 761; *Sellers v. Commercial Fire Ins. Co.*, 105 Ala. 282; *McCornick v. Queen of Sheba Gold Min. & Mill. Co.*, 23 Utah, 71.

<sup>255</sup> See post, § 214.

of its competency.<sup>256</sup> But in the case of simple contracts made by an agent, where the agent's authority may be proved by parol, the fact of signing and the authority to sign are both questions of fact for the jury, and the order of proving them is immaterial.<sup>257</sup> A written instrument signed by a person as agent is not admissible in evidence in an action thereon without proof of the agency.<sup>258</sup>

## § 72. Construction of powers of attorney.

The construction of a written instrument for the purpose of determining whether it creates an agency is governed by the same rules as the construction of other instruments. No particular form of words is necessary, but it is sufficient if an intention to create an agency appears from the language of the instrument, read in the light of all the surrounding circumstances.<sup>259</sup> A power of attorney to con-

<sup>256</sup> *Videau v. Griffin*, 21 Cal. 389; *McMurtry v. Frank*, 4 T. B. Mon. (Ky.) 39; *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66; *Tolman v. Emerson*, 4 Pick. (Mass.) 160; *White v. Skinner*, 13 Johns. (N. Y.) 307; *Loudon Sav. Fund Soc. v. Hagers-town Sav. Bank*, 36 Pa. 498, 78 Am. Dec. 390.

<sup>257</sup> *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66.

<sup>258</sup> *Gray v. Gillilan*, 15 Ill. 453, 60 Am. Dec. 761.

<sup>259</sup> *Bosseau v. O'Brien*, 4 Biss. 395, Fed. Cas. No. 1,667; *Willcox & G. Sewing Mach. Co. v. Ewing*, 141 U. S. 627; *Evans v. Cincinnati, S. & M. R. Co.*, 78 Ala. 341; *Ex parte Robinson*, 86 Ala. 622; *American Mortg. Co. v. King*, 105 Ala. 358; *Gist v. Harkrider* (Ark.) 15 S. W. 187; *Banks v. Flint*, 54 Ark. 40; *Bissell v. Terry*, 69 Ill. 184; *Hemstreet v. Burdick*, 90 Ill. 444; *Van Sandt v. Dows & Co.*, 63 Iowa, 594; *Storm Lake Bank v. Missouri Valley L. Ins. Co.*, 66 Iowa, 617; *Stewart v. Pickering*, 73 Iowa, 652; *Chicago, I. & D. R. Co. v. Estes*, 71 Iowa, 603; *Whelage v. Lotz*, 44 La. Ann. 600; *Willis v. Toledo, A. A. & N. M. R. Co.*, 72 Mich. 160; *Freiberg, Klein & Co. v. Beach Hotel & Seaside Imp. Co.*, 63 Tex. 449. The fact that a power of attorney purports to be executed by a person, acknowledged before a notary public, and ample in its terms to authorize the person appointed to perform the acts mentioned, is prima facie proof of such authority. *Springer v. Orr*, 82 Ill. App. 558. It has been held that a power of attorney from a husband and his wife jointly for the sale and conveyance of all their property, in which the words "we," "us," and "our" were consistently and exclusively used, did not authorize a sale and convey-

vey land need not delegate such authority in express terms, but the authority may be implied.<sup>260</sup> In construing a power of attorney, the primary rule is to ascertain and give effect to the intention of the parties.<sup>261</sup> But such powers are strictly construed and are never extended by intendment or construction beyond that which is given in terms, or absolutely necessary to carry the authority into effect.<sup>262</sup> Where authority to do a specific act is conferred in express terms, and general words are also employed, the general words are to be limited to the particular act authorized.<sup>263</sup> It has been

ance of property, the title to which was in the husband alone, in the absence of extrinsic proof that there was no property owned by them jointly. *Dodge v. Hopkins*, 14 Wis. 630.

<sup>260</sup> *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600.

<sup>261</sup> *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600; *Hemstreet v. Burdick*, 90 Ill. 444; *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273; *Lamy v. Burr*, 36 Mo. 85, 88 Am. Dec. 135.

<sup>262</sup> *Bosseau v. O'Brien*, 4 Biss. 395, Fed. Cas. No. 1,667; *Brantley v. Southern L. Ins. Co.*, 53 Ala. 554; *Golinsky v. Allison*, 114 Cal. 458; *Equitable L. Assur. Soc. v. Poe*, 53 Md. 28; *Penfold v. Warner*, 96 Mich. 179, 35 Am. St. Rep. 591; *Gilbert v. How*, 45 Minn. 121, 22 Am. St. Rep. 724; *Lamy v. Burr*, 36 Mo. 85, 88 Am. Dec. 135; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494; *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Security Sav. Bank v. Smith*, 38 Or. 72, 84 Am. St. Rep. 756; *Coulter v. Portland Trust Co.*, 20 Or. 469; *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927. Compare *Peters v. Farnsworth*, 15 Vt. 155; *Wickham v. Knox*, 33 Pa. 71. And see post, § 213.

<sup>263</sup> *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235; *Security Sav. Bank v. Smith*, 38 Or. 72, 84 Am. St. Rep. 756. And see post, § 217. The extent of the power is to be determined by the language employed, reading the whole instrument, and aided by the situation of the parties, the usages in the particular matter, and any other circumstance having a legal bearing and throwing light on the question. *Carson v. Smith*, 5 Minn. 78 (Gil. 53), 77 Am. Dec. 539. A power of attorney is to be construed in the light of the purpose which the agent is appointed to accomplish. *City of Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535. While evidence of usage may be given for the purpose of interpreting a power actually conferred, the nature and extent of the authority conferred by a power of attorney must be ascertained from the instrument itself, and cannot be enlarged by parol evidence of usage of other agents in like cases. *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

said that a written or verbal authority to convey or charge land, or bind another by a contract to convey, must be clear and unequivocal.<sup>264</sup> And in accordance with this view, it has been held that a verbal authority to a person "to sell" certain land for a certain price only confers authority to find a purchaser at that price, and does not confer authority to bind the owner by execution of a contract of sale.<sup>265</sup> This subject, as well as the construction of particular powers, for the purpose of determining the nature and extent of the authority conferred, will be considered in subsequent chapters.<sup>266</sup>

<sup>264</sup> *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Albertson v. Ashton*, 102 Ill. 50.

<sup>265</sup> *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617. See post, § 228.

<sup>266</sup> See post, chapters 9 and 10.

## CHAPTER V.

### AGENCY IN THE CASE OF PERSONS OCCUPYING PARTICULAR RELATIONS.

#### § 73. In general.

74. Implication and presumption of agency from relationship of the parties.
75. Agency of parent for child.
76. Duty to support parent—Liability for necessities.
77. Agency of child for parent.
78. Agency of servant for master.
79. Agency of husband for wife.
80. Agency of wife for husband—In general.
81. Agency of wife ordinarily requires appointment by or assent of husband.
82. Express authority of wife and authority implied from circumstances.
83. Married woman doing business in her own name.
84. Implied agency of wife in matters pertaining to the household.
85. Wife's implied authority to procure necessities on husband's failure to supply them.
86. Wife's implied authority to procure necessities for children.
87. Contracts by wife on her own credit.
88. Husband's ratification of wife's acts.
89. Agency of woman held out or passing as wife.
90. Agency of partner.
91. Unincorporated clubs and societies as principals.
92. Agency as between tenants in common and co-owners.
93. Agency between joint obligors—Joint obligees.
94. Implied agency of master of ship.
95. Agency of vendor for vendee.
96. Agency of priests, ministers, etc.

#### § 73. In general.

Questions as to the existence of the relation of principal and agent frequently arise in the case of persons occupying particular relations, as in the case of husband and wife, parent and child, partners, tenants in common, etc., and the relationship is sometimes, although not necessarily, a circum-

stance which gives rise to special rules. In this chapter we shall consider the relation of principal and agent in such cases and ascertain when it exists, and more particularly, the circumstances under which it may or will be implied, either as a matter of fact or as a matter of law.

**§ 74. Implication and presumption of agency from relationship of the parties.**

As we shall presently see, agency on the part of a wife to bind her husband is under some circumstances, and to a certain extent, implied as a matter of law, and irrespective of the husband's consent, and under some circumstances it is implied or presumed as a matter of fact, in the absence of evidence to the contrary.<sup>1</sup> An agency is also implied as a matter of law, under certain circumstances, in the case of parent and child.<sup>2</sup> With these exceptions, however, the general rule is that agency will not be implied or presumed, either as a matter of law or fact, from the mere fact that the parties are related, however nearly.<sup>3</sup> The relationship of the parties, however, may be shown and considered as a circumstance in determining whether there was agency in fact in a particular case, and may be sufficient with other circumstances to establish an agency, where the other circumstances would not be sufficient in the absence of such relationship.<sup>4</sup> Thus where one insured had been injured and rendered utterly helpless in a distant country, with no friend or relative near him except his brother, and it being important to close up the business relating to the insurance before he was taken

<sup>1</sup> See post, § 80 et seq.

<sup>2</sup> Post, § 77.

<sup>3</sup> *Johnson v. Stone*, 40 N. H. 197, 77 Am. Dec. 706; *McNamara v. McNamara*, 62 Ga. 200; *Walsh v. Curley*, 42 N. Y. St. Rep. 470; *Le Count v. Greenley*, 6 N. Y. St. Rep. 91, and other cases more specifically cited in the notes following. And see *Gibson v. Snow Hardware Co.*, 94 Ala. 346.

<sup>4</sup> *Sheanon v. Pacific Mut. Life Ins. Co.*, 83 Wis. 507; *Ford v. Linehan*, 146 Mass. 283. And see *Abeel v. Seymour*, 6 Hun (N. Y.) 656; *Shimmel v. Erie Ry. Co.*, 5 Daly (N. Y.) 396; *Foster v. Fleischans*, 69 Mich. 543.



home, the agency of the brother to act for him in the matter might be implied from the circumstances.<sup>5</sup>

§ 75. **Agency of parent for child.**

The mere relationship of parent and child does not of itself make the parent the agent of the child to manage or dispose of his property or for any other purpose, whether the child is a minor or of full age.<sup>6</sup> But a son or daughter, being *sui juris*, may expressly appoint his or her father or mother as agent, or such agency may be implied from the conduct of the parties.<sup>7</sup> Or there may be an estoppel by holding out or other conduct as in the case of other persons.<sup>8</sup> Thus if a son sends another who desires to purchase lands of him to his father to make a bargain, with a statement that whatever bargain they should make he would agree to, the person thus sent would be authorized to regard the father as the son's agent for the purpose of making a bargain, and the statements of the father while negotiating the sale would bind the son.<sup>9</sup>

Of course, where a child is a minor, the general rules as to agency for infants apply to an appointment of his parent as his agent.<sup>10</sup>

§ 76. **Duty to support parent—Liability for necessities.**

At common law, a child is under no legal obligation to support his parents, although they may be destitute and helpless, and in the absence of a statute, therefore, a child cannot be made liable for necessities furnished his parents without his consent.<sup>11</sup> In some jurisdictions, a legal duty

<sup>5</sup> *Sheanon v. Pacific Mut. Life Ins. Co.*, 83 Wis. 507.

<sup>6</sup> *McNamara v. McNamara*, 62 Ga. 200; *Le Count v. Greenley*, 6 N. Y. St. Rep. 91. The fact that one as father or friend merely gives information or advice in reference to a land trade does not make him an agent. *McNamara v. McNamara*, *supra*.

<sup>7</sup> *Helps v. Clayton*, 17 C. B. (N. S.) 553.

<sup>8</sup> *Reeves v. Kelly*, 30 Mich. 132.

<sup>9</sup> *Reeves v. Kelly*, 30 Mich. 132.

<sup>10</sup> See *ante*, § 18.

<sup>11</sup> *Rex v. Munden*, 1 Strange, 190; *Edwards v. Davis*, 16 Johns. (N. Y.) 281; *Becker v. Gibson*, 70 Ind. 239; *Stone v. Stone*, 32

to support their helpless and destitute parents is imposed upon children by statute, and if they fail to perform such duty, they can be held liable for necessities furnished, unless some special mode of enforcing the duty is prescribed by the statute.<sup>12</sup> Thus if a statute imposes the duty upon "the children of any poor person, who is unable to maintain himself by work, to maintain such person to the extent of their ability," a county which has, under the direction of the law, furnished necessities to an indigent and helpless father, may recover therefor in an action against the children whose duty it was to furnish the same, and whose neglect or refusal so to do made it necessary for the county to furnish such necessities.<sup>13</sup> But even under such a statute, a court would have no authority to render a judgment requiring the children to undertake the future support of their parents, where the statute is silent as to the means of enforcing such duty as to future maintenance.<sup>14</sup>

#### § 77. Agency of child for parent.

(a) **In general.**—Ordinarily a child has no implied authority to act as agent for his parent, to manage or dispose of the latter's property, make contracts, or for any other purpose, and authority will not be presumed from the mere fact of relationship.<sup>15</sup> "A son has no authority, as such, to lend his father's property, and there is no presumption that such authority has been given to a son. It may be shown that authority to lend tools and the like has been given to a

Conn. 142; *Lebanon v. Griffin*, 45 N. H. 558; *Gray v. Spalding*, 58 N. H. 345.

<sup>12</sup> *McCook County v. Kammos*, 7 S. D. 558, 58 Am. St. Rep. 854; *Howe v. Hyde*, 88 Mich. 91. It is otherwise if the statute prescribes a particular mode of enforcing the duty which it imposes. *Edwards v. Davis*, 16 Johns. (N. Y.) 281.

<sup>13</sup> *McCook County v. Kammos*, 7 S. D. 558, 58 Am. St. Rep. 854.

<sup>14</sup> *McCook County v. Kammos*, 7 S. D. 558, 58 Am. St. Rep. 854.

<sup>15</sup> *Owen v. White*, 5 Port. (Ala.) 435, 30 Am. Dec. 572; *Paul v. Hummel*, 43 Mo. 122; *Holt v. Baldwin*, 46 Mo. 265, 2 Am. Rep. 515; *Johnson v. Stone*, 40 N. H. 197, 77 Am. Dec. 706; *Walsh v. Curbey*, 42 N. Y. St. Rep. 470; *Ritch v. Smith*, 82 N. Y. 627; *Schaefer v. Osterbrink*, 67 Wis. 495; *Kumba v. Gilham*, 103 Wis. 312. And see article by Prof. W. R. Vance, in 6 Va. Law Reg. 585.

son expressly, or such an authority may be inferred from the conduct of the father, tending to show that he reposed such confidence and intrusted such discretion to the son, as by showing that on other occasions the son had lent the father's property of a similar kind, and the father, upon the facts coming to his knowledge, approved what he had done; but without such proof the son stands in the same position as a stranger."<sup>16</sup> But of course, as stated in the above quotation, a parent may expressly authorize his or her child to act as agent, and such authority may be inferred from circumstances. Or the parent may be estopped, by a holding out or other conduct, from denying such authority.<sup>17</sup> Thus where a son had in several instances used the name of his father by signing it as surety to notes given by the son, and the father, with knowledge of the fact that such use had been made of his name, directed the holder of a note so signed to see the son about it, and the latter agreed to have it arranged as desired, and smaller notes were accepted by the holder, in place of the larger one, in the belief that the new notes had been signed by the father, as he made no objection to the genuineness of the note presented to him, the facts were such as to authorize the jury to presume and find that the son was the agent of the father to sign the note, or that the father ratified the act done by the son.<sup>18</sup> If a son has been accustomed to sign his father's name as indorser of notes, and the father has recognized the indorsements as binding, authority on the part of the son to bind the father by such indorsements in other instances will be implied.<sup>19</sup> So if the parent

<sup>16</sup> *Johnson v. Stone*, 40 N. H. 197, 77 Am. Dec. 706.

<sup>17</sup> *Bryan v. Jackson*, 4 Conn. 288; *Weaver v. Ogletree*, 39 Ga. 586; *Harper v. Lemon*, 38 Ga. 227; *Murphy v. Ottenheimer*, 84 Ill. 39; *Thurber v. Anderson*, 88 Ill. 167; *Com. v. Holmes*, 119 Mass. 195; *Thayer v. White*, 12 Metc. (Mass.) 343; *Bennett v. Gillette*, 3 Minn. 423, 74 Am. Dec. 774; *Holt v. Baldwin*, 46 Mo. 265, 2 Am. Rep. 515; *Johnson v. Stone*, 40 N. H. 197, 77 Am. Dec. 706; *Abeel v. Seymour*, 6 Hun (N. Y.) 656; *Center v. Rush*, 35 Misc. (N. Y.) 294; *Fowlkes v. Baker*, 29 Tex. 139; *Chase v. Snow*, 52 Vt. 525. Compare *Greenfield Bank v. Crafts*, 2 Allen (Mass.) 269.

<sup>18</sup> *Weaver v. Ogletree*, 39 Ga. 586.

<sup>19</sup> *Abeel v. Seymour*, 6 Hun (N. Y.) 656.

has formerly paid for goods purchased on credit by his child, and does not forbid such sales, it will be inferred that the parent authorizes further purchases on credit.<sup>20</sup>

As we have seen, the fact that a person is a minor, so that he cannot bind himself, does not render him incompetent to act as agent, for a person who is not *sui juris* may act as agent.<sup>21</sup>

(b) **Contracts for necessities.**—A father is not bound by the contract of his son even for articles which are suitable and necessary, in the absence of elements of estoppel, unless an express authority is shown, or the circumstances are such that authority in fact may be inferred. A son has no implied authority to purchase necessities on his father's credit merely by virtue of the relationship.<sup>22</sup> When a child continues under the direction and control of his father, it is left to the father's discretion to determine what is necessary for him, unless it clearly appears that the father has failed to perform his duty to provide for the child's maintenance.<sup>23</sup> But an implied authority on the part of the child may arise if such an omission on the part of the father is shown. By statute in many jurisdictions, and by the weight of authority even at common law, and independently of any statute, a father is under a legal obligation to support and maintain his minor children, just as a husband is under a legal obligation to support and maintain his wife, as will be hereafter shown.<sup>24</sup> And it follows that if a father drives his minor child from home, or causes him to leave by personal violence or abuse, or otherwise neglects without cause to perform this parental duty, the law will imply or create an agency on the part of the child, as it does on the part of a

<sup>20</sup> *Plotts v. Rosebury*, 28 N. J. Law, 146; *Fowlkes v. Baker*, 29 Tex. 135.

<sup>21</sup> *Ante*, § 26.

<sup>22</sup> *Owen v. White*, 5 Port. (Ala.) 435, 30 Am. Dec. 572; *Van Valkinburgh v. Watson*, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; and other cases cited in the notes following.

<sup>23</sup> *Owen v. White*, 5 Port. (Ala.) 435, 30 Am. Dec. 572.

<sup>24</sup> See post, § 85.

wife, to purchase necessities on the father's credit,<sup>25</sup> such as food, clothing, shelter, medical attendance, etc.<sup>26</sup>

<sup>25</sup> 2 Kent, Comm. 190; Reeve, Dom. Rel. 285.

*England*: Rawlins v. Vandyke, 3 Esp. 252. But see the English cases to the contrary cited below in this note.

*Alabama*: Owen v. White, 5 Port. 435, 30 Am. Dec. 572.

*Arkansas*: Holt v. Holt, 42 Ark. 495; Jordan v. Wright, 45 Ark. 237.

*Connecticut*: Stanton v. Willson, 3 Day, 37, 3 Am. Dec. 255. And see Finch v. Finch, 22 Conn. 421.

*District of Columbia*: Holtzman v. Castleman, 2 MacArthur, 555.

*Georgia*: Keaton v. Davis, 18 Ga. 457.

*Iowa*: Porter v. Powell, 79 Iowa, 151, 18 Am. St. Rep. 353. And see Dawson v. Dawson, 12 Iowa, 513; Johnson v. Barnes, 69 Iowa, 641.

*Maine*: Weeks v. Merrow, 40 Me. 151; Gilley v. Gilley, 79 Me. 292, 1 Am. St. Rep. 307.

*Massachusetts*: Dennis v. Clark, 2 Cush. 347, 352, 48 Am. Dec. 671, 675; Reynolds v. Sweetser, 15 Gray, 78.

*Michigan*: Courtright v. Courtright, 40 Mich. 633; Hyde v. Lel-senring, 107 Mich. 490; Tyler v. Arnold, 47 Mich. 564.

*New York*: Van Valkinburgh v. Watson, 13 Johns. 480, 7 Am. Dec. 395; Manning v. Wells, 8 Misc. 646, 85 Hun, 27; Edwards v. Davis, 16 Johns. 281, 285; Cromwell v. Benjamin, 41 Barb. 558; In re Ryder, 11 Paige, 188. And see Furman v. Van Sise, 56 N. Y. 435, 15 Am. Rep. 441. Compare Raymond v. Loyl, 10 Barb. 483; Chilcott v. Trimble, 13 Barb. 502.

*Ohio*: Pretzinger v. Pretzinger, 45 Ohio St. 452, 4 Am. St. Rep. 542.

*Pennsylvania*: Fidler v. Fidler, 33 Pa. 50.

*Tennessee*: Maguinay v. Saudek, 5 Sneed, 146.

*Virginia*: Evans v. Pearce, 15 Grat. 513, 78 Am. Dec. 635.

In some decisions, however, it has been held that there is no legal obligation on a parent, independent of statute, to maintain his child, and that no action can be maintained against a father for necessities furnished to his minor child, unless the father has expressly or impliedly authorized the purchase on his credit, or has expressly or impliedly promised to pay therefor, but slight evidence is held to be sufficient to show this authority or promise.

*England*: Mortimore v. Wright, 6 Mees. & W. 482; Shelton v. Springett, 11 C. B. 452; Law v. Wilkins, 1 Nev. & P. 697; Baker v. Keen, 2 Starkie, 501.

*Illinois*: In this state it is a well established rule that "an express promise, or circumstances from which a promise by the father can be inferred, are indispensably necessary to bind the

It will be seen from the cases cited in the last but one preceding note that, although they all agree in holding a parent liable for necessities furnished to a child, where he has neglected or refused to do so, yet this liability is placed on different grounds. In the cases first cited, it is held that there is a legal obligation on a father to maintain his infant child and that if he fails or refuses to do so, there is an agency by implication of law on the part of the child to purchase such necessities on the credit of the parent. On the other hand,

parent for necessities furnished his infant child by a third person." *Hunt v. Thompson*, 3 Scam. 179; *Miller v. McKinney*, 45 Ill. App. 447; *Allen v. Jacobi*, 14 Ill. App. 277; *Schnuckle v. Bierman*, 89 Ill. 454; *Gotts v. Clark*, 78 Ill. 229; *McMillen v. Lee*, 78 Ill. 443; *Johnson v. Smallwood*, 88 Ill. 73; *Murphy v. Ottenheimer*, 84 Ill. 39. Under this rule it has been held that, if a father neglects or refuses his natural or moral duty to furnish his child with necessary and suitable wearing apparel, any one can supply the child therewith, and the law in such case will imply a promise on the part of the father to pay for them, and he will not be heard to allege the contrary; but it would be otherwise if he had not been derelict in his duty. *Allen v. Jacobi*, 14 Ill. App. 277; *Hunt v. Thompson*, 3 Scam. 179; *Miller v. McKinney*, 45 Ill. App. 447.

*Indiana*: *Hollingsworth v. Swedenborg*, 49 Ind. 378, 19 Am. Rep. 687; *White v. Mann*, 110 Ind. 74; *Watkins v. De Armond*, 89 Ind. 553. Compare *Conn v. Conn*, 57 Ind. 323.

*New Hampshire*: *French v. Benton*, 44 N. H. 30; *Kelley v. Davis*, 49 N. H. 187, 6 Am. Rep. 499; *Town of Farmington v. Jones*, 36 N. H. 271. Compare, however, *Hillsborough v. Deering*, 4 N. H. 86; *Pidgin v. Cram*, 8 N. H. 352.

*New Jersey*: *Freeman v. Robinson*, 38 N. J. Law, 383, 20 Am. Rep. 399. Compare *Tomkins v. Tomkins*, 11 N. J. Eq. 512.

*Oregon*: *Carney v. Barrett*, 4 Or. 171.

*Vermont*: *Gordon v. Potter*, 17 Vt. 348; *Varney v. Young*, 11 Vt. 258. But see *Buckminster v. Buckminster*, 38 Vt. 248, 88 Am. Dec. 652.

<sup>26</sup> What are necessities must be determined by the condition in life and means of the father as well as the character of the articles. *Stanton v. Willson*, 3 Day (Conn.) 37, 3 Am. Dec. 255; *Freeman v. Robinson*, 38 N. J. Law, 383, 20 Am. Rep. 399. And see post, § 85f, as to necessities for wife. Education has been held a necessary. *Stanton v. Willson*, 3 Day (Conn.) 37, 3 Am. Dec. 255. But compare *Hodges v. Hodges*, Peake Add. Cas. 79; *Bailey v. Calcott*, 4 Jur. 699. But not tutoring in vacation. *Peacock v. Linton*, 22 R. I. 328.

the other cases cited hold that there is no such legal obligation on the parent, independent of statutory enactment, and that there is no agency in the child in such cases, to procure necessities on the credit of the parent, unless he is expressly authorized to do so, or unless the circumstances are such as to create an agency by implication of fact. This implied authority on the part of a child to bind his father for necessities only arises in the case of neglect of duty on the part of the father, which must be affirmatively shown.<sup>27</sup> If a father abandons his minor child or drives him from home, the child carries with him such an implied authority, but it is otherwise where the child, being of the age of discretion, voluntarily leaves his father's house.<sup>28</sup> Nor is a

<sup>27</sup> *Van Valkinburgh v. Watson*, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; *Owen v. White*, 5 Port. (Ala.) 435, 30 Am. Dec. 572; *Hunt v. Thompson*, 3 Scam. (Ill.) 179, 36 Am. Dec. 538; *Glynn v. Glynn*, 94 Me. 465. A person who furnishes a child with necessities acts at his peril, and will have the burden of showing that the articles furnished were necessities, and that the father neglected his duty in the matter. *Van Valkinburgh v. Watson*, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; *Hunt v. Thompson*, 3 Scam. (Ill.) 179, 36 Am. Dec. 538; *Judge v. Barrows*, 59 Wis. 115; *Townsend v. Burnham*, 33 N. H. 270; *Rogers v. Turner*, 59 Mo. 116; *Chilcott v. Trimble*, 13 Barb. (N. Y.) 502; *Smith v. Church*, 5 Hun (N. Y.) 109; *Miller v. Davis*, 45 Ill. App. 447. Or of showing authority or assent of the father. *Rolfe v. Abbott*, 6 Car. & P. 286.

<sup>28</sup> *Angel v. McLellan*, 16 Mass. 28, 8 Am. Dec. 118; *Owen v. White*, 5 Port. (Ala.) 435, 30 Am. Dec. 572; *Hunt v. Thompson*, 3 Scam. (Ill.) 179, 36 Am. Dec. 538; *Hyde v. Leisenring*, 107 Mich. 490; *Raymond v. Loyl*, 10 Barb. (N. Y.) 483; *Goodman v. Alexander*, 28 App. Div. (N. Y.) 227; *Weeks v. Merrow*, 40 Me. 151; *Glynn v. Glynn*, 94 Me. 465; *Miller v. Davis*, 49 Ill. App. 377. But not where the child is of tender years, as between eight and nine years old. *Bradley v. Keen*, 101 Ill. App. 519. As to the effect of a limited emancipation, see *Porter v. Powell*, 79 Iowa, 151, 18 Am. St. Rep. 353. But when a father permits his minor son to buy goods on his credit, the fact that the son has left the father will not prevent a recovery against the latter for goods sold to the son, by a party acting on the faith of the agency of the son, and without notice of the change of relation, or of circumstances to put him on inquiry. *Murphy v. Ottenheimer*, 84 Ill. 39. Where a father permits his son to contract for a year's tuition, the father is liable to the instructor for the whole fee in case the son leaves the school

father liable for necessities furnished a child while in the custody of the mother, who has left him without cause.<sup>29</sup> Nor does the above rule apply to adult children; and a father is not liable for necessities furnished an adult child, in the absence of contract or authority, although the child be at the home of the father when the necessities are furnished, and although the father fails to supply them himself.<sup>30</sup> There is some conflict of authority as to whether a mother who is a widow is under an obligation to support her minor children, where they are not able to support themselves, but the better opinion is that she is under such an obligation, and that she is liable, therefore, for necessities furnished to them, on her failure to support them.<sup>31</sup> It would be otherwise, however, if the children have sufficient means of their own, or can maintain themselves, or provision has been made for their support.<sup>32</sup> If a wife obtains

of his own motion before the end of the year. *Center v. Rush*, 35 Misc. (N. Y.) 294.

<sup>29</sup> *Hyde v. Leisenring*, 107 Mich. 490; *Glynn v. Glynn*, 94 Me. 465. And see post, § 86.

<sup>30</sup> *Blachley v. Laba*, 63 Iowa, 22, 50 Am. Rep. 724; *Vorass v. Rosenberry*, 85 Ill. App. 623; *Norris v. Dodge's Adm'r*, 23 Ind. 190; *Kernodle v. Caldwell*, 46 Ind. 153; *Mills v. Wyman*, 3 Pick. (Mass.) 207; *Townsend v. Burnham*, 33 N. H. 270; *Wood v. Gill's Ex'rs*, 1 N. J. Law. 449; *Crane v. Baudouine*, 55 N. Y. 256; *Patton's Ex'r v. Hassinger*, 69 Pa. 311; *Hawkins v. Hyde*, 55 Vt. 55. But a father is liable for necessities furnished to an invalid daughter, unable to support herself and dependent on the father, notwithstanding she is over age. *Cromwell v. Benjamin*, 41 Barb. (N. Y.) 558. And where a child, living with its parent, has been accustomed to purchase on the credit of the parent such articles as were for his own personal use, he deals as the known agent of the parent and the child is not personally liable therefor, though the purchase is made after his majority. *Emery-Bird-Thayer Dry Goods Co. v. Coomer*, 87 Mo. App. 404.

<sup>31</sup> *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441; *Gray v. Durland*, 50 Barb. (N. Y.) 100, 211; *Girls' Industrial Home v. Fritchey*, 10 Mo. App. 344; *Mowbry v. Mowbry*, 64 Ill. 383.

But see *Whipple v. Dow*, 2 Mass. 415; *Dawes v. Howard*, 4 Mass. 97; *Englehardt v. Yung's Heirs*, 76 Ala. 534; *In re Besondy*, 32 Minn. 385; 50 Am. Rep. 579. Compare *Inhabitants of Dedham v. Inhabitants of Natick*, 16 Mass. 135.

<sup>32</sup> *Mowbry v. Mowbry*, 64 Ill. 383; *Whipple v. Dow*, 2 Mass. 415;



a divorce, and is given the custody of minor children, and alimony for herself, but not specifically for the support of the children also, this does not relieve the husband of his duty to support the children, and he may nevertheless be liable for necessities furnished them.<sup>33</sup> In some cases, however, the contrary is held.<sup>34</sup>

The duty of a father to support his children does not extend to the children of a wife by a former marriage, so as to render a step-father liable for necessities furnished his step-children,<sup>35</sup> unless he so receives and treats them as to raise the presumption that he intends to create the relation of parent and child.<sup>36</sup>

#### § 78. Agency of servant for master.

There is nothing in the relation of a master and his domestic or other servant to give the latter any authority to bind the former.<sup>37</sup> A servant is the agent of his master

*Dawes v. Howard*, 4 Mass. 97; *Englehardt v. Yung's Heirs*, 76 Ala. 534.

<sup>33</sup> *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 4 Am. St. Rep. 542 (allowing the wife to recover from the husband for support furnished the child); *Holt v. Holt*, 42 Ark. 495; *Courtright v. Courtright*, 40 Mich. 633; *Thomas v. Thomas*, 41 Wis. 229; *Conn v. Conn*, 57 Ind. 323.

<sup>34</sup> *Burritt v. Burritt*, 29 Barb. (N. Y.) 124; *Brow v. Brightman*, 136 Mass. 187; *Finch v. Finch*, 22 Conn. 411. In *Burritt v. Burritt*, *supra*, it was held that, where a divorce has been decreed and the care and custody of the child awarded to the mother and alimony to the wife, it must be presumed to carry with it the obligation of support, in the absence of evidence to the contrary; or at least, to relieve the father from the obligation to furnish such support upon the call of the mother; and to make the father liable in such a case, there must be special circumstances averred in the complaint or appearing in the evidence, from which the obligation must arise, or may be reasonably inferred.

<sup>35</sup> *Tubb v. Harrison*, 4 Term R. 118; *Mowbry v. Mowbry*, 64 Ill. 383; *Bond v. Lockwood*, 33 Ill. 212; *In re Besondy*, 32 Minn. 385, 50 Am. Rep. 579; *In re Ackerman*, 116 N. Y. 654. And see post, § 202.

<sup>36</sup> *Mowbry v. Mowbry*, 64 Ill. 383; *Bond v. Lockwood*, 33 Ill. 212; *Ela v. Brand*, 63 N. H. 14.

<sup>37</sup> As to the distinction between an agent and a servant, see ante, § 5.

for the purpose of managing or disposing of his property, binding him by contracts for the purchase of supplies and otherwise, or for any other purpose, in so far only as authority may have been expressly or impliedly conferred upon him by the master.<sup>38</sup> Of course, as in any other case, agency on the part of a servant to bind his master may be implied from circumstances, and the master may be estopped by his conduct clothing the servant with apparent authority. But properly speaking, in so far as the servant becomes an agent for his master he loses the character of servant.

§ 79. Agency of husband for wife.

(a) *In general.*—At common law, as we have seen, a married woman cannot appoint an agent, and therefore she cannot be bound by contracts or acts of her husband as her agent, even though she may have expressly authorized the same.<sup>39</sup> But this doctrine no longer obtains in all its strictness in any jurisdiction. In some states, as we have seen, statutes have been enacted, allowing married women to hold a separate estate, and to convey or contract with reference to the same; and in some states the common law disabilities of coverture have been removed altogether, so that she may contract in all respects as a feme sole. In so far as her disabilities have been thus removed, a married woman may appoint an agent to act for her;<sup>40</sup> and subject to special statutory provisions, she may appoint her husband as well as a third person. There is nothing in the marriage relation to prevent a husband from acting as the agent of his wife under an appointment by her.<sup>41</sup> And the same is

<sup>38</sup> *Haluptzok v. Great Northern R. Co.*, 55 Minn. 446.

<sup>39</sup> *Ante*, § 21.

<sup>40</sup> *Ante*, § 21.

<sup>41</sup> *Alabama*: *Jones v. Chenault*, 124 Ala. 610, 82 Am. St. Rep. 211; *Louisville Coffin Co. v. Stokes*, 78 Ala. 372.

*Arkansas*: *Humphrey v. McCauley*, 55 Ark. 143; *Hoffman v. McFadden*, 56 Ark. 217, 35 Am. St. Rep. 101.

*California*: *Quarg v. Scher*, 136 Cal. 406.

*Florida*: *Prentiss v. Paisley*, 25 Fla. 927.

*Illinois*: *Haight v. McVeagh*, 69 Ill. 624; *Patten v. Patten*, 75 Ill. 446; *Walker v. Carrington*, 74 Ill. 446; *Wortman v. Price*, 47 Ill. 22; *Nigh v. Dovel*, 84 Ill. App. 228.

true of any other contract or act which under the statutes a wife may make or do. The general rule is that she may authorize her husband to do for her whatever she has the capacity to do herself.<sup>42</sup> A husband may act as agent for

*Indiana:* Barnett v. Gluting, 3 Ind. App. 415; Rowell v. Klein, 44 Ind. 290; Griffin v. Ransdell, 71 Ind. 440.

*Iowa:* Hamilton v. Hooper, 46 Iowa, 515, 26 Am. Rep. 161. See Sawyer v. Biggart, 114 Iowa, 489.

*Kansas:* Wilkinson v. Elliott, 43 Kan. 590, 19 Am. St. Rep. 158.

*Louisiana:* Jones v. Read, 1 La. Ann. 200.

*Maine:* Verrill v. Parker, 65 Me. 578; Roberts v. Hartford, 86 Me. 460; Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 56 Am. St. Rep. 436.

*Massachusetts:* Arnold v. Spurr, 130 Mass. 347; Wheaton v. Trimble, 145 Mass. 345, 1 Am. St. Rep. 463; Duggan v. Wright, 157 Mass. 228.

*Michigan:* Rankin v. West, 25 Mich. 195; Luebe v. Thorpe, 94 Mich. 268; McBain v. Seligman, 58 Mich. 294; First Commercial Bank v. Newton, 117 Mich. 433.

*Missouri:* Rodgers v. Pike County Bank, 69 Mo. 562; Eystra v. Capelle, 61 Mo. 578; Long v. Martin, 152 Mo. 668.

*Nebraska:* McMurtry v. Brown, 6 Neb. 368. A husband may act as the agent of his wife in the management of her separate business. Harris v. Weir-Shugart Co., 51 Neb. 483.

*New Jersey:* Elliott v. Bodine, 59 N. J. Law, 567; Talcott v. Arnold, 54 N. J. Eq. 570; Taylor v. Wanda, 55 N. J. Eq. 491, 62 Am. St. Rep. 818; Tresch v. Wirtz, 34 N. J. Eq. 124, 36 N. J. Eq. 356.

*New York:* Wronkow v. Oakley, 133 N. Y. 505, 28 Am. St. Rep. 661; Third Nat. Bank v. Guenther, 123 N. Y. 568, 20 Am. St. Rep. 780.

*North Carolina:* Bazemore v. Mountain, 121 N. C. 59.

*Ohio:* Manhattan L. Ins. Co. v. Smith, 44 Ohio St. 156.

*Pennsylvania:* Bodey v. Thackara, 143 Pa. 171, 24 Am. St. Rep. 526; Baxter v. Maxwell, 115 Pa. 469.

*South Carolina:* Brown v. Thomson, 31 S. C. 436, 17 Am. St. Rep. 40; Scottish American Mortg. Co. v. Deas, 35 S. C. 42, 28 Am. St. Rep. 832.

*Washington:* Richmond v. Voorhees, 10 Wash. 316.

*West Virginia:* Camden v. Hiteshew, 23 W. Va. 236; Trapnell v. Conklyn, 37 W. Va. 242, 38 Am. St. Rep. 30.

*Wisconsin:* Weisbrod v. Chicago & N. W. R. Co., 18 Wis. 40, 86 Am. Dec. 743; Austin v. Austin, 45 Wis. 523; Lavassar v. Washburne, 50 Wis. 200; Wood v. Armour, 88 Wis. 488, 43 Am. St. Rep. 918.

<sup>42</sup> Under a statute authorizing the personal property of a wife

his wife in making a contract for the purchase of land, and if he makes such contract in his own name the fact that he acted as agent for his wife may be shown by parol evidence.<sup>43</sup>

Where a married woman's disabilities are only partially removed, her capacity to authorize her husband to act as her agent is limited. The rule is that she may authorize him to act as her agent in making any contract or doing any other act which she has the capacity to do herself,<sup>44</sup> unless there is some statute requiring her to act personally in the particular matter; but she cannot authorize him to bind her by any contract or act, by which she cannot bind herself.<sup>45</sup> Where a married woman is empowered by statute to contract with reference to her separate property, she may appoint her husband her agent to contract for its improvement or repair, so as to enable him to subject it to a mechanic's lien.<sup>46</sup>

**(b) Implication or presumption of husband's agency for wife.**—Although a wife may have the capacity to authorize her husband to act as her agent, as explained above, the husband cannot bind her in the absence of authority in fact from her, or an estoppel by her conduct to deny such authority. A husband has no implied authority, merely by reason of the marriage relation, to act as the agent of his wife in

to be disposed of by the husband and wife by parol, a married woman may by parol authorize her husband to vote corporate stock owned by her at corporate meetings, and to consent for her to a transfer of all the corporate property to another corporation for its capital stock to be issued to the stockholders of the former corporation. *Hoene v. Pollak*, 118 Ala. 617, 72 Am. St. Rep. 189.

<sup>43</sup> *Brodhead v. Reinbold*, 200 Pa. 618, 86 Am. St. Rep. 735.

<sup>44</sup> See the cases in note 41, *supra*.

<sup>45</sup> *Macfarland v. Helm*, 127 Mo. 327, 48 Am. St. Rep. 629; *Hall v. Callahan*, 66 Mo. 316; *Bowles v. Trapp*, 139 Ind. 55; *Ingram v. Nedd*, 44 Vt. 462. Where a statute gives a wife capacity to contract in writing with the written consent of her husband, she has no power to confer authority upon her husband by parol to make a contract in her name. *First Nat. Bank v. Leland*, 122 Ala. 289.

<sup>46</sup> *Hoffman v. McFadden*, 56 Ark. 217, 35 Am. St. Rep. 101; *Wheaton v. Trimble*, 145 Mass. 345, 1 Am. St. Rep. 463; *Bodey v. Thackara*, 143 Pa. 171, 24 Am. St. Rep. 526. And see *infra*, (b).

managing or disposing of her separate estate, or binding her by contracts with respect thereto; nor will the appointment of a husband by his wife as her agent be presumed merely from the marriage relation, without other evidence, or from circumstances which ordinarily owe their existence solely to the marriage relation,<sup>47</sup> unless by some express statutory

<sup>47</sup> *United States*: Dodge v. Knowles, 114 U. S. 435.

*Arkansas*: Hoffman v. McFadden, 56 Ark. 217, 35 Am. St. Rep. 101.

*Colorado*: Vescelius v. Martin, 11 Colo. 391.

*District of Columbia*: Weightman v. Washington Critic Co., 4 App. D. C. 136.

*Georgia*: Stilwell v. Woodruff, 76 Ga. 347; Byne v. Corker, 100 Ga. 445; Axson v. Belt, 103 Ga. 578; Jones v. Harrell, 110 Ga. 373.

*Indiana*: Runyon v. Snell, 116 Ind. 164, 9 Am. St. Rep. 839; Barnett v. Gluting, 3 Ind. App. 415; Russell v. Stoner, 18 Ind. App. 543.

*Iowa*: McLaren v. Hall, 26 Iowa, 297; Miller v. Hollingsworth, 33 Iowa, 224; Price v. Seydel, 46 Iowa, 696. See Trimble v. Thorson, 80 Iowa, 246.

*Maine*: Ferguson v. Spear, 65 Me. 277; Verrill v. Parker, 65 Me. 578.

*Massachusetts*: Merrill v. Parker, 112 Mass. 253; Hunt v. Poole, 139 Mass. 224.

*Mississippi*: Anderson v. Gregg, 44 Miss. 170; Crawford v. Redus, 54 Miss. 700.

*Missouri*: Mead v. Spalding, 94 Mo. 43; Garnett v. Berry, 3 Mo. App. 197; Henry v. Sneed, 99 Mo. 407, 17 Am. St. Rep. 580.

*Nebraska*: Rust-Owen Lumber Co. v. Holt, 60 Neb. 80, 83 Am. St. Rep. 512.

*New Hampshire*: Cate v. Rollins, 69 N. H. 426.

*New Jersey*: Elliott v. Bodine, 59 N. J. Law, 567.

*New York*: Jones v. Walker, 63 N. Y. 612; Bates v. First Nat. Bank, 89 N. Y. 286; Gilbert v. Deshon, 107 N. Y. 324; Gates v. Williams, 3 Misc. 376; Speiss v. Weinberg, 27 Misc. 774.

*Pennsylvania*: Dearie v. Martin, 78 Pa. 55.

*Tennessee*: Knott v. Carpenter, 3 Head 542, 75 Am. Dec. 779.

*Texas*: Cushman v. Masterson (Tex. Civ. App.) 64 S. W. 1031.

*Vermont*: Johnson v. Valido Marble Co., 64 Vt. 348.

*Wisconsin*: Ladd v. Hilderbrant, 27 Wis. 135, 9 Am. Rep. 445.

A husband's cultivation of his wife's land does not raise a presumption that he is her agent, with authority to sign notes on her behalf. Jones v. Harrell, 110 Ga. 373. Nor does the fact that she permitted him to manage land conveyed by him to her, dispose

provision.<sup>48</sup> It follows that a husband's knowledge of defects in the title of real estate or illegality in the consideration of a negotiable instrument purchased by his wife, or other matters, is no more imputable to her than knowledge of a stranger would be, where it is not shown that he was acting as her agent in the transaction.<sup>49</sup>

While authority on the part of a husband to act as agent for his wife will not be implied or presumed from the marriage relation alone, an agency in fact may, as in the case of other persons, be implied from the conduct of the wife in allowing the husband to act for her, or other circumstances tending to show authority in fact, and the relation between them may be taken into consideration, in connection with the other circumstances, in determining whether there was authority in fact.<sup>50</sup> A finding that a husband acted as the duly authorized agent of his wife in employing a person to perform labor upon her house is warranted, in a proceeding to enforce a mechanic's lien therefor, by evidence that the husband had general management of the property, that he employed such person to perform the labor, that the wife knew the work was being done, and that she personally gave directions as to parts of the work, or otherwise showed her assent thereto.<sup>51</sup> But authority on the part

of the products thereof, and handle the proceeds as he saw fit, authorize him to sell the land. *Saunders v. King*, 119 Iowa, 291.

<sup>48</sup> In some jurisdictions, by express statutory provision, a husband having the custody and control of his wife's separate property is presumed to be her agent. *American Exp. Co. v. Lankford*, 2 Ind. T. 18; *Gross v. Pigg*, 73 Miss. 286; *Porter v. Staten*, 64 Miss. 421.

<sup>49</sup> See post, c. 15.

<sup>50</sup> *Wheaton v. Trimble*, 145 Mass. 345, 1 Am. St. Rep. 463; *Carroll v. O'Shea*, 19 N. Y. Supp. 374; *Bodey v. Thackara*, 143 Pa. 171, 24 Am. St. Rep. 526; *Minard v. Stillman*, 31 Or. 164, 65 Am. St. Rep. 815; *Laycock v. Parker*, 103 Wis. 161; *Barnett v. Gluting*, 3 Ind. App. 415; *Shafer v. Archbold*, 116 Ind. 29; *Arnold v. Spurr*, 130 Mass. 347; *Hunt v. Mercantile Ins. Co.*, 22 Fed. 503.

<sup>51</sup> *Richards v. John Spry Lumber Co.*, 169 Ill. 238; *Bumgartner v. Hall*, 163 Ill. 136; *McNichols v. Kettner*, 22 Ill. App. 493; *Anderson v. Armstead*, 69 Ill. 452; *Interstate Bldg. & Loan Ass'n v. Ayers*, 71 Ill. App. 530; *Thompson v. Shepard*, 85 Ind. 352; *Burdick v. Moon*, 24 Iowa, 418; *Kidd v. Wilson*, 23 Iowa, 464; *Bethell*

of a husband to make a contract for the improvement of his wife's real property, so as to subject it to a mechanic's lien, is not implied from the marriage relation, nor from the mere fact that the husband occupied, or managed and controlled, the property.<sup>52</sup> The mere fact that a wife has knowledge of the construction of a building by her husband on her property does not, of itself, necessarily establish the agency of her husband to charge such property with a lien for material used thereon; and she may contest the validity of such a lien,<sup>53</sup> unless there is a statute creating a liability against her under such circumstances.<sup>54</sup>

It has been held that if a conveyance of land to a married woman is delivered to her husband and accepted by him for her, acceptance by her will be presumed on the ground that, since the conveyance is for her benefit, authority on the part

v. Chicago Lumber Co., 39 Kan. 230; Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 56 Am. St. Rep. 436; Wheaton v. Trimble, 145 Mass. 345, 1 Am. St. Rep. 463; Tuttle v. Howe, 14 Minn. 145, 100 Am. Dec. 205; Farley v. Stroeh, 68 Mo. App. 85; Collins v. Megraw, 47 Mo. 495; Bradford v. Peterson, 30 Neb. 96; McCormick v. Lawton, 3 Neb. 449; Howell v. Hathaway, 28 Neb. 807; Scales v. Paine, 13 Neb. 521; Elliott v. Bodine, 59 N. J. Law, 567; Holden v. Kutscher, 17 Misc. (N. Y.) 540; Bodey v. Thackara, 143 Pa. 171, 24 Am. St. Rep. 526; Bevan v. Thackara, 143 Pa. 182, 24 Am. St. Rep. 529; Bankard v. Shaw, 199 Pa. 623; Jobe v. Hunter, 165 Pa. 5, 44 Am. St. Rep. 639; Spears v. Lawrence, 10 Wash. 368, 45 Am. St. Rep. 789; Laycock v. Parker, 103 Wis. 161. See, also, Tarr v. Muir, 21 Ky. L. R. 988, 53 S. W. 663. Compare, however, Cate v. Rollins, 69 N. H. 426; Johnson v. Parker, 27 N. J. Law, 239.

If the wife has authorized her husband to act as her agent in contracting for the building of a house upon her separate real estate, the law will give a mechanic's lien thereon, although she may not have intended to charge the property therewith. Jones v. Pothast, 72 Ind. 158 (overruling Dame v. Coffman, 58 Ind. 345, on this point).

<sup>52</sup> Hoffman v. McFadden, 56 Ark. 217, 35 Am. St. Rep. 101; Duross v. Broderick, 78 Mo. App. 260; Lyon v. Champion, 62 Conn. 75.

<sup>53</sup> Rust-Owen Lumber Co. v. Holt, 60 Neb. 80, 83 Am. St. Rep. 512; Alexander v. Perkins, 71 Mo. App. 286.

<sup>54</sup> Santa Cruz Rock Pavement Co. v. Lyons, 117 Cal. 212, 59 Am. St. Rep. 174. And see Heath v. Solles, 73 Wis. 217; North v. La Flesch, 73 Wis. 520; Smith v. Gill, 37 Minn. 455.

of the husband to accept the same for her may be presumed from their relation.<sup>55</sup>

It has been said that stronger and more satisfactory evidence is necessary to establish a husband's agency for his wife than would be required as between persons not occupying such a relation.<sup>56</sup>

(c) **Estoppel of wife to deny authority of husband.**—When a wife has authority to appoint her husband as her agent with respect to a particular matter or business, she is subject, to the same extent as any other person, to the principles of law in relation to agency by estoppel. If by her conduct she holds him out as her agent or allows him to act as such, she will be bound by his acts within the scope of his apparent authority, whether there was any actual authority or not.<sup>57</sup>

<sup>55</sup> *McGehee v. White*, 31 Miss. 46; *Pool v. Phillips*, 167 Ill. 432.

<sup>56</sup> *Rowell v. Klein*, 44 Ind. 290; *Louisville Coffin Co. v. Stokes*, 78 Ala. 372; *Eystra v. Capelle*, 61 Mo. 578; *McLaren v. Hall*, 26 Iowa, 297; *Sanford v. Pollock*, 105 N. Y. 450; *Kansas City Planning Mill Co. v. Brundage*, 25 Mo. App. 268; *Carthage Marble & W. L. Co. v. Bauman*, 44 Mo. App. 386, 392; *Thompson v. Kehrmann*, 60 Mo. App. 488; *Mead v. Spalding*, 94 Mo. 43; *Farley v. Stroeh*, 68 Mo. App. 85; *Lane v. Lockridge*, 17 Ky. L. R. 1082, 33 S. W. 730. See *Long v. Martin*, 71 Mo. App. 569, where the authority of the husband to act as the agent of his wife was shown by the weight of the testimony, it was held sufficient to establish such authority. Authority on the part of a husband to declare that his wife is his partner in business cannot be implied from his authority to attend to her business generally. *First Nat. Bank of Tuscaloosa v. Leland*, 122 Ala. 289.

Where the husband has contracted in his own name for improvements on the wife's land, it has been held that the evidence to establish his agency, in the face of his express contract, must be so clear, cogent, and persuasive as to leave no reasonable doubt of the agency in the mind of the trier of facts. *Carthage Marble & W. L. Co. v. Bauman*, 44 Mo. App. 386, 392; *Thompson v. Kehrmann*, 60 Mo. App. 488; *Farley v. Stroeh*, 68 Mo. App. 85.

<sup>57</sup> *American Mortg. Co. v. Owens*, 64 Fed. 249; *First Nat. Bank of Montgomery v. Nelson*, 106 Ala. 535; *Santa Cruz Rock Pavement Co. v. Lyons*, 133 Cal. 114; *Bull v. Coe*, 77 Cal. 54, 11 Am. St. Rep. 235; *Parker v. Freeman*, 11 Colo. 576; *Foster v. Jones*, 78 Ga. 150; *Richards v. John Spry Lumber Co.*, 169 Ill. 238; *McNichols v. Kettner*, 22 Ill. App. 493; *Anderson v. Armstead*, 69 Ill. 452; *Maxcy Mfg. Co. v. Burnham*, 89 Me. 538, 56 Am. St. Rep. 436;



(d) **Ratification.**—A wife, in so far as she has the capacity to authorize her husband to act as her agent, may expressly or impliedly ratify, and thereby render binding, contracts made or other acts done by her husband on her behalf without authority. This will be considered in a subsequent chapter.<sup>58</sup>

**§ 80. Agency of wife for husband—In general.**

As we have elsewhere seen, a married woman is competent to act as agent for another, even though her common-law disabilities have not been removed, so that she could not contract for herself in the matter, for persons who are not *sui juris* may act as agents.<sup>59</sup> We have also seen that there is nothing in the marriage relation to prevent a wife from acting as the agent of her husband.<sup>60</sup> It remains for us to consider here the appointment of a wife as the agent of her husband, and the circumstances under which such an agency will be implied. If a husband allows his wife to purchase goods on his credit, or otherwise holds her out as having authority, and then separates from her and makes

*Arnold v. Spurr*, 130 Mass. 347; *Bodine v. Killeen*, 53 N. Y. 93; *Bankard v. Shaw*, 199 Pa. 623; *McManus v. Laughlin*, 186 Pa. 498; *Brown v. Thomson*, 31 S. C. 436, 17 Am. St. Rep. 40; *City Bldg. & Loan Ass'n v. Jones*, 32 S. C. 308; *Whitaker v. Lee* (Tenn.) 57 S. W. 348; *Anderson v. Waco State Bank*, 92 Tex. 506; *Allen v. Garrison*, 92 Tex. 546; *How v. Hollis*, 20 Wash. 424; *Curtis v. Janzen*, 7 Wash. 58; *Lavassar v. Washburne*, 50 Wis. 200. And see *Bank of Ravenna v. Dobbins*, 96 Mo. App. 693. Where a married woman owning a herd of cattle intrusted her husband with the entire management and control of the same, and allowed him to conduct the business and make sales of cattle, it was held that she was bound by a sale made by a herder under authority from the husband. *Parker v. Freeman*, 11 Colo. 576. Where a wife joins with her husband in selling and conveying land, understanding the terms of the contract, and then leaves the office, supposing that her husband will receive the consideration, and he does receive it, she cannot avoid the agreement on the ground that she did not receive a consideration. *Downing v. Lewis*, 59 Neb. 38.

<sup>58</sup> *Hoene v. Pollak*, 118 Ala. 617, 72 Am. St. Rep. 189. See post, § 126.

<sup>59</sup> Ante, § 26.

<sup>60</sup> Ante, § 20.

her an adequate allowance, and she afterwards continues to purchase on his credit as before, he will be estopped to deny her authority as against tradesmen who supply her in reliance on her apparent authority, and without notice of the change of circumstances.<sup>61</sup> The fact that a husband is insane and confined in an asylum gives his wife no implied authority to bind him by contract, except for necessities.<sup>62</sup>

**§ 81. Agency of wife ordinarily requires appointment by or assent of husband.**

As we shall hereafter see, where a husband wrongfully neglects to supply his wife and children with necessities, the wife has implied authority, even without his assent, to bind him to pay for necessities purchased by her on his credit.<sup>63</sup> And where husband and wife are living together, authority to act as his agent in matters pertaining to the ordinary affairs of the household will be implied or presumed in the absence of proof to the contrary.<sup>64</sup> In other matters, however, the general rule is that a wife has no authority to act as agent for her husband without his assent, evidenced either by an express appointment by him or by his conduct. No authority can be implied merely from the fact of their relation as husband and wife.<sup>65</sup> Thus a wife

<sup>61</sup> *Wallis v. Biddick*, 22 Wkly. Rep. 76; *Cany v. Patton*, 2 Ashm. (Pa.) 145; *Anthony v. Phillips*, 17 R. I. 188; *Anon.*, 21 Misc. (N. Y.) 656; *Raymond v. Cowdrey*, 19 Misc. (N. Y.) 34; *Hartjen v. Ruebsamen*, 19 Misc. (N. Y.) 149.

<sup>62</sup> *Richardson v. Du Bois*, L. R. 5 Q. B. 51; *Chappell v. Nunn*, 41 Law T. (N. S.) 287. See post, § 85(b) (3).

<sup>63</sup> See post, § 85.

<sup>64</sup> Post, § 84.

<sup>65</sup> *Freestone v. Butcher*, 9 Car. & P. 643; *Debenham v. Mellon*, 6 App. Cas. 24; *Phillipson v. Hayter*, L. R. 6 C. P. 41; *Atkins v. Curwood*, 7 Car. & P. 756; *Manby v. Scott*, 1 Mod. 125; *Krebs v. O'Grady*, 23 Ala. 726, 58 Am. Dec. 312; *Colby v. Thompson* (Colo. App.) 64 Pac. 1053; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Brown v. Woodward*, 75 Conn. 254; *Black v. Clements*, 2 Pennewill (Del.) 499; *Phillips v. Sanchez*, 35 Fla. 187; *Compton v. Bates*, 10 Ill. App. 78; *Jones v. Woche*, 90 Ky. 230; *Jones v. Gutman*, 88 Md. 355; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Tuttle v. Hoag*, 46 Mo. 38, 2 Am. Rep. 481; *Chamberlain v. Davis*, 33 N. H. 121; *Beckwith v. Baxter*, 3 N. H. 67; *Berwick*

has no authority, merely by virtue of the marriage relation, to sign contracts generally on behalf of her husband,<sup>66</sup> to bind him by borrowing money, even though it is borrowed to purchase necessities,<sup>67</sup> to accept a deposit of money,<sup>68</sup> to receive payments on debts due to her husband,<sup>69</sup> to receive a delivery of property from a bailee,<sup>70</sup> to sell, exchange, or otherwise dispose of her husband's property,<sup>71</sup> to pay his debts,<sup>72</sup> to grant an easement or license with respect to his property,<sup>73</sup> or to rescind, release, or modify contracts made

v. *Dusenbury*, 2 *Daly* (N. Y.) 107; *Goodwin v. Kelly*, 42 *Barb.* (N. Y.) 194; *Mackinley v. McGregor*, 3 *Whart.* (Pa.) 369, 31 *Am. Dec.* 522; *Segelbaum v. Ensminger*, 117 *Pa.* 248, 2 *Am. St. Rep.* 662; *National Fire Ins. Co. v. Wagley* (Tex. Civ. App.) 68 *S. W.* 819; *Western Union Tel. Co. v. Moseley*, 28 *Tex. Civ. App.* 562; *Meador v. Page*, 39 *Vt.* 306; *Sanborn v. Cole*, 63 *Vt.* 590.

<sup>66</sup> *Manby v. Scott*, 1 *Mod.* 125; *Shaw v. Emery*, 38 *Me.* 484; *Bates v. Enright*, 42 *Me.* 118.

<sup>67</sup> *Knox v. Bushell*, 3 *C. B.* (N. S.) 334; *Brown v. Woodward*, 75 *Conn.* 254; *Gilbert's Ex'r v. Plant*, 18 *Ind.* 309; *Skinner v. Tirrell*, 159 *Mass.* 474, 38 *Am. St. Rep.* 447; *Schwarting v. Bisland*, 4 *Misc.* (N. Y.) 534; *Anderson v. Cullen*, 16 *Daly* (N. Y.) 15; *Walker v. Simpson*, 7 *Watts & S.* (Pa.) 88, 42 *Am. Dec.* 216; *Marshall v. Perkins*, 20 *R. I.* 34, 78 *Am. St. Rep.* 841; *Meador v. Page*, 39 *Vt.* 306. And see post, § 85(f).

<sup>68</sup> *Gilbert's Ex'r v. Plant*, 18 *Ind.* 308.

<sup>69</sup> *Offley v. Clay*, 2 *Man. & G.* 172; *Husche v. Sass*, 67 *Ill. App.* 245; *Thrasher v. Tuttle*, 22 *Me.* 335; *Allen v. Williamsburgh Sav. Bank*, 2 *Abb. N. C.* (N. Y.) 342, 69 *N. Y.* 314; *Walker v. Simpson*, 7 *Watts & S.* (Pa.) 83, 42 *Am. Dec.* 216. See, also, *Cheney v. Pierce*, 38 *Vt.* 515.

<sup>70</sup> *Kowing v. Manly*, 49 *N. Y.* 192.

<sup>71</sup> *Alexander v. Miller*, 16 *Pa.* 215; *Dresel v. Jordan*, 104 *Mass.* 407; *Wheeler & W. Mfg. Co. v. Morgan*, 29 *Kan.* 519; *Edwards v. Tyler*, 141 *Ill.* 454; *Brown v. Hannibal & St. J. R. Co.*, 33 *Mo.* 309; *Ness v. Singer Mfg. Co.*, 68 *Minn.* 237; *Presnall v. McLeary* (Tex. Civ. App.) 50 *S. W.* 1066; *Dunnahoe v. Williams*, 24 *Ark.* 264. It was held, however, in a Vermont case, that the wife has a legal right to make reasonable and moderate gifts of her husband's property and clothing to a relative, by way of charity, and that he cannot annul the gift by compelling its return, or by changing it into a debt against the donee. *Spencer v. Storrs*, 38 *Vt.* 156.

<sup>72</sup> *Butts v. Newton*, 29 *Wis.* 632. The fact that a wife is authorized to sell her husband's property gives her no authority to transfer the same in payment of his debt. *Butts v. Newton*, *supra*.

<sup>73</sup> *Nelson v. Garey*, 114 *Mass.* 418.

by the husband.<sup>74</sup> A wife has no authority to bind the husband by contracts, or to dispose of his property, merely because of his absence, even though he may have deserted her;<sup>75</sup> or because of his incapacity to attend to business by reason of sickness or insanity,<sup>76</sup> unless the contracts are for the purchase of necessities,<sup>77</sup> or the property is disposed of for the purpose of procuring necessities,<sup>78</sup> as will be hereafter explained.

§ 82. Express authority of wife and authority implied from circumstances.

Agency on the part of a wife to act for her husband may be created by a formal power of attorney or other express authority, verbal or in writing.<sup>79</sup> And there may be circumstances under which authority in fact will be implied. As in the case of agency between other persons, her authority may be implied from circumstances, or he may be estopped to deny her authority by having allowed her to act for him in the particular transaction or in similar previous dealings, or otherwise clothed her with apparent authority.<sup>80</sup> When

<sup>74</sup> *Goodrich v. Tracy*, 43 Vt. 314, 5 Am. Rep. 281; *Vaught v. Wellborn*, 16 Ala. 377; *Kellogg v. Robinson*, 32 Conn. 335. And see *Gray v. Otis*, 11 Vt. 628.

<sup>75</sup> *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Krebs v. O'Grady*, 23 Ala. 726, 58 Am. Dec. 312; *Savage v. Davis*, 18 Wis. 608; *Butts v. Newton*, 29 Wis. 632; *Wheeler & W. Mfg. Co. v. Morgan*, 29 Kan. 519; *Richelleu Wine Co. v. Ragland*, 43 Ill. App. 257. But the wife of an absent debtor has power as his general agent to bind him by her consent that hay attached on his farm may be fed to his cattle, also attached, where he has left her at home on the farm with several minor children, giving no other person charge of his affairs, and has been absent several months before the attachment. *Felker v. Emerson*, 16 Vt. 653, 42 Am. Dec. 532. Temporary absence of a husband gives his wife no implied authority to hire out his horse left in her care. *Savage v. Davis*, 18 Wis. 608. Compare, however, *Church v. Landers*, 10 Wend. (N. Y.) 79.

<sup>76</sup> *Alexander v. Miller*, 16 Pa. 215; *Sawyer v. Cutting*, 23 Vt. 486.

<sup>77</sup> Post, § 85.

<sup>78</sup> Post, § 85(1).

<sup>79</sup> *Goodrich v. Tracy*, 43 Vt. 314, 5 Am. Rep. 281; *Goodwin v. Kelly*, 42 Barb. (N. Y.) 194.

<sup>80</sup> *England*: *Phillipson v. Hayter*, L. R. 6 C. P. 38; *Filmer v.*

the husband is absent from home, and his property is left in charge of the wife, there is an implied agency on her part to exercise the usual and ordinary control and protection over the property thus left in her possession, unless the presumption of this authority is rebutted by proof that he had constituted another his agent for that purpose.<sup>81</sup> If a husband authorizes or allows his wife to act as his agent in particular matters, and thus holds her out as having authority, a private agreement or understanding between him and

*Lynn*, 4 Nev. & M. 559; *Plimmer v. Sells*, 3 Nev. & M. 422; *Ryan v. Sams*, 12 Q. B. 460 (although they are not married, if they live together as man and wife); *Debenham v. Mellon*, 6 App. Cas. 24; *Stevenson v. Hardie*, 2 W. Bl. 872.

*California*: *Heney v. Sargent*, 54 Cal. 396.

*Connecticut*: *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384.

*Florida*: *Phillips v. Sanchez*, 35 Fla. 187.

*Illinois*: *Hudson v. Sholem*, 65 Ill. App. 61; *Compton v. Bates*, 10 Ill. App. 78; *Stotts v. Bates*, 73 Ill. App. 640.

*Indiana*: *Mickelberry v. Harvey*, 58 Ind. 523; *Watts v. Moffett*, 12 Ind. App. 399.

*Kentucky*: *Jones v. Woche*, 90 Ky. 230.

*Louisiana*: *Cousins v. Kelsey*, 33 La. Ann. 880.

*Maryland*: *Jones v. Gutman*, 88 Md. 355.

*Michigan*: *Harris v. Smith*, 79 Mich. 54.

*Missouri*: *Tuttle v. Hoag*, 46 Mo. 38, 2 Am. Rep. 481; *Sauter v. Scrutchfield*, 28 Mo. App. 155.

*New Jersey*: *Gulick v. Grover*, 33 N. J. Law, 463.

*New York*: *Howe v. Finnegan*, 61 App. Div. 610; *Fenner v. Lewis*, 10 Johns. 38; *Gates v. Brower*, 9 N. Y. 205, 59 Am. Dec. 530.

*North Carolina*: *Sibley v. Gilmer*, 124 N. C. 631; *Cox v. Hoffman*, 20 N. C. (3 Dev. & B.) 319.

*Oregon*: *Snell v. Stone*, 23 Or. 327.

*Rhode Island*: *Anthony v. Phillips*, 17 R. I. 188.

*Vermont*: *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713.

<sup>81</sup> *Krebs v. O'Grady*, 23 Ala. 726, 58 Am. Dec. 312; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Ratch v. Miles*, 2 Conn. 638; *Casteel v. Casteel*, 8 Blackf. (Ind.) 240, 44 Am. Dec. 763; *Buford v. Speed*, 11 Bush (Ky.) 338; *Church v. Landers*, 10 Wend. (N. Y.) 79; *Spencer v. Tisue*, Add. (Pa.) 316; *Stall v. Meek*, 70 Pa. 181; *Cantrell v. Colwell*, 3 Head (Tenn.) 471; *McAfee v. Robertson*, 41 Tex. 355; *Sawyer v. Cutting*, 23 Vt. 486; *Chunot v. Larson*, 43 Wis. 539.

his wife revoking her authority, will have no effect as against third persons afterwards dealing with her in good faith and without notice of the revocation.<sup>82</sup> "If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demurrer in respect of such dealings, the tradesman has the right to assume, in the absence of notice to the contrary, that the authority of the wife which the husband has recognized continues. The husband's quiescence is in such cases tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume."<sup>83</sup> The burden of proving the wife's agency for her husband is on the person relying upon the alleged authority,<sup>84</sup> and the question whether or not there was such an agency is one of fact for the jury.<sup>85</sup>

**§ 83. Married woman doing business in her own name.**

At common law, if a married woman carries on a business in her own name with her husband's consent, it is considered that the business is his, and the wife his agent, and he is presumptively bound by her contracts in reference thereto,<sup>86</sup> unless it appears that the credit was given exclu-

<sup>82</sup> *Debenham v. Mellon*, 5 Q. B. Div. 403, 6 App. Cas. 32; *Watts v. Moffett*, 12 Ind. App. 399; *Anthony v. Phillips*, 17 R. I. 188; *Snell v. Stone*, 23 Or. 327; *Sibley v. Gilmer*, 124 N. C. 631.

<sup>83</sup> *Debenham v. Mellon*, 5 Q. B. Div. 403, 6 App. Cas. 24.

<sup>84</sup> *Phillips v. Sanchez*, 35 Fla. 187; *Compton v. Bates*, 10 Ill. App. 78.

<sup>85</sup> *Debenham v. Mellon*, 6 App. Cas. 31; *Lane v. Ironmonger*, 13 Mees. & W. 368; *Reid v. Teakle*, 13 C. B. 627; *Freestone v. Butcher*, 9 Car. & P. 643; *Phillips v. Sanchez*, 35 Fla. 187; *Casteel v. Casteel*, 8 Blackf. (Ind.) 240, 44 Am. Dec. 763; *Jones v. Woche*, 90 Ky. 230; *Roberts v. Hartford*, 86 Me. 460; *Jones v. Gutman*, 88 Md. 355; *Hart v. Young*, 1 Lans. (N. Y.) 417.

<sup>86</sup> *Phillipson v. Hayter*, L. R. 6 C. P. 38; *Petty v. Anderson*, 3 Bing. 170; *Godfrey v. Brooks*, 5 Har. (Del.) 396; *Jenkins v. Flinn*, 37 Ind. 352; *Jones v. Woche*, 90 Ky. 230; *Knowles v. Hull*, 99 Mass. 562; *Curtis v. Engel*, 2 Sandf. Ch. (N. Y.) 287; *Cropsey v. McKinney*, 30 Barb. (N. Y.) 47; *Boas v. Malone*, 140 Pa. 572; *MacKinley v. McGregor*, 3 Whart. (Pa.) 369, 31 Am. Dec. 522; *Foulds v. Curtelett*, 21 U. C. C. P. 368; *Halpenny v. Pennock*, 33 U. C. Q. B. 229. See, also, *Palen v. Lent*, 5 Bosw. (N. Y.) 713; *Rotch v. Miles*, 2 Conn. 638.

sively to her.<sup>87</sup> But in most jurisdictions this doctrine has been changed by statute, so that a husband is not liable for debts contracted by his wife in carrying on a business on her own account,<sup>88</sup> unless contracted upon his credit, with his knowledge and consent.<sup>89</sup> In some jurisdictions in order that the husband may be relieved from liability on contracts in relation to her separate business, it is required that a certificate shall be filed, setting forth the name of her husband, the nature of the business proposed to be done, and the place where it is to be done.<sup>90</sup>

**§ 84. Implied agency of wife in matters pertaining to the household.**

In the absence of evidence to the contrary, if husband and wife are living together and maintaining a home, or if they are living under the same roof, although they may be living

<sup>87</sup> *Bentley v. Griffin*, 5 Taunt, 356; *Ex parte Shepherd*, 10 Ch. Div. 573; *Jenkins v. Flinn*, 37 Ind. 352; *Weisker v. Lowenthal*, 31 Md. 413; *Tuttle v. Hoag*, 46 Mo. 42, 2 Am. Rep. 481; *Swett v. Penrice*, 24 Miss. 416; *Mackinley v. McGregor*, 3 Whart. (Pa.) 369, 31 Am. Dec. 522; *Noble v. Kreuzkamp*, 111 Pa. 68; *Thompson v. Hibberd*, 14 Phila. (Pa.) 190; *Moses v. Fogartie*, 2 Hill, Law (S. C.) 335; *Hoppek v. Hartby*, 7 Baxt. (Tenn.) 411. And see post, § 87. Compare *Krouskop v. Shontz*, 51 Wis. 204, 37 Am. Rep. 817; *Carreau v. Chapotel*, 45 La. Ann. 850.

<sup>88</sup> See Laws N. Y. 1896, c. 272, § 25 (former provision Laws 1860, c. 90, § 8); *Gillies v. Lent*, 2 Abb. Pr. (N. S.; N. Y.) 455; *Trieber v. Stover*, 30 Ark. 727; *Haight v. McVeagh*, 69 Ill. 624; *Jaycox v. Wing*, 66 Ill. 182; *Colby v. Lamson*, 39 Me. 119; *Oxnard v. Swanton*, 39 Me. 125; *Dunbar v. Meyer*, 43 Miss. 679.

<sup>89</sup> *Oxnard v. Swanton*, 39 Me. 125.

<sup>90</sup> Mass. St. 1862, c. 198. As to the construction and effect of this statute, see *Knowles v. Hull*, 99 Mass. 562; *Feran v. Rudolphsen*, 106 Mass. 471; *Ridley v. Knox*, 138 Mass. 83; *Browning v. Carson*, 163 Mass. 255. Under this statute it is held, that if neither of them has filed the certificate as provided, the husband will be liable upon a contract made by his wife in the prosecution of business on her separate account, whether or not the person contracting with the wife did so upon her sole and exclusive credit. *Feran v. Rudolphsen*, supra. But this statute does not apply to a husband domiciled in another state, whose wife does business in Massachusetts. *Hill v. Wright*, 129 Mass. 296.

separate,<sup>91</sup> it is presumed that the management of the ordinary domestic affairs of the household is intrusted to the wife, and she has implied authority to purchase on his credit such provisions, clothing, and other articles, as may be necessary or suitable for the family, taking into consideration their style of living sanctioned by him.<sup>92</sup> And in like man-

<sup>91</sup> *Harrison v. Grady*, 12 Jur. (N. S.) 140. And see, *Hentze v. Marjenhoff*, 42 S. C. 427.

<sup>92</sup> *England*: *Debenham v. Mellon*, 6 App. Cas. 24; *Phillipson v. Hayter*, L. R. 6 C. P. 38; *Etherington v. Parrot*, 1 Salk. 118; *Emmett v. Norton*, 8 Car. & P. 506; *Clifford v. Laton*, 3 Car. & P. 15; *Freestone v. Butcher*, 9 Car. & P. 643; *Harrison v. Grady*, 12 Jur. (N. S.) 140.

*Alabama*: *Hughes v. Chadwick*, 6 Ala. 651.

*Colorado*: *Hardenbrook v. Harrison*, 11 Colo. 9.

*Connecticut*: *Benjamin v. Benjamin*, 15 Conn. 357, 39 Am. Dec. 384.

*Illinois*: *Compton v. Bates*, 10 Ill. App. 78; *Gotts v. Clark*, 78 Ill. 229; *Warrington v. Anable*, 84 Ill. App. 593; *Hibler v. Thomas*, 99 Ill. App. 355.

*Indiana*: *Litson v. Brown*, 26 Ind. 489; *Watts v. Moffett*, 12 Ind. App. 399.

*Maine*: *Furlong v. Hysom*, 35 Me. 332; *Baker v. Carter*, 83 Me. 132, 23 Am. St. Rep. 764.

*Minnesota*: *Flynn v. Messenger*, 28 Minn. 208, 41 Am. Rep. 279; *Wagner v. Nagel*, 33 Minn. 348; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *S. E. Olson Co. v. Youngquist*, 76 Minn. 26.

*Missouri*: *Sauter v. Scrutchfield*, 28 Mo. App. 150; *Steinhauser v. Spraul*, 127 Mo. 541.

*New Hampshire*: *Tebbetts v. Hapgood*, 34 N. H. 420.

*New Jersey*: *Vusler v. Cox*, 53 N. J. Law, 516.

*New York*: *Lindholm v. Kane*, 92 Hun, 369; *McCutchen v. McGahay*, 11 Johns. 281, 6 Am. Dec. 373; *Keller v. Phillips*, 39 N. Y. 351; *Cromwell v. Benjamin*, 41 Barb. 558.

*Ohio*: *McMillan v. Auerback*, 7 Ohio N. P. 376.

*Pennsylvania*: *Moore v. Copley*, 165 Pa. 294, 44 Am. St. Rep. 664.

*Vermont*: *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713.

*Wisconsin*: *Haberman v. Gasser*, 104 Wis. 98.

An order by the wife to a third party, in whose care and custody her husband had left their vacant residence, directing such party to allow an upholsterer to take curtains and furniture therefrom and to do work therein as ordered by her, is within her general agency to act for him in all matters connected with the domestic



ner, the husband is bound, on the ground of agency, by the declarations of the wife in relation to the ordinary affairs of the household.<sup>93</sup> It would seem clear, however, from the reason on which this rule is based, that it does not apply where husband and wife, although they may cohabit, do not maintain a house.<sup>94</sup> But the common law as to the agency of the wife binding the husband in ordinary domestic affairs becomes unimportant when by statute both husband and wife are made responsible for family expenses.<sup>95</sup>

The implied authority of the wife under this doctrine extends to the purchase of such articles only as are necessary or suitable for herself and the family, taking into consideration their station in life and their style of living. It does not extend to the purchase of articles which have no relation to the household, or are unsuitable to the husband's style of living, or to purchases which are clearly extravagant or excessive.<sup>96</sup> A wife has no implied authority to bind her husband by a purchase of jewelry which is unsuitable to their station in life,<sup>97</sup> if, indeed, she has implied au-

economy of the house and family, and will bind the husband. *Tyler v. Mutual District Messenger Co.*, 17 App. D. C. 85.

<sup>93</sup> *Anon.*, 1 Strange, 527. See, also, *Anderson v. Sanderson*, 2 Starkie, 204; *Emerson v. Blonden*, 1 Esp. 142; *Casteel v. Casteel*, 8 Blackf. (Ind.) 240, 44 Am. Dec. 763; *Pickering v. Pickering*, 6 N. H. 120; *Chamberlain v. Davis*, 33 N. H. 122.

<sup>94</sup> It was so held in *Debenham v. Mellon*, 6 App. Cas. 32.

<sup>95</sup> *Gaffield v. Scott*, 40 Ill. App. 380.

The term "expenses of the family," as used in the statute, (Rev. St. Ill. 1874, c. 68, § 15,) making such expenses chargeable upon the property of both husband and wife, is not synonymous with "necessaries," which may be personal and individual, and does not include an article which in no way conduces to the welfare of the family generally, although at times it is used or displayed in the family by the one for whom it was purchased. *Hyman v. Harding*, 162 Ill. 357.

<sup>96</sup> *Debenham v. Mellon*, 6 App. Cas. 24; *Montague v. Benedict*, 3 Barn. & C. 631; *Harrison v. Grady*, 13 Law T. (N. S.) 369, 12 Jur. (N. S.) 140; *Lane v. Ironmonger*, 13 Mees. & W. 368; *Phillipson v. Hayter*, L. R. 6 C. P. 38; *Freestone v. Butcher*, 9 Car. & P. 643; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Raynes v. Bennett*, 114 Mass. 424; *Cany v. Patton*, 2 Ashm. (Pa.) 140.

<sup>97</sup> *Montague v. Benedict*, 3 Barn. & C. 631. Diamond earrings,

thority to purchase jewelry at all on his credit.<sup>98</sup> The presumption that a wife has authority to bind her husband by the purchase of articles for domestic use, and in other matters pertaining to the affairs of the household, is a presumption of fact and not a conclusive presumption of law, and may be rebutted by showing that there was no authority in fact,<sup>99</sup> provided, of course, the husband is not estopped by having clothed the wife with apparent authority.<sup>100</sup> The husband is certainly not liable for articles purchased by his wife on his credit contrary to his prohibition, if the person dealing with her had notice of the prohibition,<sup>101</sup> unless the articles are necessities and he has neglected his duty to provide them, as will be hereafter explained, the burden of proving which is on the person furnishing the articles.<sup>102</sup> The mere fact that a husband's prohibition to his wife to deal on his account is not communicated to persons with whom she subsequently deals does not render the husband liable to such persons.<sup>103</sup> But it is otherwise if he has previously permitted her to purchase goods on his credit, and tradesmen deal with her without notice that her authority has been revoked.<sup>104</sup> The husband is not liable, in the

a watch for the wife's daughter by a former marriage and not a member of the husband's family, and a chain given to the lover of a servant, are not necessities. *Otto v. Matthie*, 70 Ill. App. 54. And see *Hyman v. Harding*, 162 Ill. 357.

<sup>98</sup> See *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362.

<sup>99</sup> *Etherington v. Parrot*, 1 Salk. 118; *Keller v. Phillips*, 39 N. Y. 351; *Cromwell v. Benjamin*, 41 Barb. (N. Y.) 560; *Sauter v. Scrutchfield*, 28 Mo. App. 155.

<sup>100</sup> Ante, § 82.

<sup>101</sup> *Etherington v. Parrot*, 1 Salk. 118; *Cromwell v. Benjamin*, 41 Barb. (N. Y.) 560; *Keller v. Phillips*, 39 N. Y. 351; *Hibler v. Thomas*, 99 Ill. App. 355; *Sauter v. Scrutchfield*, 28 Mo. App. 155. A wife's authority to order goods on her husband's credit is not affected by a mere complaint on his part as to her extravagance, or by a statement that he would not be responsible if it should be continued. There must have been a direct, present, positive, absolute prohibition. *Morgan v. Chetwynd*, 4 Fost. & F. 451.

<sup>102</sup> See post, § 85 (g).

<sup>103</sup> *Debenham v. Mellon*, 6 App. Cas. 31; *Jolly v. Rees*, 15 C. B. (N. S.) 628; *Compton v. Bates*, 10 Ill. App. 78.

<sup>104</sup> *Debenham v. Mellon*, 6 App. Cas. 36; *Jolly v. Rees*, 15 C. B.

absence of authority in fact, and in the absence of elements of estoppel, if he has supplied his wife with all necessary and suitable articles, or with sufficient money to purchase them.<sup>105</sup> Nor can the husband be held personally liable for necessities which she has expressly bought on her own credit, although they are such as she might have bought on his credit, and charged him with.<sup>106</sup>

**§ 85. Wife's implied authority to procure necessities on husband's failure to supply them.**

(a) **In general.**—To the rule that a wife is not the agent of her husband merely by virtue of the marriage relation, so as to have implied authority to bind him by contract, there is a well settled exception with respect to the purchase of necessities in case of the husband's neglect to support the wife. If a husband deserts his wife or turns her away without cause, or drives her away by his ill-treatment or misconduct, or if, although they may be living separate by mutual consent or may be living together, he fails to provide her with necessities for herself and her children by him, she has implied authority to procure the same on his credit, and to bind him to pay for them. Her agency in this respect is said to arise from necessity, and is not at all dependent upon the husband's consent. It exists even though he may forbid her to purchase, and though the persons from whom she purchases may know of his want of consent, because of the fact that a husband is under a legal duty to support his wife.

(N. S.) 628; *Watts v. Moffett*, 12 Ind. App. 399; *Wallis v. Biddick*, 22 Wkly. Rep. 76; *Cothran v. Lee*, 24 Ala. 380.

<sup>105</sup> *Holt v. Brien*, 4 Barn. & Ald. 252; *Morgan v. Chetwynd*, 4 Fost. & F. 451; *Montague v. Benedict*, 3 Barn. & C. 631; *Debenham v. Mellon*, 6 App. Cas. 24; *Seaton v. Benedict*, 5 Bing. 28; *Reid v. Teakle*, 13 C. B. 627; *Reneaux v. Teakle*, 8 Exch. 680; *Cromwell v. Benjamin*, 41 Barb. (N. Y.) 558; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Clark v. Cox*, 32 Mich. 204; *Sauter v. Scrutchfield*, 28 Mo. App. 155. Compare *Ruddock v. Marsh*, 1 Hurl. & N. 601, where it was held that the husband was liable for the price of provisions ordered for the house by his wife, though he had supplied his wife with sufficient money to keep house, where the person supplying the goods had no notice of that fact.

<sup>106</sup> See post, § 87.

and the law implies authority on the part of the wife, and imposes liability on the part of the husband, by reason of this duty.<sup>107</sup> The husband cannot escape liability under

<sup>107</sup> *England*: *Eastland v. Burchell*, 3 Q. B. Div. 436; *Montague v. Benedict*, 3 Barn. & C. 636; *Atkins v. Curwood*, 7 Car. & P. 756; *Seaton v. Benedict*, 5 Bing. 28; *Johnston v. Sumner*, 3 Hurl. & N. 261; *Debenham v. Mellon*, 6 App. Cas. 31; *Deare v. Soutten*, L. R. 9 Eq. 151; *Emmett v. Norton*, 8 Car. & P. 506.

*Alabama*: *Zeigler v. David*, 23 Ala. 127; *Pearson v. Darrington*, 32 Ala. 228.

*California*: *St. Vincent's Inst. for Insane v. Davis*, 129 Cal. 20.

*Connecticut*: *Pierpont v. Wilson*, 49 Conn. 450; *Ahern v. Easterby*, 42 Conn. 546 (where the husband was in prison).

*Delaware*: *Kemp v. Downham*, 5 Har. 417; *Biddle v. Frazier*, 3 Houst. 258.

*Florida*: *Phillips v. Sanchez*, 35 Fla. 187.

*Georgia*: *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421.

*Illinois*: *Seybold v. Morgan*, 43 Ill. App. 39; *McClary v. Warner*, 69 Ill. App. 223; *Ross v. Ross*, 69 Ill. 569; *Wilcoxon v. Read*, 95 Ill. App. 33; *Brinckerhoff v. Briggs*, 92 Ill. App. 537; *Hibler v. Thomas*, 99 Ill. App. 355.

*Indiana*: *Watkins v. De Armond*, 89 Ind. 553; *Eiler v. Crull*, 99 Ind. 375; *Arnold v. Brandt*, 16 Ind. App. 169.

*Iowa*: *Tibbetts v. Wadden*, 94 Iowa, 173; *Descelles v. Kadmus*, 8 Iowa, 51. And see *Devendorf v. Emerson*, 66 Iowa, 698.

*Kentucky*: *Billing v. Pilcher*, 7 B. Mon. 458, 46 Am. Dec. 523.

*Massachusetts*: *Benjamin v. Dockham*, 134 Mass. 418; *Eames v. Sweetser*, 101 Mass. 78; *Prescott v. Webster*, 175 Mass. 316; *Rayne v. Bennett*, 114 Mass. 428; *Cartwright v. Bate*, 1 Allen 514, 79 Am. Dec. 759; *Hall v. Weir*, 1 Allen. 261; *Mayhew v. Thayer*, 8 Gray, 172.

*Minnesota*: *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Oltman v. Yost*, 62 Minn. 261; *Kirk v. Chinstrand*, 85 Minn. 108; *S. E. Olson Co. v. Youngquist*, 76 Minn. 26.

*Mississippi*: *East v. King*, 77 Miss. 738.

*Missouri*: *Sauter v. Scrutchfield*, 28 Mo. App. 150; *McKinney v. Guhman*, 38 Mo. App. 344; *Reed v. Crissey*, 63 Mo. App. 185.

*Nebraska*: *Belknap v. Stewart*, 38 Neb. 304, 41 Am. St. Rep. 729.

*New Hampshire*: *Ferren v. Moore*, 59 N. H. 106; *Allen v. Aldrich*, 29 N. H. 63; *Rumney v. Keyes*, 7 N. H. 571; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120; *Ott v. Hentall*, 70 N. H. 231.

*New Jersey*: *Vusler v. Cox*, 53 N. J. Law, 516; *Snover v. Blair*, 25 N. J. Law, 94.

*New York*: *Baker v. Barney*, 8 Johns. 72, 5 Am. Dec. 326; *Lockwood v. Thomas*, 12 Johns. 248; *Cromwell v. Benjamin*, 41 Barb.

such circumstances by showing that he gave to the person furnishing the necessities notice that he would not be responsible.<sup>108</sup> And if he refuses to permit his wife to live with him, he cannot relieve himself from liability for her maintenance and support by showing that he procured board and lodging for her with a person with whom she refused to live, as where she is thus turned away she may procure necessities from whomsoever she pleases, so long as the place selected by her is respectable and the expense thereof does not exceed proper limits, considering the husband's financial condition.<sup>109</sup>

This implied authority of the wife to bind the husband for necessities exists notwithstanding the fact that the wife has a separate estate, for this does not make it any the less the duty of the husband to support her.<sup>110</sup> In some decisions, however, it is held that if the wife has an adequate means of support, or receives an adequate maintenance from some source, she cannot procure necessities on the credit of her husband though she is living separate from him for

558; *Comstock v. Green*, 88 Hun, 64; *Raymond v. Cowdrey*, 19 Misc. 34; *Hardy v. Eagle*, 23 Misc. 441.

*Pennsylvania*: *Cany v. Patton*, 2 Ashm. 140; *Hultz v. Gibbs*, 66 Pa. 360; *Llewellyn v. Levy*, 163 Pa. 647; *Moore v. Copley*, 165 Pa. 294, 44 Am. St. Rep. 664.

*Rhode Island*: *Anthony v. Phillips*, 17 R. I. 188.

*South Carolina*: *Clement v. Mattison*, 3 Rich. Law, 93.

*Texas*: *Black v. Bryan*, 18 Tex. 453.

*Vermont*: *Roberts v. Kelley*, 51 Vt. 97; *Frost v. Willis*, 13 Vt. 202.

*Canada*: *Tait v. Lindsay*, 12 U. C. C. P. 414; *Griffith v. Paterson*, 20 Grant Ch. 615.

<sup>108</sup> *Harris v. Morris*, 4 Esp. 41; *Pierpont v. Wilson*, 49 Conn. 450; *Sykes v. Halstead*, 1 Sandf. (N. Y.) 483; *Watkins v. De Armond*, 89 Ind. 553; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120, and other cases cited in the note preceding.

<sup>109</sup> *Kirk v. Chinstrand*, 85 Minn. 108; *Waxmuth v. McDonald*, 96 Ill. App. 242.

<sup>110</sup> *Ewers v. Hutton*, 3 Esp. 256; *Ott v. Hentall*, 70 N. H. 231; *Callahan v. Patterson*, 4 Tex. 61, 51 Am. Dec. 712; *Rushing v. Clancy*, 92 Ga. 769; *Poole v. People*, 24 Colo. 510; *Prescott v. Webster*, 175 Mass. 316.

a justifiable cause, and he neglects to support her.<sup>111</sup> The husband is liable for necessities so furnished to a wife, notwithstanding statutes giving a married woman the capacity to contract generally or in reference to her separate estate,<sup>112</sup> unless the wife in fact contracts for herself.<sup>113</sup> And the principle applies although the husband is a minor, for a minor may bind himself by a contract to pay for necessities furnished to himself or his wife and children.<sup>114</sup> The principle applies only when necessities are in fact furnished the wife. He is not liable, unless agency in fact on the part of the wife is shown, for breach of a contract to purchase necessities.<sup>115</sup> In order that a husband may be bound by his wife's purchase of necessities, she must act for him in making the purchase. He is not bound if the credit is given to her individually.<sup>116</sup> Where a wife lives with and is supported by her father, the law will not imply a promise on

<sup>111</sup> *Hunt v. Hayes*, 64 Vt. 89, 33 Am. St. Rep. 917; *Liddlow v. Wilmot*, 2 Stark. 86; *War v. Huntly*, 1 Salk. 118; *Johnston v. Sumner*, 3 Hurl. & N. 261; *Clifford v. Laton*, 3 Car. & P. 15; *Dixon v. Hurrell*, 8 Car. & P. 717; *Bazeley v. Forder*, 9 Best & S. 599; *Litson v. Brown*, 26 Ind. 489; *Arnold v. Brandt*, 16 Ind. App. 171; *Archibald v. Flynn*, 32 U. C. Q. B. 523; *Fredd v. Eves*, 4 Har. (Del.) 385. But a precarious income is not sufficient. *Thompson v. Hervey*, 4 Burrow, 2177. And see *Lockwood v. Thomas*, 12 Johns. (N. Y.) 248; *Anderson v. McLeod*, 2 P. E. Island Rep. 142. "In this connection it is worthy of remark, if the husband's liability when he turns his wife away is put upon the ground of agency arising from necessity, as many of the cases do put it, it logically follows that when there is no necessity there can be no agency, for cessante ratione legis, cessat ipse lex; and there can be no necessity when the wife has means of her own with which she can supply herself." *Hunt v. Hayes*, *supra*.

<sup>112</sup> *Graham v. Schleimer*, 28 Misc. (N. Y.) 535; *Wilson v. Herbert*, 41 N. J. Law, 454, 32 Am. Rep. 243; *Dunbar v. Meyer*, 43 Miss. 684; *Cook v. Ligon*, 54 Miss. 368; *Ott v. Hentall*, 70 N. H. 231; *McMillan v. Auerback*, 7 Ohio N. P. 376.

<sup>113</sup> *Post*, § 87.

<sup>114</sup> *Chapple v. Cooper*, 13 Mees. & W. 252; *Turner v. Trisby*, 1 Strange, 168; *Cantine v. Phillips' Adm'r*, 5 Har. (Del.) 428; *People v. Moores*, 4 Denio (N. Y.) 520; *Chapman v. Hughes*, 61 Miss. 339; *Dunbar v. Meyer*, 43 Miss. 684; *Price v. Sanders*, 60 Ind. 310.

<sup>115</sup> *Sulter v. Mustin*, 50 Ga. 242.

<sup>116</sup> See *post*, § 87.

the part of the husband to pay the father for the support, unless there is something to show that payment was expected and intended, for the relationship of parent and child excludes the ordinary implication.<sup>117</sup> But a husband has been held liable for necessities furnished his wife, after her desertion by him, by her son by a former marriage,<sup>118</sup> or by her mother.<sup>119</sup>

(b) **Effect of separation of husband and wife, abandonment, desertion, etc.—(1) Separation by agreement—Allowance.**—The fact that a husband and wife are living separate and apart by mutual consent or agreement does not take away her implied authority to bind him for necessities, if he fails to provide them, and has not made her an adequate allowance for her support.<sup>120</sup> He is not liable, however, if he makes her an adequate allowance, and pays the same, and tradesmen who furnish her with articles after the separation act at their peril.<sup>121</sup> Some of the courts, but not all, have

<sup>117</sup> *Cantine v. Phillips' Adm'r*, 5 Har. (Del.) 428. Compare *Biddle v. Frazier*, 3 Houst. (Del.) 258; *Watkins v. De Armond*, 89 Ind. 553; *Griffith v. Paterson*, 20 Grant Ch. 615. Where a husband took his wife to her father's house and left her there till she obtained a divorce, he was held liable to her father for her board while there, without any express contract between them, notwithstanding the fact that the defendant paid his wife an agreed sum, in lieu of alimony, upon her proceeding for divorce.† *Burkett v. Trowbridge*, 61 Me. 251.

<sup>118</sup> *Eller v. Crull*, 99 Ind. 375.

<sup>119</sup> *East v. King*, 77 Miss. 738.

<sup>120</sup> *Dixon v. Hurrell*, 8 Car. & P. 717; *Emmett v. Norton*, 8 Car. & P. 506; *Johnston v. Sumner*, 3 Hurl. & N. 261; *Pearson v. Darlington*, 32 Ala. 243; *Seybold v. Morgan*, 43 Ill. App. 39; *McClary v. Warner*, 69 Ill. App. 223; *Schnuckle v. Bierman*, 89 Ill. 454; *Mayhew v. Thayer*, 8 Gray (Mass.) 172; *Oltman v. Yost*, 62 Minn. 261; *McKinney v. Guhman*, 38 Mo. App. 344; *Belknap v. Stewart*, 38 Neb. 304, 41 Am. St. Rep. 729; *Town of Rumney v. Keyes*, 7 N. H. 571; *Vusler v. Cox*, 53 N. J. Law, 516; *Baker v. Barney*, 8 Johns. (N. Y.) 72, 5 Am. Dec. 326; *Lockwood v. Thomas*, 12 Johns. (N. Y.) 248; *Raymond v. Cowdrey*, 19 Misc. (N. Y.) 34; *Cany v. Patton*, 2 Ashm. (Pa.) 140; *Frost v. Willits*, 13 Vt. 202; *Tait v. Lindsay*, 12 U. C. C. P. 414.

<sup>121</sup> *Rawlins v. Vandyke*, 3 Esp. 250; *Hodgkinson v. Fletcher*, 4 Camp. 70; *Holder v. Cope*, 2 Car. & K. 437; *Emmett v. Norton*, 8

held that the husband is not liable in such a case, even though the person furnishing the necessities may have had no notice of the separation and allowance.<sup>122</sup>

Car. & P. 506; *Mizen v. Pick*, 3 Mees. & W. 481; *Negus v. Forster*, 46 Law T. (N. S.) 675; *Burrett v. Booty*, 8 Taunt. 343; *Mallalieu v. Lyon*, 1 Fost. & F. 431; *Baker v. Barney*, 8 Johns. (N. Y.) 73, 5 Am. Dec. 326; *Mott v. Comstock*, 8 Wend. (N. Y.) 544; *Kimball v. Keyes*, 11 Wend. (N. Y.) 34; *Le Boutillier v. Fiske*, 47 Hun (N. Y.) 324; *Raymond v. Cowdrey*, 19 Misc. (N. Y.) 34; *Hatch v. Leonard*, 71 App. Div. (N. Y.) 32; *Fredd v. Eves*, 4 Har. (Del.) 385; *Reese v. Chilton*, 26 Mo. 598; *Zealand v. Dewhurst*, 23 U. C. C. P. 117. Compare, however, *Rennick v. Ficklin*, 3 B. Mon. (Ky.) 166, where, though husband and wife separate, and provision be made for her maintenance, yet if during the separation the wife buys necessities and the parties become reconciled and the necessities come to the possession of the wife and family, the husband is liable therefor.

As to the burden of proof in such cases, see *infra*, (g).

A contract between the husband and a third person to maintain the wife will not relieve him from liability for necessities furnished her if she is driven away by the ill usage of such third person, or if he otherwise fails to perform the contract; but it is otherwise if the wife leaves, or refuses to accept such maintenance, without cause. *Pidgin v. Cram*, 8 N. H. 350. The fact that the husband had conveyed property to trustees for the wife does not relieve him from liability, unless it is shown that the trustees accepted the trust and took possession of the property. *Burrett v. Booty*, 8 Taunt. 343.

<sup>122</sup> *Reeve v. Conyngham*, 2 Car. & K. 444; *Mizen v. Pick*, 3 Mees. & W. 481; *Wallis v. Biddick*, 22 Wkly. Rep. 76; *Cany v. Patton*, 2 Ashm. (Pa.) 144. Contra, *Rawlyns v. Vandyke*, 3 Esp. 250; *Lawrence v. Brown*, 91 Iowa, 342. The general reputation of the separation has been held to be sufficient notice. *Tod v. Stokes*, 12 Mod. 244; *Baker v. Barney*, 8 Johns. (N. Y.) 73, 5 Am. Dec. 326; *Le Boutillier v. Fiske*, 47 Hun (N. Y.) 324. As we have seen in another section, where a husband allows his wife to purchase goods on his credit, or otherwise holds her out as having authority, and then separates from her and makes her an allowance, he will be estopped to deny the continuance of her authority as against tradesmen who continue to supply her on his credit without notice of the changed conditions. See ante, § 80. "But if, though a tradesman, he had never been so authorized to give credit to the wife, but merely knew, as any one else knew, that the two were living together as man and wife, then there is no duty on the husband to give notice to him of the separation." *Wallis v. Biddick*, 22 Wkly. Rep. 76.



In order that a husband may be relieved from liability for necessities furnished his wife because of having made her an allowance, the allowance must have been paid. A mere unperformed agreement to pay is not enough.<sup>123</sup> And the allowance must have been adequate, taking into consideration the station in life of the parties, and the means of the husband,<sup>124</sup> unless the wife has agreed to accept the allowance as sufficient, in which case she must repudiate the agreement, and offer to return to him, before she can bind him by purchase of necessities.<sup>125</sup>

— (2) **Husband's desertion of wife.**—If a husband deserts or turns away his wife without sufficient cause, and without an adequate provision for her support, she clearly has implied authority to purchase necessities on his credit and to bind him to pay for them.<sup>126</sup> But this does not apply where a husband leaves his wife or turns her away for sufficient cause, as because of adultery<sup>127</sup> or extreme cruelty.<sup>128</sup>

<sup>123</sup> *Hodgkinson v. Fletcher*, 4 Camp. 70; *Nurse v. Craig*, 2 Bos. & P. 148; *Beale v. Arabin*, 36 Law T. (N. S.) 249; *Baker v. Barney*, 8 Johns. (N. Y.) 72, 5 Am. Dec. 326; *McKinney v. Guhman*, 38 Mo. App. 347.

<sup>124</sup> *Dixon v. Hurrell*, 8 Car. & P. 717; *Holder v. Cope*, 2 Car. & K. 437; *Hodgkinson v. Fletcher*, 4 Camp. 70; *Baker v. Sampson*, 14 C. B. (N. S.) 385; *Mayhew v. Thayer*, 8 Gray (Mass.) 172, and other cases cited in note 120, *supra*.

The adequacy of the allowance is a question for the jury. See *infra*, (h).

As to the burden of proof, see *infra*, (g).

<sup>125</sup> *Biffin v. Bignell*, 7 Hurl. & N. 877; *Eastland v. Burchell*, 3 Q. B. Div. 432; *Alley v. Winn*, 134 Mass. 77, 45 Am. Rep. 297.

<sup>126</sup> See the cases cited *supra*, this section, note 107. As to the wife's leaving the husband and because of his adultery, cruel treatment, or other misconduct, see *infra*, (4).

<sup>127</sup> *Gill v. Read*, 5 R. I. 344, 73 Am. Dec. 73. And see *infra*, (5). A bigamous marriage by a wife, and her conviction therefor, does not justify her husband in casting her off, or relieve him from liability for necessities afterwards furnished her, where she acted in good faith, after having been turned away by him without cause, and in the belief, intentionally induced by him, that he was dead. *Cartwright v. Bate*, 1 Allen (Mass.) 514, 79 Am. Dec. 759.

<sup>128</sup> *Sawyer v. Richards*, 65 N. H. 185. A husband is none the less liable for necessities furnished his wife after a separation through

Nor does the rule apply where the husband, after deserting or driving away the wife without sufficient cause, offers to return or take her back, and she rejects the offer,<sup>129</sup> unless it appears that the offer was not made in good faith, or was accompanied by conditions which he had no right to impose, or that the wife had sufficient cause for rejecting it.<sup>130</sup>

— (3) **Husband's insanity.**—The fact that a husband is insane, and confined in an asylum or elsewhere, does not affect the wife's right to support, and if no provision is made for her support out of his estate, she has the same implied authority to bind him for necessities as if he were sane and failed to furnish her adequate support.<sup>131</sup>

— (4) **Wife's abandonment of husband.**—If a wife leaves her husband without his consent and without sufficient cause, she has no implied authority to bind him even for necessities, for under such conditions there is no duty on the part of the husband to support her.<sup>132</sup> By the weight of authority, a tradesman who supplies the wife with necessities

his fault, because she and the person furnishing the same conspired to abduct his minor child with a view to compelling him to settle a separate maintenance on her. *Burlen v. Shannon*, 14 Gray (Mass.) 433.

<sup>129</sup> *Walker v. Loughton*, 31 N. H. 111.

<sup>130</sup> *Walker v. Loughton*, 31 N. H. 111; *Waxmuth v. McDonald*, 96 Ill. App. 242. The fact that the husband requires that the wife shall change her place of residence does not excuse her rejection of his offer to live with her, for he has a right to fix their residence at any suitable place. *Walker v. Loughton*, *supra*.

<sup>131</sup> *Read v. Legard*, 6 Exch. 636; *Richardson v. Du Bois*, L. R. 5 Q. B. 51; *Shaw v. Thompson*, 16 Pick. (Mass.) 198, 26 Am. Dec. 655; *Booth v. Cottingham*, 126 Ind. 431; *Thedford v. Reade*, 25 Misc. (N. Y.) 490.

<sup>132</sup> *Mainwaring v. Leslie*, 2 Car. & P. 507; *Clifford v. Laton*, 3 Car. & P. 15; *Johnston v. Sumner*, 3 Hurl. & N. 261; *Collins v. Mitchell*, 5 Har. (Del.) 369; *Schnuckle v. Bierman*, 89 Ill. 454; *Bever v. Galloway*, 71 Ill. 517; *Rea v. Durkee*, 25 Ill. 503; *Oinson v. Heritage*, 45 Ind. 73, 15 Am. Rep. 258; *Hartmann v. Tegart*, 12 Kan. 177; *Peaks v. Mayhew*, 94 Me. 571; *Benjamin v. Dockham*, 132 Mass. 181; *Inhabitants of Sturbridge v. Franklin*, 160 Mass. 149; *Reese v. Chilton*, 26 Mo. 598; *Rutherford v. Cox*, 11 Mo. 349; *Belknap v. Stewart*, 38 Neb. 304, 41 Am. St. Rep. 729; *Allen v. Aldrich*, 29 N. H. 63; *Blowers v. Sturtevant*, 4 Denio (N. Y.) 46; *Catlin*

under such circumstances cannot hold the husband liable, even though he may have had no notice of the separation,<sup>133</sup> unless he can make out an estoppel against the husband by showing that he had allowed the wife to make such purchases before the separation, and thus clothed her with apparent authority to make the purchase in question.<sup>134</sup>

A wife does not abandon her husband, so as to render this rule applicable, where she has sufficient cause for leaving him, as in the case of adultery on his part,<sup>135</sup> or conduct amounting to what the law regards as cruel treatment.<sup>136</sup>

*v. Martin*, 69 N. Y. 393; *Bostwick v. Brower*, 22 Misc. (N. Y.) 709; *Monroe County Sup'rs v. Budlong*, 51 Barb. (N. Y.) 493; *Lippincott's Estate*, 12 Phila. (Pa.) 142; *Williams v. Prince*, 3 Strob. (S. C.) 490; *Brown v. Patton*, 3 Humph. (Tenn.) 135; *Morgan v. Hughes*, 20 Tex. 141; *Cline v. Hackbarth*, 27 Tex. Civ. App. 391; *Thorne v. Kathan*, 51 Vt. 520; *Brown v. Mudgett*, 40 Vt. 68; *Sturtevant v. Starin*, 19 Wis. 269. But the husband may be liable by reason of an express promise, or by reason of a promise implied from acts on his part warranting the inference of agreement in fact. *Brown v. Patton*, 3 Humph. (Tenn.) 135; *Catlin v. Martin*, 69 N. Y. 393, and see other cases cited supra this note.

Where a person furnished necessities, during divorce proceedings, to her niece, who secured a divorce on the ground of extreme cruelty, and it appeared from letters that the niece left her husband for the purpose of procuring a divorce and marrying another man, it was held that the wife left without justification and the former husband was not liable for the necessities so furnished. *Corry v. Lackey*, 105 Mich. 363.

<sup>133</sup> *McCutchen v. McGahay*, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; *Vusler v. Cox*, 53 N. J. Law, 518; *Reese v. Chilton*, 26 Mo. 598; *Sturtevant v. Starin*, 19 Wis. 269. And see *Day v. Wamsley*, 33 Ind. 145.

<sup>134</sup> *Hartjen v. Ruebsamen*, 19 Misc. (N. Y.) 149; *Anthony v. Phillips*, 17 R. I. 188.

<sup>135</sup> *Sykes v. Halstead*, 1 Sandf. (N. Y.) 483.

<sup>136</sup> *Forristall v. Lawson*, 34 Law T. (N. S.) 903; *Harrison v. Grady*, 13 Law T. 369, 12 Jur. (N. S.) 140; *Emmett v. Norton*, 8 Car. & P. 506; *Johnston v. Sumner*, 3 Hurl. & N. 261; *Zeigler v. David*, 23 Ala. 127; *Kemp v. Downham*, 5 Har. (Del.) 417; *Biddle v. Frazler*, 3 Houst. (Del.) 258; *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421; *Ross v. Ross*, 69 Ill. 569; *Seybold v. Morgan*, 43 Ill. App. 39; *Wilson v. Bishop*, 10 Ill. App. 588; *Descelles v. Kadmus*, 8 Iowa, 51; *Billing v. Pilcher*, 7 B. Mon. (Ky.) 458, 46 Am. Dec. 523; *Thorpe v. Shapleigh*, 67 Me. 235; *Hancock v. Merrick*, 10 Cush. (Mass.) 41; *Reynolds v. Sweetser*, 15 Gray (Mass.) 78; *Mayhew v. Thayer*, 8 Gray

And in such cases the husband is liable for necessities furnished her, even though he may have given notice before they were furnished that he would not be responsible.<sup>137</sup> The wife must have left the husband because of his misconduct, and not from some other and insufficient cause.<sup>138</sup> She is not justified in leaving, so as to carry with her implied authority to bind him for necessities, merely because of quarrels, disagreements, and difficulties, not amounting to cruel treatment.<sup>139</sup> The rule that a wife who has left

(Mass.) 172; *Ott v. Hentall*, 70 N. H. 231; *Allen v. Aldrich*, 29 N. H. 63; *Snover v. Blair*, 25 N. J. Law, 94; *Comstock v. Green*, 88 Hun (N. Y.) 64; *Pomeroy v. Wells*, 8 Paige (N. Y.) 406; *Hultz v. Gibbs*, 66 Pa. 360; *Com. v. Wall*, 4 Pa. Dist. R. 326; *Clement v. Matison*, 3 Rich. Law (S. C.) 93; *Griffith v. Paterson*, 20 Grant Ch. 615; *Hughes v. Rees*, 10 Ont. Pr. Rep. 301. Bringing a prostitute into the house, or threatening to confine the wife in a madhouse, is equivalent to turning her away, and justifies her in leaving. *Houlston v. Smyth*, 2 Car. & P. 22, 3 Bing. 127; *Tempany v. Hakewill*, 1 Fost. & F. 438; *Descelles v. Kadmus*, 8 Iowa, 51. She has implied authority to pledge his credit for necessities, if he connives at or condones her adultery, and then turns her away, although he has expressly forbidden the person supplying them to trust her. *Wilson v. Glossop*, 20 Q. B. Div. 354, 57 Law J. Q. B. Div. 161; *Harris v. Morris*, 4 Esp. 41.

As to the burden of proof, see *infra*, (g).

<sup>137</sup> *Wilson v. Glossop*, 20 Q. B. Div. 354, 57 Law J. Q. B. Div. 161; *Harris v. Morris*, 4 Esp. 41; *Sykes v. Halstead*, 1 Sandf. (N. Y.) 483; *Watkins v. De Armond*, 89 Ind. 553. And see *supra*, this section, (a).

<sup>138</sup> Therefore, where it appeared that the husband had used violence towards the wife on an occasion five months before their separation, and there had been other difficulties and quarrels, but when she left his house it was not from any apprehension of ill treatment, but in order to make a visit, and she refused to return unless his relatives, who lived with him, would go away,—it was held that he was not liable for board furnished her during such separation. *Blowers v. Sturtevant*, 4 Denio (N. Y.) 46.

<sup>139</sup> *Reed v. Moore*, 5 Car. & P. 200; *Biddle v. Frazier*, 3 Houst. (Del.) 258, 263; *Blowers v. Sturtevant*, 4 Denio (N. Y.) 46; *Breinig v. Meitzler*, 23 Pa. 161. No amount of ill treatment, short of personal violence, or such as to induce a reasonable fear of personal violence, it has been held would entitle a wife to pledge her husband's credit after leaving his house without his consent. *Horwood v. Heffer*, 3 Taunt. 421; *Emery v. Emery*, 1 Younge & J. 501; *Brown*

her husband without cause and without his consent cannot bind him for necessities does not apply where the separation is involuntary on the part of the wife, and without her fault, or even where it is due to her fault, if it is through operation of the law, as in case of her conviction and imprisonment for a crime.<sup>140</sup> Nor does the rule apply, even where the separation was voluntary on the part of the wife, and without sufficient cause, where she has returned to her husband, or has in good faith offered to return and been refused.<sup>141</sup>

— (5) **Wife's adultery.**—A husband is not liable for necessities furnished his wife after she has committed adultery and eloped, whether the person supplying her with necessities knows of the circumstances of the separation or not.<sup>142</sup> And the same is true where the wife has been left or turned away by the husband for adultery,<sup>143</sup> or where she has committed adultery after having been turned away or deserted by the husband without cause, or after having

v. Ackroyd, 5 El. & Bl. 819; Breinig v. Meitzler, 23 Pa. 156. A wife is not justified in leaving because of the husband's refusal to send away relatives who are living with him. *Blowers v. Sturtevant*, 4 Denio (N. Y.) 46. Utter indifference and neglect upon the part of a husband, not accompanied by proof of physical violence, threats or specific misconduct of any kind towards his wife, do not justify her in abandoning him, nor render him liable to third persons who thereafter supply her with necessities. *Bostwick v. Brower*, 22 Misc. (N. Y.) 709.

<sup>140</sup> *Bates v. Enright*, 42 Me. 113.

<sup>141</sup> *Cunningham v. Irwin*, 7 Serg. & R. (Pa.) 247, 10 Am. Dec. 458; *Henderson v. Stringer*, 2 Dana (Ky.) 291; *McCutchen v. McGahay*, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; *McGahay v. Williams*, 12 Johns. (N. Y.) 293; *Blowers v. Sturtevant*, 4 Denio (N. Y.) 46. But see *Child v. Hardyman*, 2 Strange, 875. That the offer to return may be made through a third person, see *McGahay v. Williams*, 12 Johns. (N. Y.) 293. The return or offer to return imposes no liability for necessities previously supplied. *Olinson v. Heritage*, 45 Ind. 73, 15 Am. Rep. 258; *Williams v. Prince*, 3 Strob. (S. C.) 490; *Reese v. Chilton*, 26 Mo. 598.

<sup>142</sup> *Morris v. Martin*, 1 Strange, 647; *Govier v. Hancock*, 6 Term R. 603; *Gill v. Read*, 5 R. I. 344, 73 Am. Dec. 73.

<sup>143</sup> *Ham v. Toovey*, cited in 1 Selw. N. P. 293; *Gill v. Read*, 5 R. I. 344, 73 Am. Dec. 73; *Peaks v. Mayhew*, 94 Me. 571.

separated from him with his consent, or for sufficient cause.<sup>144</sup> But if the husband condones the adultery and receives the wife back, and afterwards turns her away or leaves her without new cause, he will be liable for necessities subsequently furnished her.<sup>145</sup>

(c) **Necessity for a valid marriage.**—This rule applies, not only where the parties are legally husband and wife, but also where a man has lived with a woman and held her out as his wife, without being legally married to her, or without having gone through any form of marriage at all, provided the person furnishing the necessities relies on the express or implied representation of the man, and believes that the woman is his wife.<sup>146</sup> But the rule does not apply where the person furnishing the necessities knows that there has been no marriage, or where, although he may not know this, he has not been misled by any conduct on the part of the man.<sup>147</sup> Of course a man may make such woman his agent for the purpose of purchasing necessities, by expressly authorizing her to do so, or by holding her out as having such authority, even though the tradesman knows that there is no valid marriage. In such case the same rules would apply as in the appointment of any other agent.

(d) **Effect of annulment of marriage or divorce.**—A husband is under no duty to provide for his wife after a valid divorce a vinculo matrimonii, or after an annulment of the marriage, and cannot be held liable for necessities furnished

<sup>144</sup> *Govier v. Hancock*, 6 Term R. 603; *Cooper v. Lloyd*, 6 C. B. (N. S.) 519; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73; *Almy v. Willcox*, 110 Mass. 443. This does not apply where the husband consented to the adultery (*Wilson v. Glossop*, 19 Q. B. Div. 379; *Ferren v. Moore*, 59 N. H. 106); nor does it apply where the husband turns away the wife without cause, and intentionally leads her into the belief that he is dead, and she afterwards, in good faith, contracts a bigamous marriage (*Cartwright v. Bate*, 1 Allen [Mass.] 514, 79 Am. Dec. 759).

<sup>145</sup> *Harris v. Morris*, 4 Esp. 41.

<sup>146</sup> *Paule v. Goding*, 2 Fost. & F. 585; *Robinson v. Nahon*, 1 Camp. 245.

<sup>147</sup> *Munro v. De Chemant*, 4 Camp. 215; *Gomme v. Franklin*, 1 Fost. & F. 465.

to her thereafter.<sup>148</sup> But of course, a liability for necessities furnished cannot be affected by a subsequent divorce or annulment of the marriage. When a wife is granted a divorce a mensa et thoro, with a provision for alimony, and the husband fails to pay the alimony, he will be liable for necessities furnished her during the period of such neglect.<sup>149</sup>

(e) **Pendency of proceedings for a divorce.**—The mere pendency of proceedings for a divorce, either by the husband or by the wife, does not relieve the husband from his duty to support the wife, and he will be liable, as in other cases, for necessities furnished her pending such proceedings,<sup>150</sup> unless the court has made an allowance of alimony to the wife for her maintenance pending the suit, and it is paid by the husband.<sup>151</sup> The allowance of alimony, either temporary or permanent, to the wife, does not relieve the husband from liability for necessities furnished before such allowance, although after commencement of the suit.<sup>152</sup>

(f) **What are "necessaries" for which the husband is liable.**—The term "necessaries," within the meaning of the rule under consideration, includes necessary food, drink, and clothing,<sup>153</sup> medicines, and medical attendance or ad-

<sup>148</sup> *Anstey v. Manners*, Gow, 10.

<sup>149</sup> *Hunt v. De Blaquiére*, 5 Bing. 550.

<sup>150</sup> *Keegan v. Smith*, 5 Barn. & C. 375; *Houliston v. Smyth*, 3 Bing. 127; *Johnston v. Allen*, 39 How. Pr. (N. Y.) 506; *Minck v. Martin*, 54 N. Y. Super. Ct. 136; *Sykes v. Halstead*, 1 Sandf. (N. Y.) 484; *Hancock v. Merrick*, 10 Cush. (Mass.) 41; *Dowe v. Smith*, 11 Allen (Mass.) 107; *Burkett v. Trowbridge*, 61 Me. 251. The wife is not bound to accept board and a separate apartment, in the house where her husband resides, while prosecuting a suit against him for divorce; and an offer of the same will not exempt him from liability for necessities supplied to her. *Sykes v. Halstead*, 1 Sandf. (N. Y.) 483.

<sup>151</sup> *Willson v. Smyth*, 1 Barn. & Adol. 801; *Hare v. Gibson*, 32 Ohio St. 33, 30 Am. Rep. 568; *Crittenden v. Schermerhorn*, 39 Mich. 661, 33 Am. Rep. 440; *Bennett v. O'Fallon*, 2 Mo. 69, 22 Am. Dec. 440; *Johnston v. Allen*, 39 How. Pr. (N. Y.) 506.

<sup>152</sup> *Keegan v. Smith*, 5 Barn. & C. 375; *Dowe v. Smith*, 11 Allen (Mass.) 107. And see *Burkett v. Trowbridge*, 61 Me. 252.

<sup>153</sup> *Wallis v. Biddick*, 22 Wkly. Rep. 76; *Reed v. Crissey*, 63 Mo. App. 184; *Sauter v. Scrutchfield*, 28 Mo. App. 157; *Dolan v. Brooks*,

vice, and nursing,<sup>154</sup> a suitable lodging or other place of residence,<sup>155</sup> services of domestics suitable to the husband's and wife's condition in life,<sup>156</sup> etc. The term is not limited to such things as are absolutely essential to sustain life, but includes such as are necessary and proper to support the wife in accordance with the rank or position in life and the estate of the husband, and the style of living and position in society into which he has introduced her, or which he has allowed her to assume.<sup>157</sup> It follows that for the

168 Mass. 350. As defined in *Reed v. Crissey*, *supra*, necessities for which the husband is liable when furnished the wife, consist of food, drink, clothing, washing, physic, medical attendance, instruction and suitable residence.

<sup>154</sup> *Beale v. Arabin*, 36 Law T. (N. S.) 249; *Forristall v. Lawson*, 34 Law T. (N. S.) 903; *Harrison v. Grady*, 12 Jur. (N. S.) 140; *Anon.*, 1 Strange, 527; *Cothran v. Lee*, 24 Ala. 380; *Black v. Clements*, 2 Pen. (Del.) 499; *Bevier v. Galloway*, 71 Ill. 517; *Wilcoxon v. Read*, 95 Ill. App. 33; *Seybold v. Morgan*, 43 Ill. App. 39; *Towery v. McGaw*, 22 Ky. L. R. 155, 56 S. W. 727; *Long v. Beard*, 20 Ky. L. R. 1036, 48 S. W. 158; *Carpenter v. Hazelrigg*, 20 Ky. L. R. 231, 45 S. W. 666; *State v. Housekeeper*, 70 Md. 162, 14 Am. St. Rep. 340; *Carstens v. Hanselman*, 61 Mich. 426, 1 Am. St. Rep. 606; *Reed v. Crissey*, 63 Mo. App. 184; *Tebbetts v. Hapgood*, 34 N. H. 420; *Ott v. Hentall*, 70 N. H. 231; *Comstock v. Green*, 88 Hun (N. Y.) 64; *Hardy v. Eagle*, 23 Misc. (N. Y.) 441; *Dixon v. Chapman*, 56 App. Div. (N. Y.) 542. See, also, *Peaks v. Mayhew*, 94 Me. 571. But the husband is not liable for medicines and advice furnished to his wife in his absence, by a party not professing to be a physician, or to have any medical skill or knowledge of diseases or their remedies. *Wood v. O'Kelley*, 8 Cush. (Mass.) 406. Medical attendance for an ordinary hired servant is not a necessary. *Baker v. Witten*, 1 Okl. 160.

<sup>155</sup> *Oltman v. Yost*, 62 Minn. 261; *Kirk v. Chinstrand*, 85 Minn. 108; *Waxmuth v. McDonald*, 96 Ill. App. 242; *Ott v. Hentall*, 70 N. H. 231; *Reed v. Crissey*, 63 Mo. App. 184; *Sauter v. Scrutchfield*, 28 Mo. App. 157.

<sup>156</sup> *Flynn v. Messenger*, 28 Minn. 208, 41 Am. Rep. 279; *Wagner v. Nagel*, 33 Minn. 348; *Phillips v. Sanchez*, 35 Fla. 187. But the labor and services of slaves applied to the support and maintenance of the wife cannot be regarded as necessities, though their value was not more than sufficient for her necessary support and maintenance. *Zeigler v. David*, 23 Ala. 127.

<sup>157</sup> *Phillipson v. Hayter*, L. R. 6 C. P. 42; *Morgan v. Chetwynd*, 4 Fost. & F. 451; *Raynes v. Bennett*, 114 Mass. 428; *Shelton v. Hoadley*, 15 Conn. 535; *Ray v. Adden*, 50 N. H. 82, 9 Am. Rep. 175; *Bergh*



purpose of determining whether particular articles or a particular residence furnished to a wife were necessities, it is proper to prove and to take into consideration the husband's style of living,<sup>158</sup> his wealth and income, or capacity to earn money,<sup>159</sup> the character and cost of clothing which he had previously allowed the wife to purchase on his credit,<sup>160</sup> the style of living in the society in which he has introduced her or allowed her to appear,<sup>161</sup> etc. In some of the cases it has been said that the question depends upon the condition in life and position of the wife.<sup>162</sup> But the better opinion and weight of authority is that it depends upon the condition of the husband, as well as the wife,—upon the condition in life of both.<sup>163</sup>

*v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Sauter v. Scrutched*, 28 Mo. App. 150; *Keller v. Phillips*, 39 N. Y. 351; *Clark v. Cox*, 32 Mich. 204. A horse purchased by a wife to be used by her in a business conducted on her own account is not a "necessary" for which the husband can be held liable. *Palmer v. Coghlan* (Tex. Civ. App.) 55 S. W. 1122.

<sup>158</sup> As that he wore diamonds and kept fast horses. *Raynes v. Bennett*, 114 Mass. 428.

<sup>159</sup> *Clark v. Cox*, 32 Mich. 204. The public records, showing the amount of property on which taxes are assessed against the husband, are not admissible for this purpose. *Raynes v. Bennett*, 114 Mass. 427.

<sup>160</sup> *Raynes v. Bennett*, 114 Mass. 428.

<sup>161</sup> *Clark v. Cox*, 32 Mich. 204.

<sup>162</sup> *Ray v. Adden*, 50 N. H. 82, 9 Am. Rep. 175; *Thorpe v. Shapleigh*, 67 Me. 238.

<sup>163</sup> *Compton v. Bates*, 10 Ill. App. 78; *Wilcoxon v. Read*, 95 Ill. App. 33; *Keller v. Phillips*, 39 N. Y. 354; *Clark v. Cox*, 32 Mich. 204; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Barr v. Armstrong*, 56 Mo. 577; *Ott v. Hentall*, 70 N. H. 231.

In *Compton v. Bates*, 10 Ill. App. 85, Pillsbury, J., in deciding upon an instruction given in the lower court says: "This instruction only requires the goods purchased to be of a character necessary and suitable to the position in life of the wife. If, as it would seem, this instruction was intended to state the rule of the liability of the husband growing out of the necessities of the wife, then it extends the liability of the husband beyond what we had supposed it to be. If the wife has been provided with necessities suitable to the condition in life of the parties and the estate of the husband, then, as we have seen, the husband is not liable for other goods that

The term "necessaries" does not include a pew in a place of worship, and a wife cannot bind her husband to pay rent for the same without his consent.<sup>164</sup>

Nor does the term include money, as such, loaned to the wife. At common law, the husband cannot be held liable therefor, even though it may be shown that the money was intended and in fact used for the purchase of necessities.<sup>165</sup> In equity, however, according to the weight of authority, where money is advanced to a wife for the purchase of necessities, on her husband's credit, and under such conditions that she would be authorized to purchase necessities on his credit, and is properly applied to such purpose, the lender, by application of the equitable doctrine of subrogation, may recover from the husband to the extent to which the money is so applied.<sup>166</sup>

may be purchased by the wife, although of the same character of necessities. To make him liable upon this ground, the goods actually purchased must be needed by the wife for her present use. Besides, the jury, by this instruction, were to determine whether the goods were necessary and suitable by the standard alone of the wife's position in life. It was held in *Manby v. Scott*, 1 Sid. 109, that 'the estate and degree of the husband' should be considered upon this question, a rule which has not, so far as we are advised, ever been departed from."

<sup>164</sup> *St. John's Parish v. Bronson*, 40 Conn. 75, 16 Am. Rep. 17.

<sup>165</sup> *Knox v. Bushell*, 3 C. B. (N. S.) 334; *Paule v. Goding*, 2 Fost. & F. 585; *Zeigler v. David*, 23 Ala. 127; *Brown v. Woodward*, 75 Conn. 254; *Gilbert's Ex'r v. Plant*, 18 Ind. 308; *Skinner v. Tirrell*, 159 Mass. 474, 38 Am. St. Rep. 447; *Anderson v. Cullen*, 16 Daly (N. Y.) 15; *Schwartz v. Bisland*, 4 Misc. (N. Y.) 534; *Walker v. Simpson*, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216; *Gill v. Read*, 5 R. I. 347, 73 Am. Dec. 73; *Marshall v. Perkins*, 20 R. I. 34, 78 Am. St. Rep. 841.

<sup>166</sup> *Harris v. Lee*, 1 P. Wms. 482; *Marlow v. Pitfield*, 1 P. Wms. 558; *Deare v. Soutten*, L. R. 9 Eq. 151; *Jenner v. Morris*, 3 De Gex, F. & J. 45; *Walker v. Simpson*, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216; *Kenyon v. Farris*, 47 Conn. 510, 36 Am. Rep. 86; *Kenny v. Meislahn*, 69 App. Div. (N. Y.) 572; *Reed v. Crissey*, 63 Mo. App. 184.

In a late New Jersey case, however, it was held that there could be no such recovery where the husband was merely ill, and had not deserted the wife. *Leuppie v. Osborn's Ex'rs*, 52 N. J. Eq. 637. And in Massachusetts the doctrine has been repudiated altogether. In that state, a husband is not liable, even in equity, in the absence of

Under a statute making both husband and wife liable for expenses of the family, the term "expenses of the family" is not synonymous with "necessaries," which may be personal and individual, and does not include an article which in no way conduces to the welfare of the family.<sup>167</sup>

Whether a husband is liable for legal services rendered for his wife on his credit, on the ground that they were necessities, depends upon the circumstances. Legal services rendered at the request of a married woman in relation to her estate are certainly not necessities, and the husband cannot be made liable therefor without his consent. It is otherwise, however, in the case of services of an attorney or counsellor at law which are necessary to procure for a wife such sustenance or protection as the husband is under a legal duty to afford her, or which are necessary to protect her against wrongs on the part of the husband. Thus it has been held that a husband is liable for legal services rendered in defending a criminal prosecution against his wife,<sup>168</sup> particularly when the services are in defending a groundless charge made against her by the husband,<sup>169</sup> or a charge based upon acts done by her with the concurrence of her husband.<sup>170</sup> It has also been held that a husband is liable for legal services rendered for his wife, in order to protect her against him, by having him bound over to keep the peace, etc.,<sup>171</sup> unless there is no ground for the proceed-

consent or ratification, for money borrowed by his wife and applied in the purchase of necessities, although she may be living separate from him. *Skinner v. Tirrell*, 159 Mass. 474, 38 Am. St. Rep. 447.

<sup>167</sup> *Hyman v. Harding*, 162 Ill. 357.

<sup>168</sup> *Artz v. Robertson*, 50 Ill. App. 27; and cases in the notes following.

<sup>169</sup> *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532; *Warner v. Heiden*, 28 Wis. 517, 9 Am. Rep. 515.

<sup>170</sup> See *Shepherd v. Mackoul*, 3 Camp. 326.

<sup>171</sup> *Shepherd v. Mackoul*, 3 Camp. 326; *Turner v. Rookes*, 10 Adol. & E. 47; *Williams v. Monroe*, 18 B. Mon. (Ky.) 514; *Morris v. Palmer*, 39 N. H. 123. But not for services in prosecuting an indictment against the husband to punish him for an assault upon her. *Grindell v. Godmond*, 5 Adol. & E. 755; *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532.

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ings;<sup>172</sup> for services in prosecuting proceedings by the wife against the husband for restitution of conjugal rights, or to compel him to support her;<sup>173</sup> or in prosecuting against the husband a suit for a divorce a mensa et thoro, if there were reasonable grounds therefor,<sup>174</sup> but not otherwise.<sup>175</sup> It is held in England that a wife may bind her husband to pay the fees and disbursements of her solicitor in a suit for a dissolution of the marriage.<sup>176</sup> In this country, however, the decided weight of authority is to the effect that the services of an attorney or solicitor for a wife in a suit for annulment of the marriage or for a divorce a vinculo matrimonii are not necessities, and that the wife cannot bind the husband to pay therefor, whether the suit is brought by the wife<sup>177</sup> or by the husband.<sup>178</sup> But certainly the husband

<sup>172</sup> *Smith v. Davis*, 45 N. H. 566.

<sup>173</sup> *Wilson v. Ford*, L. R. 3 Exch. 63. But not for services of an attorney, rendered on behalf of his wife in proceedings prosecuted by the people against the husband for nonsupport. *McQuhae v. Rey*, 2 Misc. (N. Y.) 476, 3 Misc. 550.

<sup>174</sup> *Rice v. Shepherd*, 12 C. B. (N. S.) 332; *Brown v. Ackroyd*, 5 El. & Bl. 819; *McCurley v. Stockbridge*, 62 Md. 422, 50 Am. Rep. 229; *Peck v. Marling's Adm'r*, 22 W. Va. 708; *Langbein v. Schneider*, 27 Abb. N. C. (N. Y.) 228; *Naumer v. Gray*, 28 App. Div. (N. Y.) 529, 32 App. Div. 627; *Hahn v. Rogers*, 34 Misc. (N. Y.) 549.

<sup>175</sup> *Brown v. Ackroyd*, 5 El. & Bl. 819; *Baylis v. Watkins*, 33 Law J. Ch. 300.

<sup>176</sup> *Ottaway v. Hamilton*, L. R. 3 C. P. Div. 393; *Stocken v. Patrick*, 29 Law T. (N. S.) 507.

<sup>177</sup> *Pearson v. Darrington*, 32 Ala. 227; *Shelton v. Pendleton*, 18 Conn. 417; *Dow v. Eyester*, 79 Ill. 254; *Williams v. Monroe*, 18 B. Mon. (Ky.) 518; *Isbell v. Weiss*, 60 Mo. App. 54; *Yeiser v. Lowe*, 50 Neb. 310; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120; *Dorsey v. Goodenow*, *Wright* (Ohio) 120; *Wing v. Hurlburt*, 15 Vt. 607, 40 Am. Dec. 695; *Peck v. Marling's Adm'r*, 22 W. Va. 708.

In Iowa, it was held contra in *Preston v. Johnson*, 65 Iowa, 285, and *Clyde v. Peavy*, 74 Iowa, 47. But compare *Johnson v. Williams*, 3 G. Greene (Iowa) 97, 54 Am. Dec. 491, where it was held that the husband was not liable, and *Sherwin v. Maben*, 78 Iowa, 467, where it was held that the husband was not liable for the reason that it appeared that there was no ground for divorce as alleged in the complaint. And see opinion of the court in this case for review of cases in this state on this subject. In *Sprayberry v. Merk*, 30 Ga. 81, 76 Am. Dec. 637, *Stephens, J.*, says: "As to this one matter of a

would not be liable for legal services rendered to his wife, where she is living apart from him by reason of her own adultery.<sup>179</sup>

Where a wife purchases on her husband's credit some goods which are necessities, and others which are not, either by reason of their character or quantity, the husband is liable for the former.<sup>180</sup> But where the articles furnished are not necessities, the husband cannot be held liable for the whole, or for a fractional part thereof, on the ground that they might have answered the purpose of other articles which would have been necessities.<sup>181</sup>

— **Wife's funeral expenses.**—A husband is liable at common law, on implied contract, for his wife's burial expen-

suit for a divorce, the wife is *sui juris*, having a clear right to institute and conduct that kind of a suit independently of her husband's consent. But this right is practically denied to her, if she can command no means of paying the agents who are necessary to the conduct of the suit. Therefore it is that, *quoad hoc*, she may charge the common funds of herself and husband in his hands. But as this power on her part is founded on the necessity of the case, so its extent does not exceed the demand of the necessity; and therefore she can charge the common funds (or her husband, which is the same thing in effect) only with the real value of such services as she may procure, and not with the price which she may fix on them by her contract. Upon these views is founded the constant practice of the court in granting alimony to the wife during the pending of her suit for divorce, and in embracing her counsel fees in the allowance. It is worthy of remark that her counsel fees are allowed as a part of her necessary maintenance, and are allowed before it is ascertained whether she has a valid ground for a divorce or not." And see *Glenn v. Hill*, 50 Ga. 94. In Texas, it is held that the husband is liable for reasonable attorney's fees incurred by his wife in the prosecution of a suit for divorce, only where it is shown that the suit was instigated by the wife in good faith and upon reasonable grounds. *Dodd v. Hein*, 26 Tex. Civ. App. 164, 62 S. W. 811; *Ceccato v. Deutschman*, 19 Tex. Civ. App. 434.

<sup>179</sup> *Cooke v. Newell*, 40 Conn. 596; *McCullough v. Robinson*, 2 Ind. 630; *Coffin v. Dunham*, 8 Cush. (Mass.) 404, 54 Am. Dec. 769; *Ray v. Adden*, 50 N. H. 82, 9 Am. Rep. 175; *Wing v. Hurlburt*, 15 Vt. 607, 40 Am. Dec. 695. Contra, *Porter v. Briggs*, 38 Iowa, 166, 18 Am. Rep. 27; *Gossett v. Patten*, 23 Kan. 340.

<sup>180</sup> *Peaks v. Mayhew*, 94 Me. 571. And see *infra*, (b), (5).

<sup>181</sup> *Eames v. Sweetser*, 101 Mass. 78; *Roberts v. Kelley*, 51 Vt. 97.

<sup>182</sup> *Thorpe v. Shapleigh*, 67 Me. 235.

ses,<sup>182</sup> but this, of course, is not on the theory of the wife's agency for the husband.

(g) **Presumption and burden of proof as to necessities.**—When a husband has forbidden tradesmen to supply his wife with articles on his credit, this, as we have seen, does not prevent a tradesman from furnishing her with necessities, if the husband fails to perform his duty in supplying them.<sup>183</sup> But a tradesman who furnishes her with articles after such prohibition acts at his peril, and in order to hold the husband liable, he has the burden of proving not only that the articles furnished were properly necessities, but also that the husband had neglected his duty, so as to give the wife the implied authority to purchase on his credit without his consent.<sup>184</sup> As we have seen in another section, where a husband and wife are living together there is a presumption that she has implied authority, as a matter of fact, to purchase on his credit necessities for the household, unless he has forbidden it, and the prohibition is brought to the notice of tradesmen.<sup>185</sup> But there is no such presumption where the wife is living separate from her husband. In such a case tradesmen supplying her with necessities have the burden of proving that the circumstances were such as to authorize her to bind him.<sup>186</sup> They have the burden of prov-

<sup>182</sup> See 15 Am. & Eng. Enc. Law, 880; *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670; *Gleason v. Warner*, 78 Minn. 405.

<sup>183</sup> *Supra*, this section.

<sup>184</sup> *Etherington v. Parrot*, 1 Salk. 118; *Hibler v. Thomas*, 99 Ill. App. 355; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Woodward v. Barnes*, 43 Vt. 330; *Barr v. Armstrong*, 56 Mo. 577; *Mott v. Comstock*, 8 Wend. (N. Y.) 544; *Keller v. Phillips*, 39 N. Y. 351; *Therlott v. Baglioli*, 9 Bosw. (N. Y.) 578. And see *McGrath v. Donnelly*, 131 Pa. 551. Where a husband notifies a merchant not to sell goods on credit to his wife and he is subsequently sued for goods sold to her after such notice, the burden is upon the husband, first, to establish his notice, and having done so, it shifts upon the merchant to show that the husband failed to furnish the necessary and suitable support to his wife and family. *Hibler v. Thomas*, 99 Ill. App. 355.

<sup>185</sup> See *ante*, § 84.

<sup>186</sup> *Johnston v. Sumner*, 3 Hurl. & N. 261; *Walker v. Simpson*, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216; *Gill v. Read*, 5 R. I. 343, 73

ing, when the wife has left the husband, that she left with his consent or for sufficient cause.<sup>187</sup> Where the husband has made his wife an allowance, one who furnishes her with necessaries has the burden of proving that it was not paid, or was inadequate.<sup>188</sup>

(h) **Province of court and jury.**—There has been some difficulty in determining when it is for the court, and when for the jury, to say whether particular things furnished to a wife are necessaries, but the following rule may be laid down as established by the weight of authority, and as in accordance with the general doctrine as to the respective provinces of the court and jury:<sup>189</sup>

Whether articles of a certain kind, as clothing, food, jewelry, pew-rent, etc., are or are not of such a character that they can be necessaries, is a question of law, which the court must decide, and upon which it must instruct the jury.<sup>190</sup> But whether any particular thing falls within the classes of

Am. Dec. 73; *Sturbridge v. Franklin*, 160 Mass. 149; *S. E. Olson Co. v. Youngquist*, 76 Minn. 26; *Peaks v. Mayhew*, 94 Me. 571; *St. Vincent's Inst. for Insane v. Davis*, 129 Cal. 17; *Vusler v. Cox*, 53 N. J. Law, 516.

<sup>187</sup> *Mainwaring v. Leslie*, 2 Car. & P. 507; *Clifford v. Laton*, 3 Car. & P. 15; *Blowers v. Sturtevant*, 4 Denio (N. Y.) 46; *Sturbridge v. Franklin*, 160 Mass. 149; *Rea v. Durkee*, 25 Ill. 503; *Billing v. Pilcher*, 7 B. Mon. (Ky.) 458, 46 Am. Dec. 523; *Hartmann v. Tegart*, 12 Kan. 177; *Peaks v. Mayhew*, 94 Me. 571; *Reese v. Chilton*, 26 Mo. 598; *Hultz v. Gibbs*, 66 Pa. 360. Compare *Emmett v. Norton*, 8 Car. & P. 506.

But it has been held that where the marriage has been proven, and it has been shown that the articles furnished were necessaries for the wife's support, it was *prima facie* evidence of the liability of the husband, and of his promise to pay, and the burden of proof rests upon the husband to show that her separate residence, and want of means of support, was through no fault of his. *Rumney v. Keyes*, 7 N. H. 571; *Allen v. Aldrich*, 29 N. H. 73.

<sup>188</sup> *Bloomington v. Brinckerhoff*, 2 Misc. (N. Y.) 49; *McKinney v. Guhman*, 38 Mo. App. 344; *Johnston v. Sumner*, 3 Hurl. & N. 261.

Other cases, however, hold that the burden is on the husband to show that he has made her a proper allowance or that she has it from some fund of her own. *Dixon v. Hurrell*, 8 Car. & P. 717; *Mayhew v. Thayer*, 8 Gray (Mass.) 172; *Pidgin v. Cram*, 8 N. H. 352; *Baker v. Barney*, 8 Johns. (N. Y.) 57, 5 Am. Dec. 326.

<sup>189</sup> See 1 *Parsons*, Cont. 296.

<sup>190</sup> *Phillipson v. Hayter*, L. R. 6 C. P. 41; *Raynes v. Bennett*, 114

articles which may be necessities, taking into consideration the condition in life of the husband and wife, and whether the quantity or amount furnished was excessive under the circumstances, are questions of fact for the jury.<sup>191</sup> If there is no question as to the character of the articles furnished, and they are such as could not under any circumstances, or under the undisputed circumstances of the particular case, fall within any class of necessities, according to the established law on the subject, the court need not submit the question to the jury.<sup>192</sup> Whether an allowance made by a husband to his wife, when living separate, was adequate, is a question for the jury.<sup>193</sup>

(i) **Agency to use or dispose of husband's property for maintenance.**—If a husband deserts his wife, or is in prison, leaving her without the means of support, she has implied authority to use his real or personal estate, or to dispose of his money or other personal property, for the purpose of maintaining herself and family, and procuring necessities.<sup>194</sup> She may receive and apply the earnings of her minor children for such purpose,<sup>195</sup> and in Texas it has been held that

Mass. 428; *St. John's Parish v. Bronson*, 40 Conn. 75, 16 Am. Rep. 17; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Sulter v. Mustin*, 50 Ga. 242; *Sauter v. Scrutchfield*, 28 Mo. App. 157.

<sup>191</sup> *Hunt v. De Blaquiere*, 5 Bing. 550; *Compton v. Bates*, 10 Ill. App. 84; *Rea v. Durkee*, 25 Ill. 503; *Vercler v. Jansen*, 96 Ill. App. 328; *Tupper v. Cadwell*, 12 Metc. (Mass.) 559, 46 Am. Dec. 704; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Raynes v. Bennett*, 114 Mass. 424; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Sauter v. Scrutchfield*, 28 Mo. App. 157; *Graham v. Schleiher*, 28 Misc. (N. Y.) 535; *McGrath v. Donnelly*, 131 Pa. 551.

<sup>192</sup> *Phillipson v. Hayter*, L. R. 6 C. P. 41; *Raynes v. Bennett*, 114 Mass. 428; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Sulter v. Mustin*, 50 Ga. 242; and other cases in note 190, *supra*.

<sup>193</sup> *Holder v. Cope*, 2 Car. & K. 437; *Hodgkinson v. Fletcher*, 4 Camp. 70.

<sup>194</sup> *Ahern v. Easterby*, 42 Conn. 546 (where the husband was in prison); *Loy v. Loy*, 128 Ind. 150; *Rawson v. Spangler*, 62 Iowa, 59; *Camerlin v. Palmer Co.*, 10 Allen (Mass.) 539; *Preston v. Bancroft*, 62 Vt. 86.

<sup>195</sup> *Camerlin v. Palmer Co.*, 10 Allen (Mass.) 539.



she may, under such circumstances, manage and dispose of community property for such purpose.<sup>196</sup>

**§ 86. Wife's implied authority to procure necessities for children.**

If a husband deserts his wife or turns her away, or if they are living separate by mutual consent, and he allows his child to remain with her without providing for the child's support, the wife has implied authority to procure necessities for the child on his credit.<sup>197</sup> And such authority is not affected by the fact that the wife commits adultery, so that she would have no authority to procure necessities on his credit for herself.<sup>198</sup> The husband is not liable where he makes and pays the wife an adequate allowance for the support of his children, or makes other suitable and adequate provision therefor.<sup>199</sup> Nor is a husband liable where his wife leaves him without sufficient cause and takes a child

<sup>196</sup> *Wright v. Hays' Adm'r*, 10 Tex. 133; *Cheek v. Bellows*, 17 Tex. 613; *Fullerton v. Doyle*, 18 Tex. 12; *Carothers v. McNese*, 43 Tex. 221; *Zimpelman v. Robb*, 53 Tex. 274.

<sup>197</sup> *Rawlyns v. Vandyke*, 3 Esp. 252; *McMillen v. Lee*, 78 Ill. 443; *Peck v. Gibeson*, 83 Ill. App. 92; *Reynolds v. Sweetser*, 15 Gray (Mass.) 78; *Camerlin v. Palmer Co.*, 10 Allen (Mass.) 540; *East v. King*, 77 Miss. 738; *Rumney v. Keyes*, 7 N. H. 571; *Walker v. Laighton*, 31 N. H. 111; *Hardy v. Eagle*, 23 Misc. (N. Y.) 441; *Dixon v. Chapman*, 56 App. Div. (N. Y.) 542; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73. See, also, *Bazeley v. Forder*, 9 Best & S. 599. It has been held that the education of children is not within the rule. *Hodges v. Hodges*, Peake Add. Cas. 79; *Bailey v. Calcott*, 4 Jur. 699. Compare, however, *Stanton v. Willson*, 3 Day (Conn.) 37, 3 Am. Dec. 255. Where the custody of a minor child is given to the mother by a decree of court, under the statute of 1874, c. 205, the father is not liable for the support of such child. *Brow v. Brightman*, 136 Mass. 187.

<sup>198</sup> *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73. Compare *Atkyns v. Pearce*, 2 C. B. (N. S.) 763. But a man who has received into his house and supported a woman and children compelled to leave home by the cruelty of her husband cannot recover from the husband the expense of supporting the children, if one of his motives for receiving them was that he might maintain an adulterous intercourse with the woman. *Almy v. Wilcox*, 110 Mass. 443.

<sup>199</sup> *Atkyns v. Pearce*, 2 C. B. (N. S.) 763; *Kimball v. Keyes*, 11 Wend. (N. Y.) 34.

with her, knowing that he is able and willing to support the child,<sup>200</sup> or even where the wife leaves for sufficient cause and takes and keeps the child with her contrary to his expressed wishes.<sup>201</sup> A wife has no implied authority to bind her husband for necessities for her children by a former husband.<sup>202</sup>

**§ 87. Contracts by wife on her own credit.**

Even when a wife has authority, express or implied, to bind her husband by purchase of goods or other contracts, the husband will not be bound unless she assumes or undertakes to bind him. If she acts on her own account, and credit is given to her, and not to her husband, the latter is not liable on the contract. This rule applies to contracts for necessities as well as to other contracts, and it can make no difference that the circumstances were such that the wife could have bound the husband.<sup>203</sup> But under a statute making

<sup>200</sup> *Baldwin v. Foster*, 138 Mass. 449; *Hyde v. Lelsenring*, 107 Mich. 490.

<sup>201</sup> *Hancock v. Merrick*, 10 Cush. (Mass.) 41. It is otherwise where there is an order or decree of the court giving the wife the custody of the child. *Bazeley v. Forder*, 9 Best & S. 599.

<sup>202</sup> *Tubb v. Harrison*, 4 Term R. 118. And see *Com. v. Hamilton*, 6 Mass. 273; *Bond v. Lockwood*, 33 Ill. 212; *McMahill v. McMahon's Estate*, 113 Ill. 461; *In re Besondy*, 32 Minn. 385, 50 Am. Rep. 579. The children of a wife by a former husband are not a part of the family of a second husband from whom she has separated, so as to render him liable for their support, under the Iowa Code making the expenses of the family chargeable on the property of either husband or wife. *Menefee v. Chesley*, 98 Iowa, 55. If, however, a stepfather assumes the relation of a parent to his infant step-son, he accepts the parental obligation of supporting him. *Ela v. Brand*, 63 N. H. 14.

<sup>203</sup> *England*: *Metcalf v. Shaw*, 3 Camp. 22; *Bentley v. Griffin*, 5 Taunt. 356; *Holt v. Brien*, 4 Barn. & Ald. 252.

*Alabama*: *Pearson v. Darrington*, 32 Ala. 228; *Gayle's Adm'r v. Marshall*, 70 Ala. 522; *Gafford v. Dunham*, 111 Ala. 551.

*Connecticut*: *Shelton v. Pendleton*, 18 Conn. 417; *Taylor v. Shelton*, 30 Conn. 122.

*Delaware*: *Black v. Clements*, 2 Pen. 499.

*Florida*: *Halle v. Einstein*, 34 Fla. 589.

*Georgia*: *Connerat v. Goldsmith*, 6 Ga. 14; *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421; *Morris v. Root*, 65 Ga. 686.

both husband and wife liable for the "family expenses," the husband may be held liable therefor, notwithstanding credit may have been extended to the wife alone.<sup>204</sup> Purchases of necessities, while living with the husband, are never presumed to have been made on the credit of the wife; such fact must be shown affirmatively.<sup>205</sup>

A husband cannot be held liable for goods sold to his wife on her own credit, or on any other contract made with her on her own credit, because he knew of and assented to the transaction, or acted for her in the matter,<sup>206</sup> or because he is personally benefitted by the contract,<sup>207</sup> or because, by reason of legal disability, the contract is not binding upon the wife.<sup>208</sup>

Where the credit is given to the wife, the contract, not being made by her as agent of her husband, cannot be ratified by him.<sup>209</sup> A promise by him to pay the debt would be a promise to answer for the debt of another, and subject to all the rules governing such a promise.

*Maryland:* *Maulsby v. Byers*, 67 Md. 440.

*Michigan:* *Franklin v. Foster*, 20 Mich. 75.

*Mississippi:* *Swett v. Penrice*, 24 Miss. 416.

*Missouri:* *Tuttle v. Hoag*, 46 Mo. 38, 2 Am. Rep. 481.

*New Hampshire:* *Hill v. Goodrich*, 46 N. H. 41.

*New York:* *Stammers v. Macomb*, 2 Wend. 454; *Simmons v. McElwain*, 26 Barb. 419; *Ehrich v. Bucki*, 7 Misc. 118; *Byrnes v. Rayner*, 84 Hun, 199; *Lindholm v. Kane*, 92 Hun, 369.

*Ohio:* *Dorsey v. Goodenow*, *Wright*, 120; *McMillan v. Auerback*, 7 Ohio N. P. 376.

*Oklahoma:* *Baker v. Witten*, 1 Okl. 160.

*Pennsylvania:* *Moore v. Copley*, 165 Pa. 294, 44 Am. St. Rep. 664.

*South Carolina:* *Moses v. Fogartie*, 2 Hill (S. C.) 335.

*Tennessee:* *Catron v. Warren*, 1 Cold. 358.

*Vermont:* *Carter v. Howard*, 39 Vt. 106; *Bugbee v. Blood*, 48 Vt. 497; *Roberts v. Kelley*, 51 Vt. 97.

Compare *Black v. Bryan*, 18 Tex. 453.

<sup>204</sup> *Warrington v. Anable*, 84 Ill. App. 593.

<sup>205</sup> *Moore v. Copley*, 165 Pa. 294, 44 Am. St. Rep. 664.

<sup>206</sup> *Taylor v. Shelton*, 30 Conn. 122; *Swett v. Penrice*, 24 Miss. 416;

*Maulsby v. Byers*, 67 Md. 440; *Roberts v. Kelley*, 51 Vt. 97.

<sup>207</sup> *Carter v. Howard*, 39 Vt. 106. But see *Roberts v. Kelley*, 51 Vt. 97.

<sup>208</sup> *Taylor v. Shelton*, 30 Conn. 122.

<sup>209</sup> See post, § 122.

Whether credit was given to the husband or to the wife must be determined from the evidence, and is a question of fact for the jury.<sup>210</sup> If a person lends money or sells goods to a wife with the understanding that the transaction shall be concealed from the husband, it may properly be inferred that the credit was given to the wife.<sup>211</sup> If a tradesman, in supplying a wife with such goods as she has implied authority to purchase on her husband's credit, in fact furnishes them on the husband's credit, he is not precluded from holding the husband liable by the fact that he charged the goods to the wife on his books.<sup>212</sup>

**§ 88. Husband's ratification of wife's acts.**

If a wife acts as agent of her husband without authority, the husband may ratify her acts and thus render them binding upon him to the same extent as if originally authorized, and a ratification by him may be either express, or implied from his conduct.<sup>213</sup>

**§ 89. Agency of woman held out or passing as wife.**

Where a man lives with a woman, allowing her to assume his name and pass as his wife, she has implied authority to pledge his credit for necessities during the continuance of the cohabitation, in like manner and to the same extent as if she were in fact his wife,<sup>214</sup> and this is true although the

<sup>210</sup> *Bentley v. Griffin*, 5 Taunt. 356; *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421.

<sup>211</sup> *Franklin v. Foster*, 20 Mich. 75. But the request of a feme covert to a merchant not to call on her husband for pay for necessities that she purchased on her husband's credit, as she wished to pay for them herself, will not be presumed to have been made with a fraudulent intent, and the husband will be liable for them. *Day v. Burnham*, 36 Vt. 37.

<sup>212</sup> *Baker v. Carter*, 83 Me. 132, 23 Am. St. Rep. 764; *Furlong v. Hyson*, 35 Me. 332; *Jewsbury v. Newbold*, 26 Law J. Exch. 247; *Sibley v. Gilmer*, 124 N. C. 631. See, also, *Lauck v. Rhode*, 20 Misc. (N. Y.) 346.

<sup>213</sup> See post, § 122. In order that the husband may render a contract made by the wife binding upon him by ratification, the credit must have been given to him and not to the wife.

<sup>214</sup> *Paule v. Goding*, 2 Fost. & F. 585.

person who furnished the necessities knew at the time that they were not married.<sup>215</sup> But if there is no cohabitation, the mere fact that a man allows a woman to use his name is not sufficient to raise this presumption of authority to pledge his credit.<sup>216</sup> And although they cohabited, if not actually married, a subsequent separation terminates the presumed authority to pledge his credit and he will not be liable for necessities furnished the woman thereafter,<sup>217</sup> unless held so on the ground of estoppel.<sup>218</sup>

### § 90. Agency of partner.

In an ordinary partnership, each partner is not only a principal, but he is also an agent in the management of the business of the firm. In the absence of provision or agreement to the contrary, he is the general agent of his co-partners with implied authority to bind them as members of the firm in all matters which are properly within the scope of the partnership business.<sup>219</sup> And as agent for his co-part-

<sup>215</sup> *Ryan v. Sams*, 12 Q. B. 460; *Watson v. Threlkeld*, 2 Esp. 637.

<sup>216</sup> *Gomme v. Franklin*, 1 Fost. & F. 465.

<sup>217</sup> *Munro v. De Chemant*, 4 Camp. 215.

<sup>218</sup> *Ryan v. Sams*, 12 Q. B. 460.

<sup>219</sup> 1 *Bates*, Partn. § 461.

*England*: *Hawken v. Bourne*, 8 Mees. & W. 703.

*United States*: *Wheeler v. Sage*, 1 Wall. 518; *Kimbrow v. Bullitt*, 22 How. 256.

*Alabama*: *Rovelsky v. Brown*, 92 Ala. 522, 25 Am. St. Rep. 83.

*California*: *Forbes v. Scannell*, 13 Cal. 288.

*Connecticut*: *Usher v. Waddingham*, 62 Conn. 412.

*Dakota*: *Pearson v. Post*, 2 Dak. 220.

*Illinois*: *Raymond v. Vaughn*, 128 Ill. 256, 15 Am. St. Rep. 112; *Edwards v. Dillon*, 147 Ill. 14, 37 Am. St. Rep. 199.

*Indiana*: *Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. Rep. 355.

*Iowa*: *Western Stage Co. v. Walker*, 2 Iowa, 504, 65 Am. Dec. 789.

*Kentucky*: *Montjoy v. Holden*, Litt. Sel. Cas. 447, 12 Am. Dec. 331; *Warder v. Newdigate*, 11 B. Mon. 174, 52 Am. Dec. 567.

*Massachusetts*: *Smith v. Collins*, 115 Mass. 388.

*Minnesota*: *Flarsheim v. Brestrup*, 43 Minn. 298.

*Missouri*: *Eau Claire-St. Louis Lumber Co. v. Gray*, 81 Mo. App. 337.

*New Hampshire*: *National State Capital Bank v. Noyes*, 62 N. H. 35.

ners he has implied authority, unless there is some provision or agreement to the contrary, not only to act himself in the conduct of the partnership business, but also to appoint agents to represent the firm, where such an appointment is within the partnership business.<sup>220</sup> It has been sug-

*New Jersey:* Gerli v. Poidebard Silk Mfg. Co., 57 N. J. Law, 432, 51 Am. St. Rep. 611.

*New York:* Cookingham v. Lasher, 38 Barb. 658; Comstock v. Buchanan, 57 Barb. 127; Johnston v. Trask, 116 N. Y. 136, 15 Am. St. Rep. 394.

*Pennsylvania:* Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 Am. Dec. 390; Wilkins v. Boyce, 3 Watts, 39; Robertson v. Wood, 10 Kulp, 76.

*South Carolina:* Kinsler v. McCants, 4 Rich. Law, 46, 53 Am. Dec. 711.

*Tennessee:* Whiteman Bros. v. American Central Ins. Co., 14 Lea, 327; Pooley v. Whitmore, 10 Heisk. 629, 27 Am. Rep. 733.

*Wisconsin:* Tucker v. Cole, 54 Wis. 539; Fletcher v. Ingram, 46 Wis. 191.

"When, then, a partnership is formed for a particular purpose," said Chief Justice Marshall, in *Winship v. Bank of United States*, 5 Pet. 561, "it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of its business, has a right to consider him as the company, whoever may compose it. \* \* \* The articles of copartnership are perhaps never published. They are rarely if ever seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties, as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general powers contained in all partnerships. The acting parties are identified with the company, and have power to conduct its usual business, in the usual way."

<sup>220</sup> *England:* Beckham v. Drake, 9 Mees. & W. 79; Hawken v. Bourne, 8 Mees. & W. 703.

*Alabama:* Lucas v. Bank of Darien, 2 Stew. 280.

*Colorado:* Charles v. Eshleman, 5 Colo. 107.

*Illinois:* Bartlett v. Powell, 90 Ill. 331.

*Indiana:* Froun v. Davis, 97 Ind. 401.

*Iowa:* Paton v. Baker, 62 Iowa, 704; Boyd v. Watson, 101 Iowa, 214.

*Kansas:* Frye v. Sanders, 21 Kan. 26, 30 Am. Rep. 421; Wheatley v. Tutt, 4 Kan. 240.

gested that the power of a partner to bind the firm results directly from the contract of the parties rather than by operation of law. Whether this be so depends somewhat on the question whether a partnership be regarded as a contract or a status established by contract.

The implied power of a partner is not without limit. He has no authority, unless express authority or an estoppel is shown, to bind his co-partners in a matter which is beyond the scope of the partnership business.<sup>221</sup> And as he

*Louisiana:* Johnston's Ex'r v. Brown, 18 La. Ann. 330.

*Maryland:* Holloway v. Turner, 61 Md. 217.

*Massachusetts:* Durgin v. Somers, 117 Mass. 55.

*Michigan:* Burgan v. Lyell, 2 Mich. 102, 55 Am. Dec. 53; Harvey v. McAdams, 32 Mich. 472; Banner Tobacco Co. v. Jenison, 48 Mich. 459.

*New Hampshire:* Wills v. Cutler, 61 N. H. 405.

*Pennsylvania:* Tillier v. Whitehead, 1 Dall. 269.

*Texas:* Coons v. Renick, 11 Tex. 134, 60 Am. Dec. 230.

*Vermont:* Carley v. Jenkins, 46 Vt. 721.

<sup>221</sup> *United States:* Bowen v. Clark, 1 Biss. 128, Fed. Cas. No. 1,721; Winship v. Bank of United States, 5 Pet. 561.

*Alabama:* Lang's Heirs v. Waring, 17 Ala. 145.

*Colorado:* Lewin v. Barry, 15 Colo. App. 461.

*Connecticut:* New York Firemen Ins. Co. v. Bennett, 5 Conn. 574, 13 Am. Dec. 109.

*Georgia:* Davis v. Dodson, 95 Ga. 718, 51 Am. St. Rep. 108.

*Illinois:* Ruffner v. McConnel, 17 Ill. 212.

*Iowa:* Western Stage Co. v. Walker, 2 Iowa, 504, 65 Am. Dec. 789; Seeberger v. Wyman, 108 Iowa, 527.

*Kansas:* Shattuck v. Chandler, 40 Kan. 516, 10 Am. St. Rep. 227.

*Kentucky:* Brooks-Waterfield Co. v. Jackson, 21 Ky. L. R. 854, 53 S. W. 41.

*Maine:* Rollins v. Stevens, 31 Me. 454.

*Michigan:* Van Kleeck v. McCabe, 87 Mich. 599, 24 Am. St. Rep. 182.

*Minnesota:* Maurin v. Lyon, 69 Minn. 257, 65 Am. St. Rep. 568.

*New York:* Hitchcock v. Peterson, 14 Hun, 390; Laverty v. Burr, 1 Wend. 529; Stall v. Catskill Bank, 18 Wend. 466; Palliser v. Erhardt, 46 App. Div. 222.

*North Dakota:* Clarke v. Wallace, 1 N. D. 404, 26 Am. St. Rep. 636.

*Pennsylvania:* Sutton v. Irwine, 12 Serg. & R. 13; Tanner v. Hall, 1 Pa. 417.

cannot appoint an agent to do for the firm what he cannot do himself, he cannot, without special authority, appoint an agent to bind the other partners by a conveyance or other transaction which is not within the scope of the partnership business.<sup>222</sup>

The power of a partner to bind his co-partners by an instrument under seal is elsewhere considered.<sup>223</sup>

### § 91. Unincorporated clubs and societies as principals.

When a number of persons form a club or society for social, political, religious, or charitable purposes, etc., without becoming incorporated, the law does not regard them as a legal entity or artificial person, like a corporation, but merely as a collection of individuals, and it necessarily follows that the club or association, as such, cannot appoint or have an agent.<sup>224</sup> The members may appoint an agent, but in such a case he is the agent of the members as individuals. They are joint principals.<sup>225</sup> Such an association is not a partnership, and to render a member liable as a principal on contracts made by the persons or committees who manage and assume to act for the association, it must be shown that he expressly or impliedly authorized them to represent and bind him.<sup>226</sup> Members of such bodies are not chargeable

*Tennessee*: *Bank of Tennessee v. Saffarrans*, 3 Humph. 557; *Crosthwait v. Ross*, 1 Humph. 23, 34 Am. Dec. 613.

*Utah*: *Peterson v. Armstrong*, 24 Utah, 96; *Guthell v. Gilmer*, 23 Utah, 84; *Cavanaugh v. Salisbury*, 22 Utah, 465.

<sup>222</sup> *Charles v. Eshleman*, 5 Colo. 107; *Palliser v. Erhardt*, 46 App. Div. (N. Y.) 222.

<sup>223</sup> See ante, § 52(f).

<sup>224</sup> *Clark & M. Corp.* 48.

<sup>225</sup> *Ray v. Powers*, 134 Mass. 22; *Willcox v. Arnold*, 162 Mass. 577; *Reding v. Anderson*, 72 Iowa, 498.

<sup>226</sup> *Fleming v. Hector*, 2 Mees. & W. 172; *Todd v. Emly*, 7 Mees. & W. 427; *Hawke v. Cole*, 62 Law T. (N. S.) 658; *Wilson v. Henderson*, 123 Cal. 262; *Lewis v. Tilton*, 64 Iowa, 220, 52 Am. Rep. 436; *Burt v. Lathrop*, 52 Mich. 106; *Newell v. Borden*, 128 Mass. 31; *Richmond v. Judy*, 6 Mo. App. 465; *Lafond v. Deems*, 81 N. Y. 507; *McCabe v. Goodfellow*, 133 N. Y. 89; *Devoss v. Gray*, 22 Ohio St. 159; *Ash v. Guile*, 97 Pa. 493, 39 Am. Rep. 818.

It has been held that where persons join for social and recreative purposes, and assume a name under which they incur liabilities.



with debts on its behalf, unless the relation of principal and agent is established between the representative of the association and person sought to be made liable. It must be shown that the party assuming to act for the association was the agent of the member upon whom liability is sought to be fastened, and is authorized by him to enter into the contract as his representative.<sup>227</sup> But mere membership is not sufficient to fix the liability of a member for indebtedness contracted on behalf of such an association or society.<sup>228</sup>

they become jointly liable for the indebtedness incurred, and each member continues liable so long as he remains a member, and until he gives notice of his withdrawal to creditors. *Park v. Spaulding*, 10 Hun (N. Y.) 128. And see *Ebbinghausen v. Worth Club*, 4 Abb. N. C. (N. Y.) 300.

<sup>227</sup> *Fleming v. Hector*, 2 Mees. & W. 172; *Wood v. Finch*, 2 Fost. & F. 447; *Delauney v. Strickland*, 2 Stark. 416; *Luckombe v. Ashton*, 2 Fost. & F. 707; *Lewis v. Tilton*, 64 Iowa, 220, 52 Am. Rep. 436; *Ray v. Powers*, 134 Mass. 22; *Newell v. Borden*, 128 Mass. 31; *Volger v. Ray*, 131 Mass. 439; *Burt v. Lathrop*, 52 Mich. 106; *Rice v. Peninsular Club*, 52 Mich. 87; *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505; *Richmond v. Judy*, 6 Mo. App. 465; *Sizer v. Daniels*, 66 Barb. (N. Y.) 426; *Devoss v. Gray*, 22 Ohio St. 169; *Ash v. Guile*, 97 Pa. 493, 39 Am. Rep. 818; *Ridgely v. Dobson*, 3 Watts & S. (Pa.) 118.

In *Eichbaum v. Irons*, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540, it was held that the liability of the members or committees appointed by a political meeting to provide a free public dinner for the members of a political party was not determinable by the law of principal and agent, nor by the law of partnership, but by the question of concurrence in giving the order—their action being joint, and not several.

And see *Davison v. Holden*, 55 Conn. 103, 3 Am. St. Rep. 40, wherein it is said that persons associating for commercial purposes for their pecuniary advantage, and who for convenience transact business and assume associate name, are liable upon the principle of the law of agency. *Bennett v. Lathrop*, 71 Conn. 613, 71 Am. St. Rep. 222.

<sup>228</sup> *Fleming v. Hector*, 2 Mees. & W. 172; *Caldicott v. Griffiths*, 8 Exch. 898; *Hawke v. Cole*, 62 Law T. (N. S.) 658; *Ash v. Guile*, 97 Pa. 493, 39 Am. Rep. 818; *McCabe v. Goodfellow*, 133 N. Y. 89. And the mere fact that a person is a member of the managing committee is not of itself evidence of authority to pledge his credit. *Wood v. Finch*, 2 Fost. & F. 447; *Draper v. Manvers*, 9 Times Law R. 73; *Steele v. Gourley*, 3 Times Law R. 772; *Overton v. Hewett*,

A member can only be made liable by his personal acts or participation in the transaction in question,<sup>229</sup> or where the business is conducted through the medium of officers or agents, by agreeing, at the time of becoming a member, to the exercise of defined powers by the representatives of the association, as by expressly or impliedly consenting to abide by the provisions of its constitution, by-laws, or corresponding rules of guidance, respecting their appointments and powers,<sup>230</sup> or by sanctioning or acquiescing in an appointment or delegation of authority, either by voting therefor, by assenting to the action taken, or by subsequently ratifying it.<sup>231</sup> In the absence of an agreement to abide by the

3 Times Law R. 246. A member is not liable for rent under a lease executed by the association before he became a member, on a count framed on the contract originally made. *Barry v. Nuckolls*, 2 Humph. (Tenn.) 324.

<sup>229</sup> *Reding v. Anderson*, 72 Iowa, 498; *Ash v. Gule*, 97 Pa. 493, 39 Am. Rep. 818; *In re St. James Club*, 16 Jur. 1075.

<sup>230</sup> *Fleming v. Hector*, 2 Mees. & W. 172; *Todd v. Emly*, 7 Mees. & W. 427; *Bennett v. Lathrop*, 71 Conn. 613, 71 Am. St. Rep. 222. By-laws providing for a number less than the whole to constitute a quorum, which, or a majority thereof, may act for the whole body, are binding on those who agree to them. *Cohn v. Borst*, 36 Hun (N. Y.) 562.

<sup>231</sup> *Fleming v. Hector*, 2 Mees. & W. 172; *Todd v. Emly*, 7 Mees. & W. 427; *The St. James Club*, 2 De Gex, M. & G. 383; *Delauney v. Strickland*, 2 Stark. 416; *Braithwaite v. Skofield*, 9 Barn. & C. 401; *Cockerell v. Aucompte*, 2 C. B. (N. S.) 440; *Reding v. Anderson*, 72 Iowa, 498; *Lewis v. Tilton*, 64 Iowa, 220, 52 Am. Rep. 436; *Wells v. Turner*, 16 Md. 133; *Willcox v. Arnold*, 162 Mass. 577; *Volger v. Ray*, 131 Mass. 439; *Newell v. Borden*, 128 Mass. 31; *Ray v. Powers*, 134 Mass. 22; *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505; *Ferris v. Thaw*, 72 Mo. 446; *Richmond v. Judy*, 6 Mo. App. 469; *Devoss v. Gray*, 22 Ohio St. 159, 169; *Fichbaum v. Irons*, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540; *Ridgely v. Dobson*, 3 Watts & S. (Pa.) 118; *Ash v. Gule*, 97 Pa. 493, 39 Am. Rep. 818; *Fredenthal v. Taylor*, 26 Wis. 286. See, also, *Keller v. Tracy*, 11 Iowa, 530; *Drake v. Normal School Trustees*, 11 Iowa, 54. Where persons associated and raised funds to erect a building, and appointed one of their members as their agent to employ workmen and purchase materials, it was held that he had authority to bind the subscribers, including himself, and that all might be sued jointly. *Robinson v. Robinson*, 10 Me. 240.

action of a majority of the members, or of the action of a committee or officer of the association, the liability is limited to those only who agreed to be bound by such actions.<sup>232</sup> The assent need not be express, but may be made out by acts and conduct.<sup>233</sup> Neither need it be proved by former records, but may be established by parol proof.<sup>234</sup> There may be cases, however, in which the objects for which the association is organized are so clear, and the acts done are so essentially necessary to the furtherance of those objects, that the members will be presumptively bound by them, without evidence of consent or ratification.<sup>235</sup>

**§ 92. Agency as between tenants in common and co-owners.**

In order that one tenant in common of real property or co-owner of personal property may bind the other with respect to such property, consent on the part of the other is essential. There is no implied agency, as in the case of a partnership, merely by virtue of their relation.<sup>236</sup> "One tenant in common has no power as such to convey or dispose of the lands of his co-tenant, and cannot execute a deed of the lands of his co-tenant in any other manner than a stranger."<sup>237</sup> So the mere relation of co-tenancy between joint mine owners does not empower one of them to render

<sup>232</sup> *Todd v. Emly*, 7 Mees. & W. 427; *Fleming v. Hector*, 2 Mees. & W. 172; *Newell v. Borden*, 128 Mass. 31; *Devoss v. Gray*, 22 Ohio St. 159. Every member present at a meeting assents beforehand to whatever the majority may do, and becomes a party to acts done, though against his will. If he would escape responsibility, he must protest and throw up his membership on the spot. *Eichbaum v. Irons*, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540.

<sup>233</sup> *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505.

<sup>234</sup> *Newell v. Borden*, 128 Mass. 31; *Ray v. Powers*, 134 Mass. 22.

<sup>235</sup> *Sizer v. Daniels*, 66 Barb. (N. Y.) 426; *Richmond v. Judy*, 6 Mo. App. 465; *McCabe v. Goodfellow*, 133 N. Y. 89.

<sup>236</sup> *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; *Metzger v. Huntington*, 139 Ind. 501; *Barton v. Williams*, 5 Barn. & Ald. 395; *Dunham v. Loverock*, 158 Pa. 197, 38 Am. St. Rep. 838; *Butler Sav. Bank v. Osborne*, 159 Pa. 10, 39 Am. St. Rep. 665; *Burt & Brabb Lumber Co. v. Clay City Lumber Co.*, 23 Ky. L. R. 1019, 64 S. W. 652.

<sup>237</sup> *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; *McElroy v. McLeay*, 71 Vt. 396.

his co-tenants liable on any contracts or for any expenditures he may make as their agent.<sup>238</sup> But where the act is such that it is manifestly for the benefit of all the co-tenants, as the filing of a notice of an adverse claim to a mine, it may be done by one on behalf of the others without a power of attorney from them.<sup>239</sup> The appointment of an agent by one co-tenant, to act in reference to the common property, will bind that one only,<sup>240</sup> unless his co-owner joins in or subsequently ratifies such appointment.<sup>241</sup> But the majority owner of a vessel acts as the agent of his co-owners in managing the ship, and acts done by him in the course of such management are binding on them, unless they expressly dissent.<sup>242</sup>

### § 93. Agency between joint obligors—Joint obligees.

It sometimes becomes necessary that the relation of principal and agent should exist between persons having a joint interest or joint liability in certain matters. Such persons have a common interest and at times it is necessary that one of them should represent his co-obligors in matters in which they are all concerned. In accordance with this principle, the joint debtor may act as the agent of his co-debtors in paying the joint debt and, when he has done so, may compel contribution from them; and if, after satisfying the debt,

<sup>238</sup> *Rico Reduction & Min. Co. v. Musgrave*, 14 Colo. 79; *Chase v. Savage Silver Min. Co.*, 2 Nev. 9; *Paul v. Cragnaz*, 25 Nev. 295; *Mercur v. State Line & S. R. Co.*, 171 Pa. 12.

<sup>239</sup> *Nesbitt v. Delamar's Nev. Gold Min. Co.*, 24 Nev. 273, 77 Am. St. Rep. 807.

<sup>240</sup> *Keay v. Fenwick*, 1 C. P. Div. 745; *Perminter v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177; *Noe v. Christie*, 51 N. Y. 270; *Omaha & Grant Smelting & Refining Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185; *Mayfield v. McKnight* (Tenn.) 56 S. W. 42.

<sup>241</sup> *Keay v. Fenwick*, 1 C. P. Div. 745; *Noe v. Christie*, 51 N. Y. 270. As to the necessity for authority under seal, see ante, 52(g).

<sup>242</sup> *Swift v. Tatner*, 89 Ga. 660, 32 Am. St. Rep. 101; *Gray's Adm'r v. Allen*, 14 Ohio, 58, 45 Am. Dec. 523; *Thoms v. Southard*, 2 Dana (Ky.) 475, 26 Am. Dec. 467. But a part owner of a vessel is not an agent of his co-owners when he takes it to sail on shares, agreeing out of its earnings to pay all expenses, and to give the others a certain proportion of the net proceeds. *Williams v. Hays*, 143 N. Y. 442, 42 Am. St. Rep. 743.

he is discharged therefrom, it redounds to the benefit of all and will operate to discharge them all.<sup>243</sup> As has been said, "Each represents the others in matters relating to the payment and discharge of their joint liability."<sup>244</sup> This agency of a joint obligor, however, should not be extended beyond what is necessary to perform or complete the original contract.<sup>245</sup> It is doubtless the law that joint debtors, in matters respecting their joint indebtedness, may, to a certain extent, bind each other by their admissions,<sup>246</sup> but this can only be as to facts affecting rights or remedies then existing. The admissions must relate to matters showing what are the terms of the contract already made, or whether it has been performed or otherwise discharged. The idea, however, cannot be sanctioned, that a co-debtor, merely because he is such, has authority to bind his associates to a new contract, although it may be in regard to an old debt.<sup>247</sup>

A partial payment by a joint debtor, therefore, without the knowledge or assent or subsequent ratification of his co-debtors, will not bind the latter so as to authorize the inference of a new promise on their part, and therefore will not affect the defense of the statute of limitations as to them.<sup>248</sup> Of course

<sup>243</sup> *Whitcomb v. Whiting*, 2 Doug. 652; *Chetwood v. California Nat. Bank*, 113 Cal. 414; *Fitch v. Hammer*, 17 Colo. 591; *Scofield v. Clark*, 48 Neb. 711; *Green v. Rick*, 121 Pa. 130, 6 Am. St. Rep. 760; *Mills v. Hyde*, 19 Vt. 59, 46 Am. Dec. 177; *Maslin's Ex'rs v. Hiett*, 37 W. Va. 15. A receipt under seal, given by an obligee to a joint obligor, "in full satisfaction for his liability" upon the obligation, releases the co-obligors, if the receipt itself does not show a contrary intention. *Hale v. Spaulding*, 145 Mass. 482, 1 Am. St. Rep. 475.

<sup>244</sup> *Green v. Rick*, 121 Pa. 130, 6 Am. St. Rep. 760.

<sup>245</sup> *Wolf v. Fink*, 1 Pa. 435, 44 Am. Dec. 141; *Smith v. United States*, 2 Wall. (U. S.) 219. One co-surety is not an agent of the others for the purpose of extending the time of payment of a promissory note. *Wolf v. Fink*, 1 Pa. 435, 44 Am. Dec. 141.

<sup>246</sup> *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47.

<sup>247</sup> *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47; and see cases hereafter cited.

<sup>248</sup> *Lowther v. Chappell*, 8 Ala. 353; *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47; *Waughop v. Bartlett*, 165 Ill. 124; *Boynnton v. Spafford*, 162 Ill. 113, 53 Am. St. Rep. 274; *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297; *Oleson v. Willson*, 20 Mont. 544, 63

the joint obligors may expressly authorize one of their number to make a partial payment on a joint obligation or to make a new promise; or such authority may result from the relation of the parties; or the acts may be subsequently ratified, in either of which cases the co-obligors would all be estopped to plead the statute of limitations.<sup>249</sup> In some of the cases, the acknowledgment or partial payment relied upon to take the case out of the statute was made before the bar of the statute had become complete; but in principle, there is no distinction between the legal effect of the acknowledgment or payment made before or after the bar of the statute has attached; and a new promise or part payment by one of two or more joint debtors, whether made before or after the debt is barred by statute, takes the case out of the statute only as to the party so promising or paying, unless his co-debtors assent to or subsequently ratify such promise or payment.<sup>250</sup> But notwithstanding this, there is much conflict in the cases as to the right of one joint debtor to act as the agent of his co-debtors in extending the bar of the statute, before it has attached. It has been held in a number of cases, following Lord Mansfield's decision, that, where the bar of the statute has not attached, the joint relationship of the co-debtors makes one of them the agent of the other to the extent that he may, by payment or new promise, represent his co-debtors in extending the bar of the statute as to the joint debt.<sup>251</sup> But the better considered cases

Am. St. Rep. 639; *Bender v. Blessing*, 82 Hun (N. Y.) 320; *McMullen v. Rafferty*, 24 Hun (N. Y.) 363; *Coleman v. Fobes*, 22 Pa. 156, 60 Am. Dec. 75; *Cowhick v. Shingle*, 5 Wyo. 87, 63 Am. St. Rep. 17.

<sup>249</sup> *Bergman v. Bly*, 66 Fed. 40; *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754; *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47; *Boynton v. Spafford*, 162 Ill. 113, 53 Am. St. Rep. 274; *Waughop v. Bartlett*, 165 Ill. 124; *Mainzinger v. Mohr*, 41 Mich. 685; *Pfenninger v. Kokesch*, 68 Minn. 81; *Oleson v. Wilson*, 20 Mont. 544, 63 Am. St. Rep. 639; *Pitts v. Hunt*, 6 Lans. (N. Y.) 146; *Haight v. Avery*, 16 Hun (N. Y.) 252; *Munro v. Potter*, 34 Barb. (N. Y.) 358; *In re Petrie*, 82 Hun (N. Y.) 62; *Whipple v. Stevens*, 22 N. H. 219; *Harper v. Edwards*, 115 N. C. 246; *Glick v. Crist*, 37 Ohio St. 388; *Wesner v. Stein*, 97 Pa. 322; *Bailey v. Corliss*, 51 Vt. 366.

<sup>250</sup> *Cowhick v. Shingle*, 5 Wyo. 87, 63 Am. St. Rep. 17.

<sup>251</sup> *England*: In *Whitcomb v. Whiting*, 2 Doug. 652, Lord Mans-

hold otherwise: that one joint debtor cannot act as the agent of his co-debtors in such cases, in extending the bar of the statute by payment or new promise without their consent, save in the case of existing partnerships.<sup>252</sup> But although

field, in reference to joint debtors, says: "Payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner, an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due."

And to the same effect, see, in cases of partnership:

*Connecticut*: *Colt v. Tracy*, 8 Conn. 286, 20 Am. Dec. 110; *Austin v. Bostwick*, 9 Conn. 496, 25 Am. Dec. 42; *Beardsley v. Hall*, 36 Conn. 270, 4 Am. Rep. 74; *Bissell v. Adams*, 35 Conn. 299.

*Georgia*: *Cox v. Bailey*, 9 Ga. 467, 54 Am. Dec. 358.

*Louisiana*: *Boult v. Sarpy*, 30 La. Ann. 494.

*Maine*: *Shepley v. Waterhouse*, 22 Me. 497; *Dinsmore v. Dinsmore*, 21 Me. 433 (but see later cases in following note).

*Maryland*: *Burgoon v. Bixler*, 55 Md. 384, 39 Am. Rep. 417; *Schindel v. Gates*, 46 Md. 604, 24 Am. Rep. 526.

*Massachusetts*: *Sigourney v. Drury*, 14 Pick. 387; *Hunt v. Bridgman*, 2 Pick. 581, 13 Am. Dec. 458; *Frye v. Barker*, 4 Pick. 381.

*Minnesota*: *Whitaker v. Rice*, 9 Minn. 13, 86 Am. Dec. 78 (but see later cases).

*Missouri*: *McClurg v. Howard*, 45 Mo. 365, 100 Am. Dec. 378; *Lawrence County v. Dunkle*, 35 Mo. 395.

*New Jersey*: *Casebolt v. Ackerman*, 46 N. J. Law, 169; *Merritt v. Day*, 38 N. J. Law, 32, 20 Am. Rep. 362.

*New York*: *Reid v. McNaughton*, 15 Barb. 168.

*North Carolina*: *Davis v. Coleman*, 7 Ired. Law, 424; *Moore v. Beaman*, 111 N. C. 328; *Green v. Greensboro Female College*, 83 N. C. 449, 35 Am. Rep. 579.

*Pennsylvania*: *Zent's Ex'rs v. Heart*, 8 Pa. 337.

*Rhode Island*: *Woonsocket Inst. v. Ballou*, 16 R. I. 351; *Perkins v. Barstow*, 6 R. I. 505.

*South Carolina*: *Beltz v. Fuller*, 1 McCord, 541, 10 Am. Dec. 693; *Smith v. Caldwell*, 15 Rich. 365.

*Wisconsin*: *National Bank v. Cotton*, 53 Wis. 31.

And this principle applies to a payment or acknowledgment made by an administrator or executor of one of the joint obligors. *County of Vernon v. Stewart*, 64 Mo. 408, 27 Am. Rep. 250; *Briggs v. Starke*, 2 Mill. Const. (S. C.) 111, 12 Am. Dec. 659; *Hord's Adm'rs v. Lee*, 4 T. B. Mon. (Ky.) 36; *Heath v. Grenell*, 61 Barb. (N. Y.) 190.

<sup>252</sup> *United States*: *Bell v. Morrison*, 1 Pet. 352; *Bergman v. Bly*, 66 Fed. 40.

*Alabama*: *Knight v. Clements*, 45 Ala. 89, 6 Am. Rep. 693;



many of the decisions recognize the rule in *Whitcomb v. Whiting* as to a payment or new promise made by a joint debtor before the claim is barred by statute, yet they nearly all adhere to the rule that one joint debtor cannot, after the bar of the statute has attached, act as the agent of the other

*Lowther v. Chappell*, 8 Ala. 353, 42 Am. Dec. 643; *Caruthers v. Mardis' Adm'rs*, 3 Ala. 599; *Myatts v. Bell*, 41 Ala. 222.

*District of Columbia*: *Miller v. Miller, MacArthur & M.* 109, 48 Am. Rep. 738.

*Florida*: *Tate v. Clements*, 16 Fla. 339, 26 Am. Rep. 709.

*Georgia*: *Hunter v. Robertson*, 30 Ga. 479.

*Illinois*: *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47; *Davis v. Mann*, 43 Ill. App. 301; *Waughop v. Bartlett*, 165 Ill. 124.

*Indiana*: *Bottles v. Miller*, 112 Ind. 584; *Meitzler v. Todd*, 12 Ind. App. 381, 54 Am. St. Rep. 531; *Yandes v. Lefavour*, 2 Blackf. (Ind.) 371.

*Kansas*: *Davis v. Clark*, 58 Kan. 459; *Steele v. Souder*, 20 Kan. 39.

*Louisiana*: *Reynolds v. Rowley*, 2 La. Ann. 890.

*Maine*: *Wellman v. Southard*, 30 Me. 425; *Odell v. Dana*, 33 Me. 182.

*Massachusetts*: *Faulkner v. Bailey*, 123 Mass. 588.

*Michigan*: *Rogers v. Anderson*, 40 Mich. 290; *Thompson v. Richards*, 14 Mich. 172.

*Minnesota*: *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297.

*Mississippi*: *Briscoe v. Anketell*, 28 Miss. 361, 61 Am. Dec. 553; *Foute v. Bacon*, 24 Miss. 156.

*New Hampshire*: *Whipple v. Stevens*, 22 N. H. 219; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Kelley v. Sanborn*, 9 N. H. 46.

*New York*: *Van Keuren v. Parmelee*, 2 N. Y. (2 Comst.) 523, 51 Am. Dec. 322; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95; *Bender v. Blessing*, 82 Hun, 320 (compare *Johnson v. Beardslee*, 15 Johns. 3).

*North Carolina*: *Campbell v. Brown*, 86 N. C. 376, 41 Am. Rep. 464; *Le Duc v. Butler*, 112 N. C. 458.

*Ohio*: *Hance v. Hair*, 25 Ohio St. 349; *Palmer v. Dodge*, 4 Ohio St. 21, 62 Am. Dec. 271.

*Pennsylvania*: *Clark v. Burn*, 86 Pa. 502; *Levy v. Cadet*, 17 Serg. & R. 126, 17 Am. Dec. 650; *Bush v. Stowell*, 71 Pa. 208, 10 Am. Rep. 694; *Coleman v. Fobes*, 22 Pa. 156, 60 Am. Dec. 75.

*South Carolina*: *Walters v. Kraft*, 23 S. C. 578, 55 Am. Rep. 44. *Tennessee*: *Muse v. Donelson*, 2 Humph. 166, 36 Am. Dec. 309; *Belote's Ex'rs v. Wynne*, 7 Yerg. 533.

*Wyoming*: *Cowhick v. Shingle*, 5 Wyo. 87, 63 Am. St. Rep. 17.



without his assent, in removing the bar of the statute by payment or acknowledgment.<sup>253</sup>

It is also true in reference to joint obligees that in some respects each may act as the agent of the others in matters pertaining to their joint interest. Thus, one of two or more joint obligees to a contract has the right to receive payment thereon, and such payment discharges the obligation to the amount paid, whether in whole or in part.<sup>254</sup>

### § 94. Implied agency of master of ship.

The master of a vessel, by reason of the particular relation he bears to his employers and to all concerned in the voyage, and the necessities of the case, may impliedly act

<sup>253</sup> *United States*: *Allen v. O'Donald*, 28 Fed. 17.

*Arkansas*: *Biscoe v. Jenkins*, 10 Ark. 108; *Biscoe v. James*, 10 Ark. 163; *Borden v. Peay*, 20 Ark. 293.

*Georgia*: *Cox v. Bailey*, 9 Ga. 467, 54 Am. Dec. 358.

*Kentucky*: *Cochran v. Walker*, 82 Ky. 220, 56 Am. Rep. 891.

*Maine*: *True v. Andrews*, 35 Me. 183. *Contra*, *Pike v. Warren*, 15 Me. 390.

*Maryland*: *Schindel v. Gates*, 46 Md. 604, 24 Am. Rep. 526; *Ellcott v. Nichols*, 7 Gill, 85, 48 Am. Dec. 546; *Burgoon v. Bixler*, 55 Md. 384, 39 Am. Rep. 417.

*Missouri*: *McClurg v. Howard*, 45 Mo. 365, 100 Am. Dec. 378.

*Nebraska*: *Mayberry v. Willoughby*, 5 Neb. 368.

*New Jersey*: *Parker v. Butterworth*, 46 N. J. Law, 244, 50 Am. Rep. 407.

*New York*: *Van Keuren v. Parmelee*, 2 N. Y. (2 Comst.) 523, 51 Am. Dec. 322; *Bogert v. Vermilya*, 10 Barb. (N. Y.) 32.

*North Carolina*: *Long v. Miller*, 93 N. C. 227; *Green v. Greensboro Female College*, 83 N. C. 449, 35 Am. Rep. 579.

*South Carolina*: *Walters v. Kraft*, 23 S. C. 578, 55 Am. Rep. 44; *Smith v. Caldwell*, 15 Rich. 365.

*Tennessee*: *Cocke v. Hoffman*, 5 Lea, 105, 40 Am. Rep. 23.

*Vermont*: *Phelps v. Stewart*, 12 Vt. 256.

*Wyoming*: *Cowhick v. Shingle*, 5 Wyo. 87, 63 Am. St. Rep. 17.

As was said in *Biscoe v. Jenkins*, 10 Ark. 108: "In our opinion, a part payment made by a compromisor after the bar has attached, unless with the consent and authority of the other, given after the bar has attached, or given before with express reference to such a state of things, cannot take from the other his right of defense to an action for recovery of the debt."

<sup>254</sup> *Moore v. Bevier*, 60 Minn. 240; *Voss v. Murray*, 50 Ohio St. 19.

as the agent of such parties when it becomes necessary that he should do so, in order to successfully carry on the voyage, or protect the cargo.<sup>255</sup> He may appoint another as master in his stead and delegate his powers as master to such other, in cases of necessity or sudden emergency in a foreign port, in the absence of the owner and employer or his authorized agent, whenever it may be necessary and proper for the welfare of the ship, and the due accomplishment of the voyage.<sup>256</sup> So in cases of necessity, he may act as agent in contracting for repairs and supplies to the ship,<sup>257</sup> or in hypothecating the vessel;<sup>258</sup> but his agency in this respect is strictly limited to the necessities of the ship.<sup>259</sup> But the authority of a master in a foreign port to procure supplies and repairs necessary for the safety of the ship and the due performance of the voyage is not confined to procuring only such supplies as are absolutely or indispensably necessary, but includes all such as are reasonably fit and proper for the ship and voyage.<sup>260</sup>

<sup>255</sup> *Harrison v. Fortlage*, 161 U. S. 57; *Jordan v. Warren Ins. Co.*, 1 Story, 342, Fed. Cas. No. 7,524; *The Sarah Ann*, 2 Sumn. 206, Fed. Cas. No. 12,342; *Duncan v. Reed*, 39 Me. 415, 63 Am. Dec. 635; *McGilveray v. Stackpole*, 38 Me. 283, 61 Am. Dec. 245.

Where the master of a vessel in distress employs a person to extinguish a fire on board and protect the cargo, with knowledge of and contracting in reference to a reasonable custom of port to charge custody, commission, and reasonable attendance fees, the owner of the vessel will be bound thereby. *Horan v. Strachan*, 86 Ga. 408, 22 Am. St. Rep. 471; *The Ripon City*, 102 Fed. 176.

<sup>256</sup> See *Gernon v. Cochran*, Bee, 209, Fed. Cas. No. 5,368.

<sup>257</sup> *The Fortitude*, 3 Sumn. 228, Fed. Cas. No. 4,953; *Naylor v. Baltzell*, Taney, 55, Fed. Cas. No. 10,061; *The Aurora*, 1 Wheat. (U. S.) 96; *Thomas v. Osborn*, 19 How. (U. S.) 22; *Ross v. Active*, 2 Wash. C. C. 226, Fed. Cas. No. 12,071; *Calef v. Steamer Bonaparte*, 1 Rob. (La.) 463, 38 Am. Dec. 190; *Black Diamond Coal Min. Co. v. Grady*, 87 Fed. 232.

<sup>258</sup> *Skrine v. Hope*, Bee, 2, Fed. Cas. No. 12,927; *Naylor v. Baltzell*, Taney, 55, Fed. Cas. No. 10,061; *Duncan v. Reed*, 39 Me. 415, 63 Am. Dec. 635.

<sup>259</sup> *Carrington v. The Ann C. Pratt*, 10 N. Y. Leg. Obs. 193, and cases cited above.

<sup>260</sup> *The Fortitude*, 3 Sumn. 228, Fed. Cas. No. 4,953; *The Medora*, 1 Sprague, 138, Fed. Cas. No. 9,391; *The Grapeshot*, 9 Wall. (U. S.) 130.

He may sell the cargo in a perishable or damaged condition, which he is unable to save or transmit, if he acts bona fide and under a stringent necessity.<sup>261</sup> He may, when his vessel becomes disabled and unable to proceed, and acting as an agent of necessity for the owners of the cargo, transship it, or if expedient retain it until his own ship is put in repair, or if necessary may sell part of it or hypothecate the whole, or he may abandon the voyage and notify the owners.<sup>262</sup> To justify a sale of the cargo in such a case, however, the necessity must be absolute and unequivocal, and is only permissible after the exhaustion of the ship's credit.<sup>263</sup> It is also clearly established that the master, as such, may sell a wrecked vessel, when he proceeds in good faith exercising his best discretion for the benefit of all con-

<sup>261</sup> *Vlierboom v. Chapman*, 13 Mees. & W. 230; *The Maria White*, 1 Hask. 204, Fed. Cas. No. 9,083; *Jordan v. Warren Ins. Co.*, 1 Story, 342, Fed. Cas. No. 7,524; *Pope v. Nickerson*, 3 Story, 465, Fed. Cas. No. 11,274; *The Velona*, 3 Ware, 139, Fed. Cas. No. 16,912; *Myers v. Baymore*, 10 Pa. 114, 49 Am. Dec. 586; *Rugely v. Sun Mut. Ins. Co.*, 7 La. Ann. 279, 56 Am. Dec. 603; *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541.

Master of a vessel may sell damaged cargo, but only in case of extreme necessity, or where it cannot be carried to its port of destination, or would be worthless on its arrival there. *Myers v. Baymore*, 10 Pa. 114, 49 Am. Dec. 586. But it has been held that the master of the ship is not an agent of the consignor, to judge for him when the goods are so damaged as to make a sale necessary before they reach their destination. *Halwerson v. Cole*, 1 Speers (S. C.) 321, 40 Am. Dec. 603.

<sup>262</sup> *Cammell v. Sewell*, 5 Hurl. & N. 728; *Naylor v. Baltzell, Taney*, 55, Fed. Cas. No. 10,061; *The Bridgewater*, 11 Chi. Leg. N. 327; *Rugely v. Sun Mut. Ins. Co.*, 7 La. Ann. 279, 56 Am. Dec. 603; *Hassam v. St. Louis Perp. Ins. Co.*, 7 La. Ann. 11, 56 Am. Dec. 591; *Graham v. Underwood*, 15 La. Ann. 402; *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316; *Fontaine v. Columbian Ins. Co.*, 9 Johns. (N. Y.) 30. And see *Englehart v. Pedro*, Fed. Cas. No. 4,489.

<sup>263</sup> *Freeman v. East India Co.*, 5 Barn. & Ald. 617; *Cannan v. Meaburn*, 1 Bing. 243; *Tronson v. Dent*, 8 Moore P. C. 419; *The Packet*, 3 Mason, 255, Fed. Cas. No. 10,654; *The Harriet*, Fed. Cas. No. 6,094; *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316; *Bryant v. Commonwealth Ins. Co.*, 13 Pick. (Mass.) 543; *Butler v. Murray*, 30 N. Y. 88, 86 Am. Dec. 355; *American Ins. Co. v. Center*, 4 Wend. (N. Y.) 45; *Stillman v. Hurd*, 10 Tex. 109.

cerned, and in view either of existing peril or of peril likely to ensue, from which, in the opinion of persons competent to judge, she cannot be rescued;<sup>264</sup> but the sale, to be binding on the owners, must be one of necessity.<sup>265</sup>

<sup>264</sup> *Hunter v. Parker*, 7 Mees. & W. 322; *Tanner v. Bennett*, Ryan & M. 182; *Idle v. Royal Exch. Assur. Co.*, 8 Taunt. 755; *The Lucinda Snow*, Abb. Adm. 305, Fed. Cas. No. 8,591; *Fitz v. Amelle*, 2 Cliff. 440, Fed. Cas. No. 4,838; *The Herald*, 8 Ben. 409, Fed. Cas. No. 6,393; *Scull v. Briddle*, 2 Wash. C. C. 150, Fed. Cas. No. 12,569; *The William Carey*, 3 Ware, 313, Fed. Cas. No. 17,689; *The Sarah Ann*, 13 Pet. (U. S.) 387, 2 Sumn. 206, Fed. Cas. No. 12,342; *The Bridgewater*, 11 Chl. Leg. News, 327, Fed. Cas. No. 1,864; *The Yarkand*, 117 Fed. 336, affirmed in 120 Fed. 887; *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248; *Duncan v. Reed*, 39 Me. 415, 63 Am. Dec. 635; *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 55; *Prince v. Ocean Ins. Co.*, 40 Me. 481; *Gates v. Thompson*, 57 Me. 442; *Winn v. Columbian Ins. Co.*, 12 Pick. (Mass.) 279; *Gordon v. Massachusetts F. & M. Ins. Co.*, 2 Pick. (Mass.) 249.

<sup>265</sup> *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248; *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316; *Butler v. Murray*, 30 N. Y. 88, 86 Am. Dec. 355; *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 517; and cases cited in preceding note. In the cases deciding that a master of a vessel has power to sell it in case of necessity, different language is used to express just what necessity will justify a sale. For example: In *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316, it was said that necessity to justify sale of cargo and ship before arriving at port of destination must be such a necessity as supersedes all human laws. In *Hall v. Franklin Ins. Co.*, 9 Pick. (Mass.) 466, Putnam, J., delivering the opinion of the court, said: "The master's authority to sell must be confined to a case of extreme necessity, which leaves no alternative, which prescribes the law for itself, and puts the party in a positive state of compulsion to act. The master acts for the owners or insurers, because they can not have an opportunity to act for themselves. If the property could be kept safely until they could be consulted, and have opportunity, in a reasonable time, to exercise their own judgment in regard to the sale, the necessity to act for them would cease." In *Fitz v. The Amelle*, 2 Cliff. 445, Fed. Cas. No. 4,838, it is said: "When the ship is disabled by perils of the sea, and the master has no means of getting the repairs done in the place where the injury occurred, or if, being in a place where the repairs might be made, he has no funds in his possession and cannot, on account of the distance or other sufficient cause, communicate with the owner, and is not able to raise the necessary means by bottomry or otherwise to execute the repairs, or if the injuries to the ship are so great that the cost of

If a vessel or its cargo is abandoned to the underwriters during a voyage for a total loss, the master then becomes, by operation of law, the agent of the underwriters with the same general rights and powers as he would have in regard to the original owners.<sup>266</sup>

**§ 95. Agency of vendor for vendee.**

When a contract of sale has been entered into between vendor and vendee, and the vendee refuses to take and pay for the goods, the vendor, if he has the control or possession of the goods, ordinarily has the choice of either one of three remedies to indemnify himself: (1) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2) he may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price; or (3) he may sell the property, acting as agent, for this purpose, of the vendee, and recover the difference between the contract price and the amount obtained on such resale. In such case, the vendor takes the position of agent for the vendee to make the sale, and all that is required of him is that he should act with

repairing her would be greater than her value after the repairs were made, or if the ship is disabled so that she cannot proceed, and the cost of repairs will amount to more than half her value, reckoning one third new for old, and the master has no funds, and can neither procure any nor communicate with the owner, and the whole circumstances are such that a prudent owner would decide to break up the voyage, then the master is justified in selling the ship as the best thing that can be done for the interest of all concerned. Such a state of circumstances creates the moral necessity, the urgent necessity, the extreme necessity, the imperious, uncontrollable necessity, described in the decided cases, and authorizes the master to sell the ship, if in his judgment, honestly exercised, the sale will best promote the interest of all concerned." And in *The Amelie*, 6 Wall. (U. S.) 18, 27, Mr. Justice Davis says: "The sale of a ship becomes a necessity within the meaning of the commercial law when nothing better can be done for the owner or those concerned in the adventure." And see other cases cited in preceding notes.

<sup>266</sup> *Story*, Ag. § 118; *General Interest Ins. Co. v. Ruggles*, 12 Wheat. (U. S.) 408. See *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248.

reasonable care and diligence and good faith; he should make the sale without unnecessary delay, but he must be the judge as to the time and place of sale provided he act in good faith and with reasonable care and diligence and give notice of his intention to sell.<sup>267</sup> But it is no part of such agency, or the duties involved in it, to notify the vendee of the time and place at which the goods are to be sold or exposed for sale.<sup>268</sup> If more is realized on such resale than is due to the vendor, he must account to the vendee for the surplus.<sup>269</sup>

The vendor, in such cases, is not strictly an agent of the vendee, but it is rather a general expression used to define the right of the vendor to make a resale and hold the vendee responsible for the loss. It is quite manifest that a resale made under such circumstances is not made by the vendor strictly as the agent of the vendee, but he acts for himself in disposing of the property for the purpose of ascertaining the actual loss he may sustain. His duties as to the manner of making the sale, as we have seen, in some respects resemble those of an agent, and hence he is said to take the

<sup>267</sup> 2 Sutherland, Dam. (2d Ed.) § 647; *West v. Cunningham*, 9 Port. (Ala.) 104, 33 Am. Dec. 300; *Magnes v. Sioux City Nursery & Seed Co.*, 14 Colo. App. 219; *Bagley v. Findlay*, 82 Ill. 524; *Roebeling's Sons' Co. v. Lock Stitch Fence Co.*, 130 Ill. 661; *Rice v. Penn Plate Glass Co.*, 88 Ill. App. 407; *Gilly v. Henry*, 8 Mart. (La.) 402, 13 Am. Dec. 291; *Atwood v. Lucas*, 53 Me. 508, 89 Am. Dec. 713; *Young v. Mertens*, 27 Md. 115; *Whitney v. Boardman*, 118 Mass. 242; *McLean v. Richardson*, 127 Mass. 345; *Van Horn v. Rucker*, 33 Mo. 391, 84 Am. Dec. 52; *Baker v. McKinney*, 87 Mo. App. 361; *Gordon v. Norris*, 49 N. H. 376; *Sands v. Taylor*, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374; *Dustan v. McAndrew*, 44 N. Y. 72; *Westfall v. Peacock*, 63 Barb. (N. Y.) 209; *Pollen v. Le Roy*, 30 N. Y. 549; *Ackerman v. Rubens*, 167 N. Y. 405, 82 Am. St. Rep. 728; *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692; *McCombs v. McKennan*, 2 Watts & S. (Pa.) 216, 37 Am. Dec. 505; *Coffman v. Hampton*, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511; *Waples v. Overaker*, 77 Tex. 7, 19 Am. St. Rep. 727; *Rosenbaum v. Weeden*, 18 Grat. (Va.) 785, 98 Am. Dec. 737. Compare *McGuinness v. Whalen*, 16 R. I. 558, 27 Am. St. Rep. 763.

<sup>268</sup> *Pollen v. Le Roy*, 30 N. Y. 549; *Magnes v. Sioux City Nursery & Seed Co.*, 14 Colo. App. 219.

<sup>269</sup> *Westfall v. Peacock*, 63 Barb. (N. Y.) 209; and see cases cited in preceding notes.

position of an agent, but otherwise he cannot be considered as such.<sup>270</sup>

**§ 96. Agency of priests, ministers, etc.**

Priests, ministers, and other ecclesiastics in charge of a parish or other church property have only such authority to manage and control the property of the church or congregation as is given to them by the canons or laws of the church. Thus, a Catholic priest having charge of a parish has no implied authority to convey real estate, the title of which is in his bishop.<sup>271</sup> The mere fact that one is a priest or minister of a church does not authorize him to bind the trustees or members of such church by contracts in reference to the church property or church affairs.

The agency of auctioneers, supercargoes, attorneys, etc., will be considered in subsequent chapters.

<sup>270</sup> See *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692.

<sup>271</sup> *Leahey v. Williams*, 141 Mass. 345; *Olcott v. Gabert*, 86 Tex. 121.

## **CHAPTER VI.**

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## I. DEFINITION AND NATURE OF RATIFICATION.

## § 97. In general.

As has been observed, assent of the parties is essential to the creation of an agency, in the absence of those circumstances of necessity or estoppel by reason of which the policy of the law forbids a denial of assent, or in other words, except in such cases as the law implies that assent has been given, and forbids its denial. Aside from such circumstances, if one without authority assumes to act for another, the latter may at his option ratify or repudiate it.<sup>1</sup> If he elects to ratify

<sup>1</sup> Taylor v. Conner, 41 Miss. 722, 97 Am. Dec. 419; Routh v.

such act, he obviously becomes thereby bound as if he had originally authorized it. In this chapter, then, it is the intention to treat of this mode of establishing the relation of principal and agent. As the rights, duties, and liabilities arising from an agency by ratification are the same as in the cases of an agency otherwise created, the consideration of those subjects will be left for subsequent chapters, and the present chapter will be confined to the treatment of ratification as the means of establishing an agency.

The question of ratification may arise: First, in reference to one who was an agent of the person ratifying, and had authority from him to some extent, but who has exceeded such authority in doing the acts in question. Second, in reference to one who had no previous authority whatever from the alleged principal, but who, of his own volition, has assumed to represent him in doing the acts or making the contracts in question. The chief distinction between these two classes is in the amount or nature of the evidence required to establish them as agents, it being obvious that it requires more or stronger evidence to establish an agency in the case of one who had no previous authority whatever from the alleged principal, than in the case of one who had previous authority but has exceeded it in doing the particular acts. Since, with this exception, the same general rules apply alike to both classes, they will be considered together.

It has been suggested that, properly speaking, a ratification does not create or establish the relation of principal and agent, especially in the case where the relation previously existed for certain purposes, but the suggestion is without force. Whether a person assumes to act as agent without any authority at all, or whether he merely exceeds his authority, he is not in fact the agent of the principal with respect to the particular act, and unless some subsequent countenance is given to such act, the incidental rights and liabilities of agency will not attach thereto. Of course, ratification does not in reality create an agency before the doing of

Thompson, 13 East, 274; *Hagedorn v. Olinerson*, 2 Maule & S. 485; *Marsh v. Keating*, 1 Bing. N. C. 198; and many other cases cited in the following pages.

the act ratified, but it creates the relation after the acts have been done; and by a fiction of the law, the authority thus subsequently given is deemed to revert back and give the acts previously done, without authority, the same force and effect as if they had been originally authorized. By this fiction of the law, the relation of principal and agent is considered to have existed from the very time the acts were done and not merely from the time of the ratification, and the rights and obligations are substantially the same as if such were actually the case. In other words, it is the establishment of the relation for certain purposes after those purposes have been accomplished.

**§ 98. Definition of ratification.**

Ratification is the election by a person, and the expression of such election by words or conduct, to accept an act or contract previously done or entered into on his behalf by another who had at the time no authority to do the act or make the contract on his behalf.<sup>2</sup> If certain acts have been performed or contracts made on behalf of another without his authority, he has, when he obtains knowledge thereof, an election either to accept or repudiate such acts or contracts. If he accepts them, his acceptance is a ratification of the previously unauthorized acts or contracts, and makes them as binding upon him from the time they were performed, as if they had been authorized in the first place.<sup>3</sup> Ratification has also been defined as "the adoption of an unauthorized transaction, by the party beneficially interested,"<sup>4</sup> but, as we shall see in a subsequent section, a ratifica-

<sup>2</sup> The following definitions, among others, have been given in the text-books and cases:

"Ratification is the adoption of an act or contract entered into in behalf of the one ratifying by one who had no previous authority to represent the one so ratifying in the doing of the act or the making of the contract." *Huffcutt, Agency* (1st Ed.) § 30. And see *Negley v. Lindsay*, 67 Pa. 217, 228, 5 Am. Rep. 427.

"A ratification is an agreement to adopt an act performed by another for the one who agrees to adopt it, or the confirmation of a voidable act." *Haggerty v. Juday*, 58 Ind. 154.

<sup>3</sup> See post, § 148, and cases there cited.

<sup>4</sup> *Schwartz v. Weber*, 6 N. Y. State Rep. 688. See, also, *Negley v. Lindsay*, 67 Pa. 217, 5 Am. Rep. 427. And see note 2, supra.

tion is not, properly speaking, an adoption.<sup>5</sup> It will be seen from the above definition that an act, in order to be the subject of ratification, must have been unauthorized. If an act has been previously authorized there can be no need for ratification. An instruction, therefore, that ratification of an agent's acts only applies to acts beyond the scope of his agency, is proper.<sup>6</sup>

**§ 99. Distinction between "ratification" and "adoption."**

Although the word "adopt" is used in most of the definitions of "ratification," in a legal sense there is a distinction between the term "adoption" and the term "ratification." The former is in effect the making of a new contract on the terms of the old, while the latter is an acceptance of the old contract itself as previously made. An adoption takes place where there cannot be, in a legal sense, a ratification. Thus as we shall presently see, in order that there may be a ratification, the person for whom the act or contract was done or entered into must have been in existence and ascertainable at the time of such act or contract. If at the time a contract is made by a person assuming to act as an agent the party for whom it is made does not exist, or is not ascertainable, he cannot, upon subsequently becoming existent, or known, ratify the contract. In such case, however, he may adopt the contract, or in other words, he may make a new contract on the terms of the one previously made. As respects the rights of the parties concerned, the distinction may be very important, for a "ratification" relates back and takes effect from the time the original contract was made, whereas an "adoption" takes effect only from the time of adoption. This doctrine is applicable, as we shall hereafter see, to contracts made by promoters of a corporation to be afterwards formed on behalf of the proposed corporation. Since there cannot be an agency for a non-existing principal and since a ratification relates back and is in contemplation of law equivalent to authority at

<sup>5</sup> Post, § 99.

<sup>6</sup> Sparkman v. Supreme Council American Legion of Honor, 57 S. C. 16.

the time the contract is made, it follows that the corporation when formed cannot ratify the contract in the sense in which the term "ratification" is used in the law of agency.<sup>7</sup> If the company, when formed, assents to the contract and agrees to be bound thereby, which it may do expressly or impliedly, it "adopts" the same. It makes a contract on the same terms, but as of the time of such adoption. Thus it has

<sup>7</sup> *McArthur v. Times Printing Co.*, 48 Minn. 319, 31 Am. St. Rep. 653; *Kelner v. Baxter*, L. R. 2 C. P. 174, 36 Law J. C. P. 94; *Howard v. Patent Ivory Mfg. Co.*, 38 Ch. Div. 156; *In re Empress Engineering Co.*, 16 Ch. Div. 125; *Melhado v. Porto Alegre, N. H. & B. R. Co.*, L. R. 9 C. P. 505, 43 Law J. C. P. 253; *Stainsby v. Frazer's Metallic Life Boat Co.*, 3 Daly (N. Y.) 98; *Weatherford, M. W. & N. W. R. Co. v. Granger*, 86 Tex. 350, 40 Am. St. Rep. 837; *Rockford, R. I. & St. L. R. Co. v. Sage*, 65 Ill. 328, 16 Am. Rep. 587; *Western Screw & Mfg. Co. v. Cousley*, 72 Ill. 531; *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 621, 59 Am. Rep. 852; *Bell's Gap R. Co. v. Christy*, 79 Pa. 54, 21 Am. Rep. 39. And see *Clark & M. Corp.* §§ 101(c), 715(a). But see *Stanton v. New York & E. R. Co.*, 59 Conn. 272, 21 Am. St. Rep. 110.

*Jessel, M. R.*, in *In re Empress Engineering Co.*, 16 Ch. Div. 125, says: "The contract between the promoters and the so-called agent for the company of course was not a contract binding upon the company, for the company had then no existence, nor could it become binding on the company by ratification, because it has been decided, and, as it appears to me, well decided, that there cannot in law be an effectual ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. It does not follow from that that acts may not be done by the company after its formation which make a new contract to the same effect as the old one, but that stands on a different principle."

And as was said by *Mitchell, J.*, in *McArthur v. Times Printing Co.*, 48 Minn. 319, 31 Am. St. Rep. 653: "Although the acts of a corporation with reference to the contracts made by promoters in its behalf before its organization are frequently loosely termed 'ratification,' yet a 'ratification,' properly so called, implies an existing person, on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. \* \* \* What is called 'adoption' in such cases is, in legal effect, the making of a contract of the date of the adoption, and not as of some former date."

been held that the date of the adoption, and not the date of the original contract, as would be the case if there were a ratification, is the date of the contract of the company, for the purpose of determining whether it is within the statute of frauds as a contract not to be performed within a year from the making thereof.<sup>8</sup>

So where a person, whose name has been signed to a deed in his absence by another without sealed authority, appears and duly acknowledges its execution, he thereby adopts the signature as his own, and there is no question of agency or ratification.<sup>9</sup> "No question of agency arises in this class of cases. The validity of the deed cannot rest upon the ground of agency or ratification. If such were the case the authority or ratification would have to be by instrument under seal; for authority or ratification must be of as high a character as the act to be performed or ratified. If the act is the execution of a sealed instrument, it must be authorized or ratified by a sealed instrument. We therefore repeat that the validity of the instrument in this class of cases does not rest on agency or ratification, but on adoption, no matter by whom the signing and sealing were performed, nor whether with or without the grantor's consent. By completing the instrument, he adopts what had previously been done to it, and makes it his in all its particulars."<sup>10</sup>

<sup>8</sup> *McArthur v. Times Printing Co.*, 48 Minn. 319, 31 Am. St. Rep. 653.

<sup>9</sup> *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386; *Lovejoy v. Richardson*, 68 Me. 386; *Lewis v. Watson*, 98 Ala. 479, 39 Am. St. Rep. 82; *Bartlett v. Drake*, 100 Mass. 174, 1 Am. Rep. 101, 97 Am. Dec. 92.

<sup>10</sup> *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386. It was further said by the court in this case, which was a case where the grantor's name was signed to a deed in his absence by the grantee, that: "It is not often important to notice this distinction, but it is important in this case, in order to avoid the apparent absurdity of holding that an agent can contract with himself, can be both grantor and grantee. An agent cannot contract with himself. He cannot as agent for the grantor execute a deed to himself. But he can prepare a deed running to himself, even to the signing and sealing, and if the grantor then adopts the deed by personally acknowledging and delivering it, it will be a legal and valid instrument. But

## II. ESSENTIAL ELEMENTS OF RATIFICATION.

## § 100. In general.

To constitute a valid ratification a number of essential elements must be present which may be enumerated as follows: It is essential (a) that there be an existing and ascertainable principal; (b) that an act, lawful and capable of ratification, be performed by another on his behalf; (c) that the alleged principal assent thereto, but a new consideration is not essential to support this assent; (d) that the principal be competent to contract, and (e) fully informed of all material facts; (f) that the ratification be in toto. In some cases of implied ratification, prejudice to the rights of the other party may be regarded as an essential element. The motive which an agent had in mind in performing the unauthorized acts cannot be considered as an element of ratification.

## § 101. An existing and ascertainable principal.

One of the essential elements of a valid ratification is that the person in whose behalf the unauthorized acts were performed shall have been in existence and ascertainable at the time the acts were done. It is not essential that he shall have been specifically named by the person assuming to act for him, but it is necessary that he shall have been an existing person and that he shall have been so described as to be readily ascertained. "The law," it has been said, "obviously requires that the person for whom the agent professes to act must be a person capable of being ascertained at the time. It is not necessary that he should be named; but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract."<sup>11</sup> It will be seen in a subsequent sec-

its validity rests upon the ground of adoption, not agency or ratification. And when the word 'ratified' or 'ratification' is used in this class of cases, as it often is, it will be found on careful examination that it is used in the sense of 'adopted' or 'adoption' and not in the technical sense in which it is used in the law of agency."

<sup>11</sup> Willes, J., in *Watson v. Swann*, 11 C. B. (N. S.) 756. And see *Wilson v. Tumman*, 6 Man. & G. 236; *Stainsby v. Frazer's Metallic Life Boat Co.*, 3 Daly (N. Y.) 98.

tion that in order that a person may ratify an act done on his behalf, he must have been capable of doing or authorizing the act. If, then, a person was not in existence at the time acts were done on his behalf, he cannot subsequently ratify them, for he could not have done or authorized them in the first instance.<sup>12</sup>

This doctrine, as we shall see in a subsequent section, applies where contracts are made by the promoters of a proposed corporation on its behalf before it has been formed. The corporation, upon coming into existence, may make itself liable upon such contracts entered into in its behalf, if it adopts the same, and it impliedly does so, if, with full knowledge of all the facts, it accepts such contracts or the benefits thereof. But this properly speaking is not a ratification, although that term is frequently used in such cases. It is an adoption of the contract. The distinction between these two terms, as pointed out in a former section, is that a ratification is an election to accept an act or contract as originally done or made and takes effect from the time it was done or made; and the principal must have been in existence at that time. An adoption, however, is the making of a new contract on the terms of the old and takes effect from the time of adoption and not from the time the contract was originally made; and it is not necessary that the principal shall have been in existence at the time the contract was originally entered into. Hence if a corporation, after incorporation, accepts the benefits of a contract entered into in its behalf before it was incorporated, it adopts such contract and is bound thereby, but does not, properly speaking, ratify such contract.<sup>13</sup> In the case of administrators of a decedent's estate there seems to be an exception to the above general rule. An administrator, after his appointment, may ratify contracts entered into in behalf of the decedent's estate, between the time of the decedent's death and the administrator's appointment. But although the administrator has no right to act until letters of administration have been granted, yet the appointment, when made, re-

<sup>12</sup> *Keener v. Baxter*, L. R. 2 C. P. 174. Post, § 119.

<sup>13</sup> See post, § 120.



lates back to the time of the intestate's death, and for this reason there is not so much of an exception as at first appears.<sup>14</sup>

**§ 102. Act must have been performed on behalf of alleged principal.**

It is also essential that an act or contract in order that it may be the subject of a ratification shall have been done or entered into by the alleged agent, as agent, and in the name or on behalf of the alleged principal. If an act or contract is done or entered into on behalf of one person, another person, who is a stranger to the transaction, cannot come in, and by an attempted ratification take advantage of or become liable for or upon it, and the same principle applies where a person does an act or enters into a contract, not intending to act as agent at all, but on his own behalf as principal.<sup>15</sup>

<sup>14</sup> *Hull v. Pickersgill*, 1 Brod. & B. 282; *Foster v. Bates*, 12 Mees. & W. 226.

<sup>15</sup> *Watson v. Swann*, 11 C. B. (N. S.) 756; *Keighley v. Durant* [1901] App. Cas. 240; *Wilson v. Tumman*, 6 Man. & G. 236; *Ancona v. Marks*, 7 Hurl. & N. 686; *Puget Sound Lumber Co. v. Krug*, 89 Cal. 237; *McDonald v. McCoy*, 121 Cal. 55; *Balloch v. Hooper*, 6 Mackey (D. C.) 421; *Roby v. Cossitt*, 78 Ill. 638; *Grund v. Van Vleck*, 69 Ill. 478; *Meiners v. Munson*, 53 Ind. 138; *Crowder v. Reed*, 80 Ind. 1; *Western Pub. House v. District Township of Rock*, 84 Iowa, 101; *Harrison v. Mitchell*, 13 La. Ann. 260; *Richardson v. Payne*, 114 Mass. 429; *Mitchell v. Minnesota Fire Ass'n*, 48 Minn. 278; *Herd v. Bank of Buffalo*, 66 Mo. App. 643; *Hammerslough v. Cheatham*, 84 Mo. 13; *Allred v. Bray*, 41 Mo. 484, 97 Am. Dec. 283; *Webb v. Cole*, 20 N. H. 490; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. (2 Comst.) 479, 51 Am. Dec. 315; *Collins v. Suau*, 7 Rob. (N. Y.) 623; *Kirchner v. Schmid*, 7 Misc. (N. Y.) 455; *Brainerd v. Dunning*, 30 N. Y. 211; *Hamlin v. Sears*, 82 N. Y. 327; *Fellows v. Commissioners of Oneida*, 36 Barb. (N. Y.) 655; *Rawlings v. Neal*, 126 N. C. 271; *Pittsburgh & Steubenville R. Co. v. Gazzam*, 32 Pa. 340; *Commercial & Agricultural Bank v. Jones*, 18 Tex. 811. Where a landowner instructs her agent, who has no general authority to sell her lands, to sell a portion thereof, and the agent employs a broker who sells the land, but it is not shown that the agent acted for the principal in employing the broker, the principal cannot be held liable for the broker's compensation by selling the land to a purchaser found by the broker. *Williams v. Moore*, 24 Tex. Civ. App. 402.

It was said in a New York case: "The general doctrine that one may, by affirmative acts, and even by silence, ratify the acts of another who has assumed to act as his agent, is not disputed. It is illustrated by many cases to be found in the books and set forth by all the text writers upon the law of agency. But the doctrine properly applies only to cases where one has assumed to act as agent for another; and then a subsequent ratification is equivalent to an original authority."<sup>16</sup> And as was held in a late English case, a contract made by a person intending to contract on behalf of a third party, but without his authority, cannot be ratified by such party so as to render him able to sue and liable to be sued on the contract, where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal.<sup>17</sup>

It is not necessary, however, that the alleged principal shall have been specifically named, or even that he shall have been known to the agent, if he was so described in the transaction as to be ascertainable.<sup>18</sup> It has further been held that where a person makes a contract, intending to act for another, the latter may ratify the contract and become principal therein, although the agent may have made the contract in his own name, and without disclosing the fact that he was acting for another.<sup>19</sup> Thus in a late Massachusetts case it was said: "It is necessary, in order to a ratification, that the act should have been done by one who was in fact acting as an agent, but it is not necessary that he should have been understood to be such by the party with whom he was dealing."<sup>20</sup> The application of the principle that

<sup>16</sup> *Hamlin v. Sears*, 82 N. Y. 327.

<sup>17</sup> *Keighley v. Durant* [1901] App. Cas. 240.

<sup>18</sup> *Ante*, § 101.

<sup>19</sup> *Durant v. Roberts* [1900] 1 Q. B. Div. 629, 82 Law T. (N. S.) 217, 69 Law J. Q. B. Div. 382. See, also, *Robinson v. Lincoln Sav. Bank*, 85 Tenn. 363.

If the person, with whom a contract is made by another in his own name, but in reality on behalf of another, has knowledge of the other's rights in the subject-matter, the latter may ratify the contract, notwithstanding it is made in the name of the agent. *Robinson v. Lincoln Sav. Bank*, 85 Tenn. 363.

<sup>20</sup> *Hayward v. Langmaid*, 181 Mass. 426, citing other cases.

an act, to be the subject of a ratification, must have been done in the name or on behalf of the person ratifying, is not limited to contracts, but it applies equally as well when it is sought to hold a person liable, on the ground of ratification, for a tort committed by another.<sup>21</sup>

§ 103. **Assent of the alleged principal.**

It is an essential element of the valid ratification that the principal shall have given his assent to the unauthorized acts. Like a previous authority this assent may either be given expressly or it may be implied from words, silence, or conduct. What constitutes an express or implied ratification will be considered hereafter. In order that such assent may constitute a ratification, it is necessary that certain conditions shall exist, namely: (1) The principal must be competent to give a binding assent; (2) such assent must be given with the full knowledge of all the material facts, and must be free from mistake or fraud; (3) such assent must be given in toto and unconditionally.

§ 104. **New consideration not necessary.**

To support this assent to an unauthorized contract it is not necessary that a new consideration shall be given, for, by the ratification, the principal consents to and becomes bound by the contract on the original consideration.<sup>22</sup> As was said in a Pennsylvania case: "Ratification is, in general, the adoption of a previously formed contract, notwithstanding a view that rendered it relatively void; and by the very nature of the act of ratification, confirmation, or affirmation (all these terms are in use to express the same thing), the party confirming becomes a party to the contract; he that was not bound becomes bound by it, and entitled to all the proper benefits of it; he accepts the consideration of the

<sup>21</sup> *Wilson v. Tumman*, 6 Man. & G. 241; *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 753. And see post, § 116.

<sup>22</sup> *First Nat. Bank of Trenton v. Gay*, 63 Mo. 33, 21 Am. Rep. 430; *Brooke v. Hook*, 24 Law T. (N. S.) 34; *Drakely v. Gregg*, 8 Wall. (U. S.) 242; *Lynch v. Smyth*, 25 Colo. 103; *Grant v. Beard*, 50 N. H. 129; *Negley v. Lindsay*, 67 Pa. 217, 5 Am. Rep. 427, 431; *Fitzpatrick v. School Com'rs*, 7 Humph. (Tenn.) 224, 46 Am. Dec. 76.

contract as a sufficient consideration for adopting it, and usually this is quite enough to support the ratification. A mere ratification cannot, of course, correct any defect in the terms of the contract. If it is in its very terms invalid for want of a consideration, or for any other defect, a mere ratification can add nothing to its binding force."<sup>23</sup>

**§ 105. Competency of alleged principal to assent.**

The competency of a principal to assent to or ratify an unauthorized act or contract, done or entered into on his behalf by another, will be fully considered in a subsequent section. It will then be seen that a person, in order that he may ratify an unauthorized act or contract, must himself have been capable of doing or authorizing the act or contract at the time it was done or made, and must also be capable of doing so at the time of the ratification.<sup>24</sup>

**§ 106. Knowledge of all material facts—Mistake—Fraud.**

It is an essential element of a valid ratification that the principal shall have a full knowledge of all material facts, unless he intentionally and deliberately ratifies when he knows that he has no such knowledge, not caring to make further inquiry in the matter. It is his privilege if he so desires, to intentionally ratify the unauthorized acts of his agent or of an assumed agent, without full knowledge of the facts, and if he is misled he cannot complain.<sup>25</sup> But

<sup>23</sup> By Lowrie, C. J., in *Pearsoll v. Chapin*, 44 Pa. 17. See *Negley v. Lindsay*, 67 Pa. 217, 5 Am. Rep. 427, 431.

<sup>24</sup> *Marsh v. Fulton County*, 10 Wall. (U. S.) 676; *McCracken v. San Francisco*, 16 Cal. 591; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *Sentell v. Kennedy*, 29 La. Ann. 679; *Taymouth Tp. v. Koehler*, 35 Mich. 22; *Bullard v. De Groff*, 59 Neb. 783. And see post, § 119.

<sup>25</sup> *Kelley v. Newburyport & A. Horse R. Co.*, 141 Mass. 496; *Marsh v. Joseph* [1897] 1 Ch. Div. 214, 66 Law J. Ch. 128; *Lewis v. Read*, 13 Mees. & W. 834; *Schutz v. Jordan*, 32 Fed. 55; *Wheeler v. Northwestern Sleigh Co.*, 39 Fed. 347; *Niemeyer Lumber Co. v. Moore*, 55 Ark. 240; *Tilleny v. Wolverton*, 54 Minn. 75; *Jewell Nursery Co. v. State*, 5 S. D. 623.

In *Ehrmantraut v. Robinson*, 52 Minn. 333, this doctrine is thus expressed: "It is sometimes said that to constitute a ratification

in the absence of such an intentional ratification, it is a general rule that in order that a ratification of an unauthorized act or contract may be valid and binding on the person ratifying, it must have been made with a full knowledge of all the material facts. If there is a mistake as to the facts, there is no ratification; and it can make no difference that facts have been innocently concealed or inadvertently misrepresented.<sup>26</sup> "No doctrine is better settled, both upon

of an unauthorized act of an agent, the principal must have had knowledge of all the material facts. As to a past and completed transaction, this would be generally true, but there are many cases where the conduct of the principal may amount to a ratification, although he may not know all the facts as to the unauthorized act of the agent in his behalf. He may ratify by voluntarily assuming the risk without inquiry, or he may deliberately ratify upon such knowledge as he possesses, without caring for more."

<sup>26</sup> *England*: *Lewis v. Read*, 13 Mees. & W. 834; *Fitzgerald v. Dresler*, 97 E. C. L. 374; *Marsh v. Joseph* [1897] 1 Ch. Div. 214, 66 Law J. Ch. 128.

*United States*: *Owings v. Hull*, 9 Pet. 608; *Rust v. Eaton*, 24 Fed. 830; *Bosseau v. O'Brien*, 4 Biss. 395, Fed. Cas. No. 1,667; *Wheeler v. Northwestern Sleigh Co.*, 39 Fed. 347; *Pacific Rolling Mill Co. v. Dayton, S. & G. R. R. Co.*, 7 Sawy. 61, 5 Fed. 852; *Bell v. Cunningham*, 3 Pet. 69.

*Alabama*: *Singer Mfg. Co. v. Belgart*, 84 Ala. 519; *Simon v. Johnson*, 105 Ala. 344, 53 Am. St. Rep. 125; *Wheeler v. McGuire*, 86 Ala. 398; *Blevins v. Pope*, 7 Ala. 371; *Patterson v. Neal*, 135 Ala. 477.

*Arkansas*: *Snow v. Grace*, 29 Ark. 131.

*California*: *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235; *Davidson v. Dallas*, 8 Cal. 227; *Dupont v. Wertheman*, 10 Cal. 354; *Dean v. Bassett*, 57 Cal. 640; *Miller v. Board of Education*, 44 Cal. 166; *Blen v. Bear River & A. Water & Min. Co.*, 20 Cal. 602, 81 Am. Dec. 132.

*Colorado*: *Fleld v. Small*, 17 Colo. 386; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565; *Extension Gold Min. & Mill. Co. v. Skinner*, 28 Colo. 237.

*Connecticut*: *Lester v. Kinne*, 37 Conn. 9; *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn. 244.

*Florida*: *Town of Madison v. Newsome*, 39 Fla. 149.

*Georgia*: *De Vaughn v. McLeroy*, 82 Ga. 687; *New Ebenezer Ass'n v. Gress Lumber Co.*, 89 Ga. 125; *Turner v. Wilcox*, 54 Ga. 593; *Mapp v. Phillips*, 32 Ga. 72; *Hardeman v. Ford*, 12 Ga. 205; *Ludden & B. Southern Music House v. McDonald*, 117 Ga. 60.

*Illinois*: *International Bank v. Ferris*, 118 Ill. 465; *Ward v. Wil-*

principle and authority, than this: That the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all

*Hams*, 26 Ill. 447, 79 Am. Dec. 385; *American Exch. Bank v. Loretta Min. Co.*, 165 Ill. 103, 56 Am. St. Rep. 233; *Kerr v. Sharp*, 83 Ill. 199; *Proctor v. Tows*, 115 Ill. 138; *Reynolds v. Ferree*, 86 Ill. 570; *Mathews v. Hamilton*, 23 Ill. 470.

*Indiana*: *Modisett v. Lindley*, 2 Blackf. 119.

*Iowa*: *Eggleston v. Mason*, 84 Iowa, 630; *Beebe & Co. v. Equitable Mut. Life & Endowment Ass'n*, 76 Iowa, 129; *Roberts v. Rumley*, 58 Iowa, 301; *White v. Morgan*, 42 Iowa, 113; *Potter v. Harvey*, 30 Iowa, 502; *Thompson v. Des Moines Driving Park*, 112 Iowa, 628.

*Kansas*: *St. John & Marsh Co. v. Cornwell*, 52 Kan. 712; *Bohart v. Oberne*, 36 Kan. 284; *Getty v. C. R. Barnes Mill. Co.*, 40 Kan. 281.

*Kentucky*: *Fletcher v. Dysart*, 9 B. Mon. 413.

*Louisiana*: *Mummy v. Haggerty*, 15 La. Ann. 268; *Delaney v. Levi*, 19 La. Ann. 251.

*Maine*: *Thorndike v. Godfrey*, 3 Me. 429; *Morrell v. Inhabitants of Dixfield*, 30 Me. 157; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96.

*Maryland*: *Adams' Exp. Co. v. Trego*, 35 Md. 47, 69; *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699; *Bannon v. Warfield*, 42 Md. 22; *Busby v. North America Life Ins. Co.*, 40 Md. 588, 17 Am. Rep. 634; *Pennsylvania, Del. & Md. Steam Nav. Co. v. Dandridge*, 8 Gill. & J. 248, 29 Am. Dec. 543; *Cumberland Coal & Iron Co. v. Sherman*, 20 Md. 117.

*Massachusetts*: *Manning v. Leland*, 153 Mass. 510; *Murray v. C. N. Nelson Lumber Co.*, 143 Mass. 250; *Thacher v. Pray*, 113 Mass. 291; *Combs v. Scott*, 12 Allen, 493; *Dickinson v. Inhabitants of Conway*, 12 Allen, 487; *Kelley v. Newburyport & A. Horse R. Co.*, 141 Mass. 496; *Bl-Spool Sew. Mach. Co. v. Acme Mfg. Co.*, 153 Mass. 404.

*Michigan*: *Hurley v. Watson*, 68 Mich. 531.

*Minnesota*: *Hunt v. Pitts Agricultural Works*, 69 Minn. 539; *Humphrey v. Havens*, 12 Minn. 298 (Gil. 196); *Woodbury v. Larned*, 5 Minn. 339 (Gil. 271); *Eckart v. Roehm*, 43 Minn. 271.

*Mississippi*: *Baker v. Byrne*, 2 Smedes & M. 193; *Meyer v. Baldwin*, 52 Miss. 263.

*Missouri*: *Steunkle v. Chicago, S. F. & C. R. Co.*, 42 Mo. App. 73; *Hyde v. Larkin*, 35 Mo. App. 366; *Sanders v. Chartrand*, 158 Mo. 352; *Johnson v. Fecht*, 94 Mo. App. 605.

*Nebraska*: *Bullard v. De Groff*, 59 Neb. 783; *Holm v. Bennett*, 43 Neb. 808; *Dietz v. City Nat. Bank*, 42 Neb. 584; *O'Shea v. Rice*, 49 Neb. 893; *Cram v. Sickel*, 51 Neb. 828, 66 Am. St. Rep. 478.

*New Hampshire*: *Grant v. Beard*, 50 N. H. 129; *Gould v. Blodgett*,

the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded in mistake or fraud."<sup>27</sup> "The general rule is perfectly well settled, that a ratification of the unauthorized act of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake, or misappre-

61 N. H. 115; *Hovey v. Brown*, 59 N. H. 114; *Bohanan v. Boston & M. R.*, 70 N. H. 526.

*New Jersey*: *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728; *Dowden v. Cryder*, 55 N. J. Law, 329; *Titus v. Cairo & Fulton R. Co.*, 46 N. J. Law, 393; *Dugan v. Lyman* (N. J. Eq.) 23 Atl. 657.

*New Mexico*: *Kirchner v. Laughlin*, 6 N. M. 300.

*New York*: *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 635; *Nixon v. Palmer*, 8 N. Y. 398; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Baldwin v. Burrows*, 47 N. Y. 199, 212; *Keeler v. Salisbury*, 33 N. Y. 648; *Rowan v. Hyatt*, 45 N. Y. 138; *Ritch v. Smith*, 82 N. Y. 627; *Seymour v. Wyckoff*, 10 N. Y. 213; *Bell v. Day*, 32 N. Y. 165; *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150.

*Pennsylvania*: *Pittsburg & S. R. Co. v. Gazzam*, 32 Pa. 340; *Zoeblisch v. Rauch*, 133 Pa. 532; *Moore's Ex'rs v. Patterson*, 28 Pa. 505; *Merrick Thread Co. v. Philadelphia Shoe Mfg. Co.*, 115 Pa. 314; *Fenn v. Dickey*, 178 Pa. 258.

*South Carolina*: *Pourie v. Fraser*, 2 Bay, 269; *McCants v. Bee*, 1 McCord, Eq. 383, 16 Am. Dec. 610; *Ravenel v. Lyles*, Spears Eq. 281.

*Tennessee*: *Williams v. Storm*, 6 Cold. 203; *Scott v. Turley*, 9 Lea, 631.

*Texas*: *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Battaglia v. Thomas*, 5 Tex. Civ. App. 563; *Commercial & Agricultural Bank v. Jones*, 18 Tex. 811; *Iron City Nat. Bank v. Fifth Nat. Bank* (Tex. Civ. App.) 47 S. W. 533.

*Utah*: *Moyle v. Congregational Soc. of Salt Lake City*, 16 Utah, 69.

*Vermont*: *Fuller v. Ellis*, 39 Vt. 345, 94 Am. Dec. 327; *Saville v. Welch*, 58 Vt. 683.

*Virginia*: *Anderson v. Creston Land Co.*, 96 Va. 257.

*Washington*: *Armstrong v. Oakley*, 23 Wash. 122.

*West Virginia*: *Curry v. Hale*, 15 W. Va. 869.

*Wisconsin*: *Ladd v. Hildebrant*, 27 Wis. 135, 9 Am. Rep. 445; *Aetna Ins. Co. v. Northwestern Iron Co.*, 21 Wis. 458; *Dodge v. McDonnell*, 14 Wis. 553.

<sup>27</sup> Story, J., in *Owings v. Hull*, 9 Pet. (U. S.) 607.

hension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption or assent to the previously unauthorized act of an agent."<sup>28</sup>

#### § 107. Illustrations.

Thus, if a person, assuming to act as agent for another, makes a sale of the latter's goods with a warranty of quality, or fitness for some specific purpose, and the owner, on being advised of the sale, ratifies it, such ratification does not include a warranty of which he had no notice.<sup>29</sup> So the mere payment of money to the order of an agent who was exceeding his authority by incurring traveling expenses does not amount to a ratification of such acts, unless it should appear that the payment was made with a full knowledge of all the facts, and with an intention of ratifying them, or that it was made to enable the agent to continue his operations.<sup>30</sup> So a mortgage, conditioned to secure the payment of notes unauthorizedly made in the mortgagor's name, was executed at the request of the mortgagor's son-in-law, upon land which the son-in-law really owned, but the title to which had been taken in the mortgagor's name without his knowledge, the mortgagor supposing the mortgage was for the benefit of the son-in-law or his wife. The mortgagor did not suppose the mortgage was given to secure notes made by him. The notes were not given in his business nor for his benefit, nor did it appear that he ever received any benefit from them. It was held that to constitute a ratification under such circumstances the act must have been deliberate, intentional, and with knowledge of all the circumstances, and that the evidence warranted a finding that the mortgagor did not ratify the son-in-law's acts.<sup>31</sup> A principal's ratification of a transaction fraudulently made by his agent does

<sup>28</sup> *Combs v. Scott*, 12 Allen (Mass.) 493.

<sup>29</sup> *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 635.

<sup>30</sup> *Fuller v. Ellis*, 39 Vt. 345, 94 Am. Dec. 327. Compare *Grand Ave. Hotel Co. v. Friedman*, 83 Mo. App. 491.

<sup>31</sup> *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150.



not become a ratification of the fraud if he was ignorant of it at the time of such ratification.<sup>32</sup>

Where the principal accepts the benefits of an unauthorized act or contract, as we shall see hereafter, it will not amount to a ratification unless he had full knowledge of all circumstances connected with such act or contract.<sup>33</sup> Thus, a principal does not ratify a contract made by his agent simply by receiving and retaining the consideration of such contract, unless he knew on what account the money was paid to him, and the terms of the contract on which it was received.<sup>34</sup> So where an agent authorized to buy goods for cash, without the knowledge of his principal, made an unauthorized purchase on credit, the acceptance and use of the goods by the principal did not operate as a ratification.<sup>35</sup>

Nor will the principal be regarded as having ratified an unauthorized act of his agent, merely because he receives money, property, or security, or avails himself of advantages derived from such act, where he did not learn that such agent had exceeded his authority, until such changes had taken place in his circumstances as to prevent him from repudiating the whole transaction without essential injury.<sup>36</sup> If, for instance, a merchant should authorize a broker by a written memorandum to purchase certain goods at a price named, and the broker should exhibit it to the seller, and yet should exceed the price, and this should be made known to the merchant, when he received the goods; if he should retain or sell them, he would ratify the bargain made by the broker, and be obliged to pay the agreed price. But if he had received the goods without knowledge that they had been purchased at an advanced price, he would not be obliged to restore them, or pay such advanced price, if he

<sup>32</sup> *Colvin v. Peck*, 62 Conn. 155; *Nichols v. Bruns*, 5 Dak. 28. And see *Stanley v. Chamberlin*, 39 N. J. Law, 565.

<sup>33</sup> *Post*, § 140.

<sup>34</sup> *Pennsylvania, Del. & M. Steam Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543.

<sup>35</sup> *Manning v. Gasharle*, 27 Ind. 399; *Welch v. Clifton Mfg. Co.*, 55 S. C. 568.

<sup>36</sup> *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96.

could not, when informed of it, repudiate the bargain without suffering loss.<sup>37</sup>

But if the principal has acquiesced for a number of years and has received the benefits of an unauthorized contract, he could not be relieved from any further obligation, because he had but recently discovered a fact that he should have ascertained, and which the law presumes that he did ascertain, long before.<sup>38</sup>

### § 108. Ratification in toto.

It is also well settled that a principal must either ratify or repudiate an unauthorized act performed in his behalf, in toto, he cannot separate the transaction and ratify a part that is beneficial or authorized and repudiate the remainder. If he ratifies part he must ratify all, or if he repudiates part he must repudiate all.<sup>39</sup> And especially can there not be

<sup>37</sup> *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96.

<sup>38</sup> *Hyatt v. Clark*, 118 N. Y. 563.

<sup>39</sup> *England*: *Wilson v. Poulter*, 2 Strange, 859; *Brewer v. Sparrow*, 7 Barn. & C. 310; *Billon v. Hyde*, 1 Atk. 126.

*United States*: *Rader's Adm'r v. Maddox*, 150 U. S. 128.

*Alabama*: *Crawford v. Barkley*, 18 Ala. 270.

*Arkansas*: *Daniels v. Brodie*, 54 Ark. 216.

*California*: *Smith v. Smith*, 80 Cal. 323.

*Colorado*: *Burkhard v. Mitchell*, 16 Colo. 376.

*Connecticut*: *Shoninger v. Peabody*, 57 Conn. 42, 14 Am. St. Rep. 88.

*Georgia*: *Southern Exp. Co. v. Palmer*, 48 Ga. 85; *Mercier v. Cope-land*, 73 Ga. 636; *Hodnett v. Tatum*, 9 Ga. 70; *Hunter v. Stembridge*, 17 Ga. 243; *Byne v. Hatcher*, 75 Ga. 289.

*Idaho*: *Burke Land & Livestock Co. v. Wells, Fargo & Co.*, 7 Idaho, 42.

*Illinois*: *Barhydt v. Clark*, 12 Ill. App. 646; *Henderson v. Cummings*, 44 Ill. 325; *Cochran v. Chitwood*, 59 Ill. 53.

*Indiana*: *Travelers' Ins. Co. v. Patten*, 119 Ind. 416; *Terry v. Provident Fund Soc.*, 13 Ind. App. 1, 55 Am. St. Rep. 217; *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 606.

*Iowa*: *Key v. National Life Ins. Co.*, 107 Iowa, 446; *Roberts v. Rumley*, 58 Iowa, 301; *Krider v. Trustees of Western College*, 31 Iowa, 547; *Beidman v. Goodell*, 56 Iowa, 592; *Deering v. Grundy County Nat. Bank*, 81 Iowa, 222.

*Kansas*: *Loomis Mill. Co. v. Vawter*, 8 Kan. App. 437.

*Louisiana*: *E. O. Stanard Mill. Co. v. Flower*, 46 La. Ann. 315;

a partial ratification where the contract was wholly unauthorized.<sup>40</sup> If an agent obtains possession of the property

*Elam v. Carruth*, 2 La. Ann. 275; *Boudreaux v. Feibleman*, 105 La. 401.

*Maine*: *Billings v. Mason*, 80 Me. 496.

*Massachusetts*: *New England Marine Ins. Co. v. De Wolf*, 8 Pick. 56.

*Michigan*: *Nichols, Shepard & Co. v. Shaffer*, 63 Mich. 599; *Eberts v. Selover*, 44 Mich. 519, 38 Am. Rep. 278; *Peninsular Bank v. Hammer*, 14 Mich. 208; *Widner v. Lane*, 14 Mich. 124; *Hutchings v. Ladd*, 16 Mich. 493.

*Minnesota*: *King v. Franklin Lumber Co.*, 80 Minn. 274.

*Mississippi*: *Watts v. Bonner*, 66 Miss. 629; *Taylor v. Conner*, 41 Miss. 722, 97 Am. Dec. 419.

*Missouri*: *State v. Harrington*, 100 Mo. 170.

*Nebraska*: *German Nat. Bank v. First Nat. Bank*, 59 Neb. 7; *Martin v. Humphrey*, 58 Neb. 414; *Citizens' State Bank v. Pence*, 59 Neb. 579; *Hall v. Hopper*, 64 Neb. 633; *United States School-Furniture Co. v. School Dist. No. 87*, 56 Neb. 645; *Rogers v. Empkie Hardware Co.*, 24 Neb. 653.

*New Hampshire*: *Eastman v. Provident Mut. Relief Ass'n*, 65 N. H. 176, 23 Am. St. Rep. 29; *Tasker v. Kenton Ins. Co.*, 59 N. H. 438; *Grant v. Beard*, 50 N. H. 129; *Hovey v. Blanchard*, 13 N. H. 145.

*New York*: *Moss v. Rossie Lead Min. Co.*, 5 Hill, 137; *Farmers' Loan & Trust Co. v. Walworth*, 1 N. Y. 433; *Garner v. Mangam*, 93 N. Y. 642; *Baker v. Union M. L. Ins. Co.*, 43 N. Y. 283; *Crans v. Hunter*, 28 N. Y. 389; *Elwell v. Chamberlain*, 31 N. Y. 611.

*North Carolina*: *Rudasill v. Falls*, 92 N. C. 222.

*Ohio*: *State v. Perry, Wright*, 662.

*Oregon*: *Coleman v. Stark*, 1 Or. 115.

*Pennsylvania*: *Pennsylvania Natural Gas Co. v. Cook*, 123 Pa. 170; *Siemens Regenerative Gas Lamp Co. v. Horstmann*, 24 Wkly. Notes Cas. 396.

*Tennessee*: *Fort v. Coker*, 11 Heisk. 579; *Seago v. Martin*, 6 Heisk. 308.

*Texas*: *Haldeman v. Chambers*, 19 Tex. 1.

*Vermont*: *McClure v. Briggs*, 58 Vt. 82; *Fitzsimmons v. Joslin*, 21 Vt. 142, 52 Am. Dec. 46; *Newell v. Hurlburt*, 2 Vt. 351.

*West Virginia*: *Lane v. Black*, 21 W. Va. 617; *Ruffner v. Hewitt*, 7 W. Va. 585, 605.

*Wisconsin*: *Strasser v. Conklin*, 54 Wis. 102; *Saveland v. Green*, 40 Wis. 431.

<sup>40</sup> *Crawford v. Barkley*, 18 Ala. 270; *Daniels v. Brodie*, 54 Ark. 216; *Shoninger v. Peabody*, 57 Conn. 42, 14 Am. St. Rep. 88; *South-*

of another, by making a stipulation or condition which he was not authorized to make, the principal must either return the property, or, if he receives it, it must be subject to the condition upon which it was parted with by the former owner. This proposition is founded upon a principle which pervades the law in all its branches: *Qui sentit commodum, sentire debet et onus*. Thus, where a party ratifies a contract which was entered into without his authority, he must ratify it altogether. He cannot ratify that part which is beneficial to him and reject the remainder; he must take the benefit to be derived from the transaction cum onere.<sup>41</sup> Thus, the plaintiff was a carriage-maker, and his shop was under the management of W., as his foreman. W. owed the defendant by note, and made and delivered to her a buggy belonging to the plaintiff in exchange for the note. The plaintiff, on hearing of this, disapproved of the arrangement, and brought his action for the price, alleging it to have been sold. It was held that he could not recover; that, regarding him as having ratified the contract, he would then be only entitled to the note; regarding him as having repudiated the contract, there would then be no sale of the buggy, and that his remedy was, after demand, to bring trover.<sup>42</sup> So a principal cannot ratify the fraud of his agent by accepting a note which is the fruit of such fraud, and suing upon it, and claiming at the same time to be a holder of the note in good faith, because the agent did not

ern Exp. Co. v. Palmer, 48 Ga. 85; Hodnett v. Tatum, 9 Ga. 70; Delaware, L. & W. R. Co. v. Thayer, 41 Ill. App. 192; Roberts v. Rumley, 58 Iowa, 301; Beidman v. Goodell, 56 Iowa, 592; Davenport Sav. Fund & Loan Ass'n v. North American F. Ins. Co., 16 Iowa, 74; Wells v. Hickox, 1 Kan. App. 485; Elam v. Carruth, 2 La. Ann. 275; Widner v. Lane, 14 Mich. 124; Peninsular Bank v. Hammer, 14 Mich. 208; Nichols v. Kern, 32 Mo. App. 1; Esterly Harvesting Mach. Co. v. Frolkey, 34 Neb. 110; Wheeler & W. Mfg. Co. v. Elbersson, 84 Hun (N. Y.) 501; Coleman v. Stark, 1 Or. 115; Kyle v. Rippey, 20 Or. 446.

<sup>41</sup> Mundorff v. Wickersham, 63 Pa. 87, 3 Am. Rep. 531; Hovill v. Pack, 7 East, 164; Coleman v. Stark, 1 Or. 115; Eastman v. Provident Mut. Relief Ass'n, 65 N. H. 176, 23 Am. St. Rep. 29; Wheeler & W. Mfg. Co. v. Aughey, 144 Pa. 398, 27 Am. St. Rep. 638.

<sup>42</sup> Whitlock v. Heard, 3 Rich. Law (S. C.) 88.



acquaint him with the circumstances under which he procured it when he sent it to him, but led him to suppose that it had been taken in the ordinary course of his agency.<sup>43</sup> Nor can the principal ratify an unauthorized transaction conditionally, as where he seeks to ratify on the condition that he shall not suffer any loss thereby. The ratification must be absolute and according to the terms of the unauthorized transaction.<sup>44</sup> Nor can he enforce a contract made by his agent, and at the same time repudiate a warranty made by the agent without authority.<sup>45</sup>

**§ 109. Ratification of part is ratification of whole.**

From the above rule, it follows that if a principal, with a full knowledge of all material facts, ratifies a part of an unauthorized act or contract, it amounts to a ratification of the whole.<sup>46</sup> Thus, if the agent has acted without authority in employing a subagent, a ratification thereof by the principal will also include the employment and acts of the subagent.<sup>47</sup> So accepting goods wrongfully seized with knowledge of all the facts is a ratification of an assault committed while making the seizure,<sup>48</sup> and where a principal by accepting the purchase money ratifies a sale made under a general authority, he also ratifies a warranty made in such sale.<sup>49</sup> But if the agency is a special one to sell property not ordinarily sold with a warranty, a receipt of the proceeds without knowledge of such warranty is not a ratification thereof.<sup>50</sup>

<sup>43</sup> *Johnston Harvester Co. v. Miller*, 72 Mich. 265, 16 Am. St. Rep. 536; *Wilder v. Beede*, 119 Cal. 646.

<sup>44</sup> *Fort v. Coker*, 11 Heisk. (Tenn.) 579.

<sup>45</sup> *Loomis Mill. Co. v. Vawter*, 8 Kan. App. 437.

<sup>46</sup> *Gaines v. Miller*, 111 U. S. 395; *Krider v. Trustees of Western College*, 31 Iowa, 547; *King v. Franklin Lumber Co.*, 80 Minn. 274; *Corning v. Southland*, 3 Hill (N. Y.) 552; *Farmers' Loan & Trust Co. v. Walworth*, 1 N. Y. 433; *Tallman v. Kimball*, 74 Hun (N. Y.) 279; *Strasser v. Conklin*, 54 Wis. 102.

<sup>47</sup> *Blantire v. Whitaker*, 11 Humph. (Tenn.) 313; *Sheldon v. Sheldon*, 3 Wis. 699.

<sup>48</sup> *Avakian v. Noble*, 121 Cal. 216.

<sup>49</sup> *Cochran v. Chittwood*, 59 Ill. 53.

<sup>50</sup> *Smith v. Tracy*, 36 N. Y. 79; *Cooley v. Perrine*, 41 N. J. Law, 322, 32 Am. Rep. 210.

It is held, however, that where the agent, in making a loan of money for his principal, exceeds his authority and secures a bonus for himself, without the principal's knowledge, the above rule as to ratification in toto does not apply, and that the principal's receiving in good faith the security for the loan and seeking to enforce it, is a ratification of the part of the contract which he had authorized and he may repudiate the unauthorized or usurious part.<sup>51</sup>

**§ 110. Prejudice to rights of other party.**

It has also been held, in the case of implied ratification, that the transaction must be such that if a ratification thereof is not implied, the rights of the other party will be prejudiced thereby.<sup>52</sup> Thus, where an agent makes a contract which is unauthorized in several particulars, the mere fact that the principal, in repudiating it, gives as his reason that it is unauthorized in a certain particular, in which, however, it is authorized, does not constitute a ratification, where the third party is in no way injured by the form of the principal's objection, so as to raise an estoppel.<sup>53</sup> But it is not believed that prejudice is such an essential element as must be present in all cases in order to constitute an implied ratification, for the circumstances of some cases may be such that a ratification will be implied, although the third party may not have been prejudiced. Of course if the act is one that would not of itself indicate an intention to ratify, or is not accompanied by other circumstances indicating such an intention, then in order that there may be a ratification it should be such an act that the third party would be injured if a ratification does not take place. Thus, silence of an alleged principal when advised of what has been done in his behalf by another without authority may be sufficient from which to infer a ratification of the unauthorized act, though the other party has not been misled or prejudiced

<sup>51</sup> *Jordan v. Humphrey*, 31 Minn. 495; *Anon.*, 40 N. J. Eq. 502, 509; *Muir v. Newark Sav. Inst.*, 16 N. J. Eq. 537; *Bell v. Day*, 32 N. Y. 165; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Esteres v. Purdy*, 66 N. Y. 446. But see *Joslin v. Miller*, 14 Neb. 91.

<sup>52</sup> *Doughaday v. Crowell*, 11 N. J. Eq. 201. And see post, § 136.

<sup>53</sup> *Brown v. Henry*, 172 Mass. 559.

by such silence.<sup>54</sup> In the absence of other circumstances, however, mere silence of itself, after knowledge, may be evidence of ratification but is not conclusive except where the facts are such that the law will presume that the agent or a third party will be prejudiced by the delay to speak or act, if the principal should thereafter be permitted to assert that he had not authorized or ratified the act.<sup>55</sup>

§ 111. **Motive of agent no element.**

It is unimportant as to questions of ratification what motive the agent may have had in exceeding his authority or acting without any authority. This doctrine has been well stated as follows: "We have examined many authorities, both elementary and judicial, in which the doctrine of ratification, as between principal and agent, is discussed, but we have not found one which considered the good faith of the agent as an element in deciding whether or not there had been a ratification; but, on the contrary, whenever the good faith of the agent has elicited remark, it has been to the effect that it could have no weight in the decision of this question. 'Indeed, in all such cases the question is not whether the party (agent) has acted from good motives and without fraud, but whether he has done his duty and acted according to the confidence reposed in him.'"<sup>56</sup>

§ 112. **Mutuality—Right of third party to withdraw.**

In the case of contracts entered into by ratification as with contracts otherwise made, it is essential that there should be a mutuality of agreement between the parties thereto; and unless both are bound when an unauthorized contract is ratified, neither is bound. Where a principal ratifies such a contract unless the other party's assent is given to such contract, either before or after the ratification, there is no binding contract.

<sup>54</sup>Lynch v. Smyth, 25 Colo. 103. Post, § 141.

<sup>55</sup>Smith v. Fletcher, 75 Minn. 189. Post, § 141(d).

<sup>56</sup>Bank of Owensboro v. Western Bank, 13 Bush (Ky.) 526, 26 Am. Rep. 211, citing Story, Agency, § 192; In re Tiedemann & Ledermann Freres, 68 Law J. Q. B. 852, [1899] 2 Q. B. 66, 81 Law T. (N. S.) 191, where agent acted with fraudulent intent.

There is some conflict among the authorities as to whether or not the third party may withdraw from a contract entered into with an unauthorized agent, before it has been ratified by the principal; or in other words whether there is before ratification such mutuality as will prevent the third party from withdrawing. Is the assent given to the contract by the unauthorized agent sufficient to hold the other party bound thereto? It has been held in England, and there is dicta in some of the cases in this country to the effect that where a person assumes to enter into a contract for another without authority, the other party cannot withdraw so as to prevent a subsequent ratification by the person for whom the pretended agent acts.<sup>57</sup> Thus it is held in a late English case that a principal may, in the absence of fraud on his part, ratify a contract made by his agent without his authority, notwithstanding that the other parties to it have before ratification repudiated it, and notwithstanding that the agent acted with fraudulent intent.<sup>58</sup> And in a New York case it is said that: "The principal upon being informed of an act of his agent in excess of his authority, has the right to elect whether he will adopt the unauthorized act or not, and so long as the condition of the parties is unchanged he cannot be prevented from such adoption, because the other party to the contract may for any reason prefer to treat the contract as invalid, and his election once

<sup>57</sup> *In re Portuguese Consol. Copper Mines*, 45 Ch. Div. 16; *Bolton Partners v. Lambert*, 41 Ch. Div. 295; *In re Tiedemann & Ledermann Freres*, 68 Law J. Q. B. 852, [1899] 2 Q. B. 66, 81 Law T. (N. S.) 191; *Andrews v. Aetna L. Ins. Co.*, 92 N. Y. 596. And see *Hall v. Norwalk F. Ins. Co.*, 57 Conn. 106.

As said by North, J, in *Re Portuguese Consol. Copper Mines*, 45 Ch. Div. 16: "It comes to this, that if an offer to purchase is made to a person who professes to be the agent for a principal, but who has no authority to accept it, the person making the offer will be in a worse position as regards withdrawing it than if it had been made to the principal; and the acceptance of the unauthorized agent in the meantime will bind the purchaser to his principal, but will not in any way bind the principal to the purchaser."

<sup>58</sup> *In re Tiedemann & Ledermann Freres*, 68 Law J. Q. B. 852, [1899] 2 Q. B. 66, 81 Law T. (N. S.) 191.



made is irrevocable.”<sup>59</sup> But, although this doctrine will not allow the third party to withdraw of his own accord, yet it is held that he may be released from such contract, before ratification, by a mutual agreement between himself and the unauthorized agent.<sup>60</sup>

The English rule, however, is thought to be contrary to settled principles of law, and to the weight of authority in this country. Until the principal ratifies the contract, there is no mutuality, or consideration for the other party's promise, and it follows that he may withdraw at any time before the principal becomes bound by a ratification.<sup>61</sup> If the contract is binding on the other party, in advance of such ratification, then he is obligated by a contract, which his adversary may treat as void or valid at his pleasure. At most, a contract so executed seems, on principle, to amount to no more than a proposal on the part of him who executed it, which he should have the right to recede from until it has been ratified or accepted, so as to become binding on the other party.<sup>62</sup>

It seems, however, that if a sufficient consideration has been given by the assumed agent, the third party cannot withdraw from the contract. Thus where a party contracting for the purchase of property takes a contract signed by an unauthorized agent on behalf of the vendor, which agent guarantees that the contract will be approved by the principal; this guaranty is held a sufficient consideration for

<sup>59</sup> *Andrews v. Aetna L. Ins. Co.*, 92 N. Y. 596, 604.

<sup>60</sup> *Walter v. James*, L. R. 6 Exch. 124.

<sup>61</sup> *Townsend v. Corning*, 23 Wend. (N. Y.) 435; *Atlee v. Bartholomew*, 69 Wis. 43, 5 Am. St. Rep. 103; *McClintock v. South Penn Oil Co.*, 146 Pa. 144, 28 Am. St. Rep. 785; *Dodge v. Hopkins*, 14 Wis. 630; *Mason v. Caldwell*, 10 Ill. 196, 48 Am. Dec. 330.

In *Dodge v. Hopkins*, 14 Wis. 630, it is said that: "In such cases it is well settled, both on principle and authority, that if either party neglects or refuses to bind himself, the instrument is void for want of mutuality, and the party who is not bound cannot avail himself of it as obligatory upon the other." But this seems to be carrying the doctrine to the other extreme from the English rule.

<sup>62</sup> *Atlee v. Bartholomew*, 69 Wis. 43, 5 Am. St. Rep. 103; *Townsend v. Corning*, 23 Wend. (N. Y.) 435.

the contract on the part of the purchaser, and he cannot deny the right of the vendor to ratify such contract.<sup>63</sup>

### III. WHAT ACTS ARE CAPABLE OF RATIFICATION.

#### § 113. In general.

In the preceding subdivision it has been seen that only such persons may ratify unauthorized acts done on their behalf as could have originally and are still capable of doing or authorizing such acts. It follows as corollary to this that as a general rule such acts may be ratified by a person in whose behalf they have been performed, as he himself could have done or authorized in the beginning and which he is still capable of doing or authorizing at the time of the ratification.<sup>64</sup> One can ratify only what he could originally have authorized. If the act is such that he could not have done it himself or could not have authorized another to do it for him, then it is not subject to his ratification, and although the act might have been subject to his ratification when originally done, yet if before he ratifies it, it becomes incapable of ratification, as by becoming illegal, or the principal incompetent or otherwise, then it may not be ratified.

If an act may be done by a principal in a particular manner only, he may ratify it when unauthorizedly done by another for him, in that manner. But if it is done by such other in any other manner than that in which he could have done it, then it cannot be ratified by him. The power to

<sup>63</sup> *Weiseger v. Wheeler*, 14 Wis. 101.

<sup>64</sup> *City of Findlay v. Pertz*, 66 Fed. 427; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *McCracken v. San Francisco*, 16 Cal. 591; *McDonald v. McCoy*, 121 Cal. 55; *Connett v. City of Chicago*, 114 Ill. 233; *Hickox v. Fels*, 86 Ill. App. 216; *O'Conner v. Arnold*, 53 Ind. 205; *Taymouth Tp. v. Koehler*, 35 Mich. 22; *Armitage v. Widoe*, 36 Mich. 124; *Jefferson County Sup'rs v. Arrighi*, 54 Miss. 668; *Clarke v. Lyon County*, 8 Nev. 188; *Farmers' Loan & Trust Co. v. Walworth*, 1 N. Y. (1 Comst.) 435; *Armstrong v. Garrow*, 6 Cow. (N. Y.) 465; *Brady v. City of N. Y.*, 16 How. Pr. (N. Y.) 432. A principal cannot ratify an unauthorized contract to sell by his agent, after he himself has disposed of the subject of agreement. *McDonald v. McCoy*, 121 Cal. 55.

ratify necessarily supposes a power to authorize or to make the contract or to do the act in the first instance and at the time of ratification; and where a principal has the power to do an act in a prescribed manner, unless it is done in that manner by one who acts for him without authority, it cannot be ratified by the principal. Thus, where the charter of a city authorizes a sale of city property only at public auction, a sale not thus made is incapable of ratification, because it could not have been otherwise made originally.<sup>65</sup> So a writing by an alleged agent insufficient to pass an interest in lands, or as a memorandum of a contract of sale thereof, as where it does not purport to be made by an agent of the principal, and does not recite any consideration, cannot be ratified as such conveyance or memorandum by acts of the party sought to be charged.<sup>66</sup>

#### § 114. Exception to general rule.

There is an exception to this general rule, however, in the case of the unauthorized giving of notice of an existing intent. As the person notified has a right to know the facts upon which such notice is based, and the intent with which it is given, and as such notice is not given with authority, the third party would be running a risk by acting upon it without such knowledge. Likewise it would be unjust to allow a subsequent ratification to relate back and validate such notice, and thus make the party notified responsible for that which he could not originally have acted upon. Hence the rule is that the principal cannot ratify an unauthorized notice of an existing intent given by an agent so as to make the other party liable thereon.<sup>67</sup> Thus, where

<sup>65</sup> *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *McCracken v. San Francisco*, 16 Cal. 619; *Cook v. Tullis*, 18 Wall. (U. S.) 332.

<sup>66</sup> *Woodcock v. Merrimon*, 122 N. C. 731.

<sup>67</sup> *Right v. Cuthell*, 5 East, 491; *Doe d. Lyster v. Goldwin*, 2 Q. B. 143; *Stewart v. Kennett*, 2 Camp. 177; *Doe d. Mann v. Walters*, 10 Barn. & C. 626; *Brahn v. Jersey City Forge Co.*, 38 N. J. Law, 74; *Pickard v. Perley*, 45 N. H. 188, 86 Am. Dec. 153; *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173. But see, *Goodtitle v. Woodward*, 3 Barn. & Ald. 689; *Roe d. Dean v. Pierce*, 2 Camp. 96.

a notice to quit is given by two out of three joint owners, it will not avail as against the tenant, by a subsequent ratification. "For the notice to be good it ought to be binding on all the parties concerned at the time when it was given, and not to depend for its validity, in part, upon any subsequent recognition of one of them; because the tenant is to act upon the notice at the time, and therefore it should be such as he may act upon with security. But if it be to depend upon a subsequent ratification of one of the joint tenants, landlords, whether or not it is to be binding upon him, the condition and situation of the tenant must remain doubtful till the time of such ratification. \* \* \* The rule of law, that *omnis ratihabitio retrotrahitur*, etc., seems only applicable to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the meantime depend on whether there be a subsequent ratification."<sup>68</sup>

#### § 115. Void and voidable acts.

As an act which is absolutely void, and not merely voidable, could not have been authorized by the principal, so it cannot be ratified by him when done in his behalf by another.<sup>69</sup> Thus, where a contract is void on the ground of public policy, or against a statute, it is incapable of ratification, for there is every reason to hold the ratification affected with the original taint.<sup>70</sup> So where the acts or contracts are illegal in their nature, they could not have been law-

<sup>68</sup> *Right v. Cuthell*, 5 East, 491, Wamb. Cas. 1034. And see *Doe d. Lyster v. Goldwin*, 2 Q. B. 143; *Doe d. Mann v. Walters*, 10 Barn. & C. 626.

<sup>69</sup> *Chapman v. Lee's Adm'r*, 47 Ala. 153; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Decuir v. Lejeune*, 15 La. Ann. 569; *Day v. McAllister*, 81 Mass. 433; *Newsom v. Hart*, 14 Mich. 237; *Armitage v. Widoe*, 36 Mich. 124; *Jefferson County Sup'rs v. Arrighi*, 54 Miss. 668; *Macfarland v. Heim*, 127 Mo. 327, 48 Am. St. Rep. 629; *Spence v. Wilmington Cotton Mills*, 115 N. C. 210; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546; *Milford Borough v. Milford Water Co.*, 124 Pa. 610.

<sup>70</sup> *Shelton v. Marshall*, 16 Tex. 344; *Negley v. Lindsay*, 67 Pa. 217, 5 Am. Rep. 427.

fully authorized, nor can they be ratified.<sup>71</sup> If a principal does ratify or seek to take the benefit of a transaction tainted with illegality, he takes it with all its incidents of illegality, and notice of that fact.<sup>72</sup>

If, however, the act or contract was one merely voidable in its nature, it may be subsequently ratified by the principal, although unauthorized.<sup>73</sup> In fact all acts or contracts which a principal may ratify are voidable, for as they are unauthorized, he has his election to either repudiate or avoid them, or to ratify them.

### § 116. Torts.

A principal may also ratify torts that have been committed in his behalf by another without his authority. If the principal, with a full knowledge of all the facts, ratifies unauthorized acts that have been done in his behalf, he is bound thereby, and it is immaterial whether they be for his detriment or advantage, or whether they be founded on a tort or on a contract; and where he thus ratifies wrongful acts or torts he will be responsible therefor.<sup>74</sup> But in order that such ratification may be effectual, it must be made with a full knowledge of all the facts and must be explicit.<sup>75</sup> So it is essential that the tort should have been committed on behalf of the principal.<sup>76</sup> But though as a rule a prin-

<sup>71</sup> *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546; *Newson v. Hart*, 14 Mich. 237; *Turner v. Phoenix Ins. Co.*, 55 Mich. 237; *Milford Borough v. Milford Water Co.*, 124 Pa. 610; *Henry Christian Bldg. & Loan Ass'n v. Walton*, 181 Pa. 201, 59 Am. St. Rep. 636.

<sup>72</sup> *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 187.

<sup>73</sup> *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. Rep. 613; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546; *Williams v. Boyd*, 75 Ind. 286; *Chapman v. Lee's Adm'r*, 47 Ala. 143.

<sup>74</sup> *Wilson v. Tumman*, 6 Man. & G. 236; *Hull v. Pickersgill*, 1 Brod. & B. 282; *Avakian v. Noble*, 121 Cal. 216; *Morehouse v. Northrop*, 33 Conn. 380, 89 Am. Dec. 211; *Lee v. West*, 47 Ga. 311; *Tucker v. Jerris*, 75 Me. 184; *Dempsey v. Chambers*, 154 Mass. 330, 26 Am. St. Rep. 249; *Exum v. Brister*, 35 Miss. 391; *National Life Ins. Co. v. Minch*, 53 N. Y. 144; *Forbes v. Hagman*, 75 Va. 178.

<sup>75</sup> *Tucker v. Jerris*, 75 Me. 184; *Adams v. Freeman*, 9 Johns. (N. Y.) 117; *West v. Shockley*, 4 Har. (Del.) 287. Ante, § 106.

<sup>76</sup> *Wilson v. Barker*, 4 Barn. & Adol. 614; *Smith v. Lozo*, 42 Mich. 6. Ante, § 102.

a notice to quit is given by two out of three joint owners, it will not avail as against the tenant, by a subsequent ratification. "For the notice to be good it ought to be binding on all the parties concerned at the time when it was given, and not to depend for its validity, in part, upon any subsequent recognition of one of them; because the tenant is to act upon the notice at the time, and therefore it should be such as he may act upon with security. But if it be to depend upon a subsequent ratification of one of the joint tenants, landlords, whether or not it is to be binding upon him, the condition and situation of the tenant must remain doubtful till the time of such ratification. \* \* \* The rule of law, that *omnis ratihabitio retrotrahitur*, etc., seems only applicable to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the meantime depend on whether there be a subsequent ratification."<sup>68</sup>

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<sup>68</sup> *Right v. Cuthell*, 5 East, 491, Wamb. Cas. 1034. And see *Doe d. Lyster v. Goldwin*, 2 Q. B. 143; *Doe d. Mann v. Walters*, 10 Barn. & C. 626.

<sup>69</sup> *Chapman v. Lee's Adm'r*, 47 Ala. 153; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Decuir v. Lejeune*, 15 La. Ann. 569; *Day v. McAllister*, 81 Mass. 433; *Newsom v. Hart*, 14 Mich. 237; *Armitage v. Widoe*, 36 Mich. 124; *Jefferson County Sup'rs v. Arrighi*, 54 Miss. 668; *Macfarland v. Heim*, 127 Mo. 327, 48 Am. St. Rep. 629; *Spence v. Wilmington Cotton Mills*, 115 N. C. 210; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546; *Milford Borough v. Milford Water Co.*, 124 Pa. 610.

<sup>70</sup> *Shelton v. Marshall*, 16 Tex. 344; *Negley v. Lindsay*, 67 Pa. 217, 5 Am. Rep. 427.

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<sup>72</sup> *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 187.

<sup>73</sup> *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. Rep. 613; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546; *Williams v. Boyd*, 75 Ind. 286; *Chapman v. Lee's Adm'r*, 47 Ala. 143.

<sup>74</sup> *Wilson v. Tumman*, 6 Man. & G. 236; *Hull v. Pickersgill*, 1 Brod. & B. 282; *Avakian v. Noble*, 121 Cal. 216; *Morehouse v. Northrop*, 33 Conn. 380, 89 Am. Dec. 211; *Lee v. West*, 47 Ga. 311; *Tucker v. Jerris*, 75 Me. 184; *Dempsey v. Chambers*, 154 Mass. 330, 26 Am. St. Rep. 249; *Exum v. Brister*, 35 Miss. 391; *National Life Ins. Co. v. Minch*, 53 N. Y. 144; *Forbes v. Hagman*, 75 Va. 178.

<sup>75</sup> *Tucker v. Jerris*, 75 Me. 184; *Adams v. Freeman*, 9 Johns. (N. Y.) 117; *West v. Shockley*, 4 Har. (Del.) 287. Ante, § 106.

<sup>76</sup> *Wilson v. Barker*, 4 Barn. & Adol. 614; *Smith v. Lozo*, 42 Mich. 6. Ante, § 102.

principal must, in ratifying a tort, have a full knowledge of all the facts, or must voluntarily take the consequences upon himself without inquiry, yet where the agent has merely acted in excess of his authority in committing a tort, mere approval of such tort will generally be sufficient.<sup>77</sup>

**§ 117. Contracts or acts tainted with fraud.**

There is a distinction between the power to ratify contracts or acts tainted with such fraud as affects merely the individual rights of the parties thereto, and power to ratify contracts or acts tainted with such fraud as involves a crime or public wrong. If the transaction is merely contrary to good faith, and the fraud affect individual interests only, ratification may be made, for if the party in whose behalf the acts have been done ratifies them, with full knowledge, he cannot be relieved thereafter.<sup>78</sup> Thus, though a contract be voidable by reason of fraud practiced on one party, or if for any other reason it might be avoided, if the party having a right to avoid the contract, being fully informed, deliberately confirms or ratifies it, even though this be done without a new consideration, and after acts have been done which would have released the person affected, he is thereby precluded from obtaining the relief he otherwise might have had.<sup>79</sup> But where the fraud is of such a character as to involve a crime, the adjustment of which is forbidden by public policy, ratification of the act from which it springs is not permitted.<sup>80</sup> As has been said: "It is certainly true that contracts which are forbidden by statute, or are inconsistent with

<sup>77</sup> *Brown v. City of Webster City* [Iowa] 88 N. W. 1070.

<sup>78</sup> *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. Rep. 613; *Williams v. Boyd*, 75 Ind. 286; *Matteawan Co. v. Bentley*, 13 Barb. (N. Y.) 641; *Wheaton v. Baker*, 14 Barb. (N. Y.) 594; *Pearsoll v. Chapin*, 44 Pa. 9; *Henry Christian Bldg. & Loan Ass'n v. Walton*, 181 Pa. 201, 59 Am. St. Rep. 636.

<sup>79</sup> *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. Rep. 613; *Williams v. Boyd*, 75 Ind. 286.

<sup>80</sup> *Henry Christian Bldg. & Loan Ass'n v. Walton*, 181 Pa. 201, 59 Am. St. Rep. 636; *Lyon v. Phillips*, 106 Pa. 57; *Shisler v. Vandike*, 92 Pa. 447, 37 Am. Rep. 702; *Pearsoll v. Chapin*, 44 Pa. 9; *Negley v. Lindsay*, 67 Pa. 217, 5 Am. Rep. 427; *Scott v. New Brunswick Bank*, 23 Can. Sup. Ct. 277.



public policy, are absolutely void, and the ratification of such a contract in any form, carries with it the taint of the original. So, where fraud is of such a character as to involve a public wrong or crime, the adjustment of which public policy forbids, the ratification of the act in which the fraud originates is also opposed to public policy, and cannot be permitted; the confirmation is held to be a fraud in law as the original was a fraud in fact, but where the transaction is contrary only to good faith and fair dealing, where it affects individual interests and nothing else, ratification is allowable."<sup>81</sup>

**§ 118. Criminal acts—Forgery.**

The compounding of criminal acts is expressly prohibited by criminal law, and any adoption or ratification of such acts with the intention of protecting or shielding the criminal is illegal and of non effect. In the relation of principal and agent this doctrine is especially called into action, where the agent has unauthorizedly forged the name of his principal, and the latter attempts to ratify the same. In all criminal acts of this nature, it must be observed, there are two separate offenses. One is against the principal himself, for which he may maintain a civil action against the agent to recover any damages suffered by reason of the forgery. The other offense is against the State, and constitutes a crime, for which the agent is amenable to the State only. As to the former offense the agent may be relieved from liability therefor, under certain circumstances, by the principal's ratification of his acts; but as the latter offense is against the State alone, and punishable by it, as a general rule no ratification of the principal will relieve him therefrom. There are statutes in some of the States, which prescribe terms upon which certain minor offenses may be adjusted by the party aggrieved; but in the absence of such statutes any attempt to compound a crime is contrary to public policy, and prohibited by the statutes. It has been said that, "it is hardly accurate to speak of ratifying a forged instrument. It may be adopted, but adoption does not relate back

<sup>81</sup> By the court in *Lyon v. Phillips*, 106 Pa. 57, 66.

and validate prior acts."<sup>82</sup> But this depends upon which view of the question is taken, whether there may or may not be a ratification of a forged instrument.

There is much apparent conflict among the authorities as to the right of a principal to ratify an unauthorized forgery made in his behalf. Of course a forgery cannot be ratified if it is done for the purpose of suppressing the crime against the state and shielding the criminal, as such a ratification would be illegal and void. The ratification which the law interdicts relates only to such acts as clearly appear to have been done in violation of a criminal statute, the motive of the ratifying party being presumably the concealment of the crime or the suppression of its prosecution.<sup>83</sup> Although the principal may make himself civilly liable upon the forged instrument by a ratification, yet any promise of his that seeks to protect the agent from his criminal liability will be held void. Thus a promise to pay a forged instrument on the consideration that the holder will forbear prosecution is not a ratification, as it is a promise based on an illegal consideration—to compound a crime—and hence is void.<sup>84</sup>

Aside from the public offense, however, and in reference to the offense against the party whose name has been forged, the authorities seemingly conflict as to whether or not there can be a ratification of such unauthorized writing. But it is thought that this conflict is more apparent than real. One class of cases holds that as a forgery is a criminal act and opposed to public policy, there can be no ratification thereof by the person whose name has been forged, in the absence of an estoppel in pais, or without a new consideration for the promise.<sup>85</sup> Thus, where the party whose name

<sup>82</sup> *Garrett v. Gonter*, 42 Pa. 148.

<sup>83</sup> *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. Rep. 613.

<sup>84</sup> *Brook v. Hook*, L. R. 6 Exch. 89, 24 Law T. (N. S.) 34; *McKenzie v. British Linen Co.*, 6 App. Cas. 82; *Williams v. Bayley*, L. R. 1 H. L. 200.

<sup>85</sup> *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. Rep. 613; *Brook v. Hook*, 24 Law T. (N. S.) 34; *Owsley v. Phillips*, 78 Ky. 517; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546; *Shisler v. Vandike*, 92 Pa. 447, 37 Am. Rep. 702; *McHugh v. County of Schuylkill*,

had been forged to a note merely assured the holder that the note would be paid, it did not amount to a ratifica-

67 Pa. 391, 5 Am. Rep. 445; *Negley v. Lindsay*, 67 Pa. 217, 5 Am. Rep. 427; *Henry Christian Bldg. & Loan Ass'n v. Walton*, 181 Pa. 201, 59 Am. St. Rep. 636.

In *Brook v. Hook*, 24 Law T. (N. S.) 34, the plaintiff had received a note from J. on the day of its date, and afterwards and before its maturity he had an interview with the defendant, and showed him the note. The defendant denied that the signature was his, and said it must be a forgery of J.'s; whereupon the plaintiff said rather than that he would pay the money, and he then signed the following paper: "Memorandum,—That I hold myself responsible for a bill, dated Nov. 7, 1869, for 20l, bearing my signature and J.'s, in favor of Mr. Brook—Richard Hook." It was contended that this paper amounted to a ratification of the forged note, and the jury in the lower court so decided; but upon appeal it was held otherwise and Kelly, Ch. B., delivering the opinion of the court, said: "I am of opinion that this verdict cannot be sustained. \* \* \* And this, first, upon the ground that this was no ratification at all, but an agreement upon the part of the defendant to treat the note as his own, and to become liable upon it, in consideration that the plaintiff would forbear to prosecute his son-in-law, Jones; and that this agreement is against public policy, and void, as founded upon an illegal consideration. And secondly, the paper in question is no ratification, inasmuch as the act done—that is, the signature to the note—is illegal and void; and that although a voidable act may be ratified by matter subsequent, it is otherwise when an act is originally and in its inception void. Many cases were cited to show that where one sued upon a bill or note has declared or admitted that the signature is his own, and has thereby altered the condition of the holder to whom the declaration or admission has been made, he is estopped from denying his signature upon an issue joined in an action upon the instrument. But here there was no such declaration and no such admission. On the contrary, the defendant distinctly declared and protested that his alleged signature was a forgery; and although in the paper signed by the defendant, he describes the bill as bearing his own signature and Jones's, I am of opinion that the true effect of the paper, taken together with the previous conversation, is that the defendant declares to the plaintiff: 'If you will forbear to prosecute Jones for the forgery of my signature, I admit, and will be bound by the admission that the signature is mine.' This, therefore, was not a statement to the plaintiff that the signature was his, and which, being believed by the plaintiff, induced him to take the note, or in any way alter his condition; but on the contrary, it

tion.<sup>86</sup> In a late Missouri case, it was held that there can be no ratification of a forgery in the execution of a note, since there is no agency and an instruction submitting the question of ratification is erroneous.<sup>87</sup> And in a late Indiana case, Mitchell, C. J., says: "The ratification of a forged instrument, or of a contract which is prohibited by law, or made in violation of a criminal statute, involves different principles from the ratification of an act or contract tainted with such fraud as involves individual rights only. One who commits the crime of forgery by signing the name of another to an obligation does not assume to act as the agent of the person whose name is forged. Upon principle, there would seem to be no room to apply the doctrine of ratification in such a case. Where the act done constitutes a crime, and is committed without any pretence of authority, it is difficult to understand how one who is in a sense the victim of the criminal act may adopt or ratify it, so as to become bound by a contract to which he is to all intents and purposes a stranger, and which as to him was conceived in a crime and is totally without consideration."<sup>88</sup> Cases of this class base their decisions upon the ground that as the forgery thus committed is absolutely void, a ratification thereof is a mere nudum pactum, unless there is an estoppel or a new consideration. But if these decisions are carefully examined it will be seen, in most of the cases, that the court constantly had in mind the offense against the State, and looked upon the ratification as an attempt to suppress the crime. Thus the court in one of the principal cases upholding the above rule, says: "It is impossible in such a case to attribute any motive to the ratifying party but that of concealing the crime and suppressing the prosecution; 'for why should a man pay money without consideration

amounted to the corrupt and illegal contract before mentioned, and worked no estoppel precluding the defendant from showing the truth." And see dissenting opinion of Martin, B.

<sup>86</sup> *Smith v. Tramel*, 68 Iowa, 488.

<sup>87</sup> *Kelchner v. Morris*, 75 Mo. App. 588.

<sup>88</sup> *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. Rep. 616.

when he himself had been wronged, unless constrained by a desire to shield the guilty party.' ”<sup>89</sup>

Where, however, the act ratified is of an ambiguous character, and may as well be attributed to a mistaken assumption of authority as to a purpose to commit a crime, public policy does not forbid the ratification of the act; nor can it be said to be without consideration, especially where indemnity has been accepted.<sup>90</sup>

— **Another doctrine.** Laying aside, however, the offense against the public and considering only the unauthorized writing of the signature, in reference to the party whose name is thus signed, the weight of authority holds to the rule that the one whose name is thus forged may ratify the act and be bound thereby. In such a view of the case it is difficult to perceive how any distinction can be made between such a writing and any other unauthorized writing. If the party whose signature has thus been forged with knowledge of all the circumstances, and intending to be bound by it, acknowledges the signature, and thus assumes the forgery as his own, he is bound thereby to the same extent as if the signature had been made by him originally, without regard to whether or not his acknowledgment amounts to an estoppel in pais, provided the ratification is not made conditional on the immunity of the criminal, and no new consideration is necessary.<sup>91</sup> Thus, where a party accepts

<sup>89</sup> By Mitchell, C. J., in *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. Rep. 616.

<sup>90</sup> *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. Rep. 613.

<sup>91</sup> *Hefner v. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106; *Living v. Wiler*, 32 Ill. 387; *Hefner v. Dawson*, 63 Ill. 403; *Harper v. Devene*, 10 La. Ann. 724; *Casco Bank v. Keene*, 53 Me. 103; *Wellington v. Jackson*, 121 Mass. 157; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Cravens v. Gillilan*, 63 Mo. 28; *Dow's Ex'r v. Spenny's Ex'r*, 29 Mo. 386; *First Nat. Bank of Trenton v. Gay*, 63 Mo. 33, 21 Am. Rep. 430; *Howard v. Duncan*, 3 Lans. (N. Y.) 174; *Commercial Bank v. Warren*, 15 N. Y. 577; *Fitzpatrick v. School Com'rs*, 7 Humph. (Tenn.) 224, 46 Am. Dec. 76. See *Chicago Edison Co. v. Fay*, 164 Ill. 323. In *Greenfield Bank v. Crafts* (4 Allen [Mass.] 447) Dewey, J., said: "The only question upon this part of the case is, whether a signature made by an unauthorized person under such circumstances as

a conveyance of property to a trustee as indemnity against promissory notes upon which his name has been forged, he thereby ratifies the debt,<sup>92</sup> and neither re-execution nor re-delivery is necessary.<sup>93</sup> And it has been held that a mortgage executed under a forged power of attorney may be ratified although the forged power could not, as this would be a ratification, not of the forgery, but of an act performed under a real or assumed authority.<sup>94</sup> These cases holding a forgery capable of ratification take the ground that, so far as considerations of public policy are concerned, the ratification of forgery should stand on the same footing as that of other contracts, and should be held valid, unless made in consideration of compounding a felony or for some other illegal consideration; that as to the want of authority, it can make

show that the party placing the name on the note was thereby committing the crime of forgery, can be adopted and ratified by any acts and admissions of the party whose name appears on the note, however full, and intentionally made and designed to signify an adoption of the signature. The defendants insist that it cannot, by such evidence as would in other cases warrant the jury in finding an adoption; and that nothing short of an estoppel, having the element of actual damage from delay or postponement, occasioned by the acts of the person whose name is borne upon the note, misleading the holder of it, will have this effect. As to the person himself whose name is so signed, it is difficult to perceive any sound reason for the proposed distinction as to the effects of ratifying an unauthorized act in the two supposed cases. \* \* \* It is, as it seems to us, equally competent for the party, he knowing all the circumstances as to the signature and intending to adopt the note, to ratify the same and thus confirm what was originally an unauthorized and illegal act. \* \* \* It is, however, urged that public policy forbids sanctioning a ratification of a forged note, as it may have a tendency to stifle a prosecution for the criminal offense. It would seem, however, that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted the guilty party was not to be prosecuted for the criminal offense."

<sup>92</sup> *Fitzpatrick v. School Com'rs*, 7 Humph. (Tenn.) 224, 46 Am. Dec. 76; *Jones v. Hamlet*, 2 Sneed (Tenn.) 256.

<sup>93</sup> *Fitzpatrick v. School Com'rs*, 7 Humph. (Tenn.) 224, 46 Am. Dec. 76.

<sup>94</sup> *Garrett v. Gonter*, 42 Pa. 143.

no difference whether the unauthorized act was or was not a forgery; that this want of authority is the very thing which the ratification cures, and to which applies the maxim "*Omnis ratihabitio retrotrahitur et mandato priori aequiparatur*"; that the ratification is "dragged back and made equivalent to a prior command"; and that a ratification is not a contract but an election to accept one previously made in the name of the ratifying party, and requires no consideration.

— **Estoppel.** The principal may, however, be held liable on a forgery on the ground of estoppel. If the principal, with a full knowledge of the circumstances, has by his admissions, promises, or other conduct, induced the holder of a note or other obligation to change his position, or if such principal has, with such knowledge, received or participated in the consideration for which the obligation had been given, he will be estopped to deny the genuineness of his signature.<sup>95</sup> Thus, silence of an alleged signer of a note, where it was shown to him and payment demanded, is competent evidence tending to show the genuineness of his signature, or if not genuine, of his assent to be bound by it. But such silence does not necessarily operate as an estoppel on him to deny or disprove his signature, unless the holder has thereby been led to change his position, or otherwise act to his injury.<sup>96</sup> So where a principal ratifies one forgery made by his agent, he will be liable on a subsequent similar forgery, as by his previous ratification he has led the other party to believe that the agent had the authority he assumed, and being thus misled to his injury the principal was estopped

<sup>95</sup> *McKenzie v. British Linen Co.*, 6 App. Cas. 82; *Union Bank v. Middlebrook*, 33 Conn. 95; *Hefner v. Dawson*, 63 Ill. 403; *Livings v. Wiler*, 32 Ill. 387; *Smith v. Tramel*, 68 Iowa, 488; *Rudd v. Matthews*, 79 Ky. 479, 42 Am. Rep. 231; *Forsyth v. Day*, 46 Me. 176; *Casco Bank v. Keene*, 53 Me. 103; *Woodruff v. Munroe*, 33 Md. 146; *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753; *Dodge v. National Exch. Bank*, 20 Ohio St. 234, 5 Am. Rep. 648; *Crout v. De Wolf*, 1 R. I. 393.

<sup>96</sup> *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753. And see *Weed v. Carpenter*, 4 Wend. (N. Y.) 219; *Reg. v. Smith*, 3 Fost. & F. 504; *Reg. v. Beardsall*, 1 Fost. & F. 529.

from denying the assumed authority.<sup>97</sup> So where the defendant, whose name had been forged as surety on a note, on being shown the note by the owner admitted that the signature was genuine, and promised to pay it, supposing he had signed it, and the owner was thus induced to forbear suit until the maker became insolvent, it was held that the defendant was estopped from setting up that his signature was forged.<sup>98</sup> And "if, in an action against an indorser of a promissory note by the bona fide holders thereof, it be shown that the indorsement was not genuine, and the defendant did not ratify or sanction it prior to the maturity of the note and its transfer to plaintiff, he is not liable. But if he adopted the note prior to its maturity, and by such adoption assisted in its negotiation, he would be estopped from setting up the forgery in a suit by a bona fide holder. But any admissions by the defendant, made subsequent to the maturity of the note, would not be evidence that he had authorized the indorsement of his name thereon."<sup>99</sup>

#### IV. WHO CAPABLE OF RATIFYING.

##### § 119. In general.

It may be stated as a general rule that any person who is capable of doing or entering into any particular act or contract in the first place, and still remains so capable, may ratify such act or contract, where it has been unauthorizedly done or entered into by another on his behalf. Thus, if an agent, in excess of his authority or without any authority at all, enters into a transaction in the name of one who could have himself entered into such transaction and may yet do so, the latter may ratify such transaction and it will have the same effect and be as binding on him as if he had originally authorized it.<sup>100</sup> But a person cannot ratify an

<sup>97</sup> *De Feriet v. Bank of America*, 23 La. Ann. 310, 8 Am. Rep. 597.

<sup>98</sup> *Rudd v. Matthews*, 79 Ky. 479, 42 Am. Rep. 231.

<sup>99</sup> *Woodruff v. Munroe*, 33 Md. 147; *Williams v. Bayley*, L. R. 1 H. L. 200.

<sup>100</sup> *Watkins v. Durand*, 1 Port. (Ala.) 251; *McCracken v. San Francisco*, 16 Cal. 591; *Williams v. Butler*, 35 Ill. 544; *Indianapolis & St. L. R. Co. v. Morris*, 67 Ill. 295; *Sentell v. Kennedy*, 29 La.



act or contract which has been done or entered into on his behalf without authority, if he was incompetent to do or enter into, or authorize, such act or contract at the time it was done or entered into on his behalf, or if he has since become and remains incompetent.<sup>101</sup> A principal cannot ratify an unauthorized agreement to sell, made by his agent, if he himself has disposed of the subject of such agreement.<sup>102</sup>

### § 120. Ratification by private corporations.

A corporation, as well as an individual, may ratify unauthorized acts or contracts which have been entered into on its behalf. If officers or other agents assume to act for a corporation without any authority at all, or in excess of their authority, and the acts or contracts are such as the corporation could originally have entered into itself or could have authorized, it may ratify such acts or contracts the same as an individual, subject to express statutory or charter provisions. And it is not necessary that such ratification should be express, but as in the case of individuals, as we shall see hereafter, may be implied from the conduct of such corporation.<sup>103</sup> But, like other principals, a corpora-

Ann. 679; *Taymouth Tp. v. Koehler*, 35 Mich. 22; *Armitage v. Widoes*, 36 Mich. 124; *Bullard v. De Groff*, 59 Neb. 783; *Pollock v. Cohen*, 32 Ohio St. 514.

<sup>101</sup> *Marsh v. Fulton County*, 10 Wall. (U. S.) 676; *McCracken v. San Francisco*, 16 Cal. 591; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Grogan v. San Francisco*, 18 Cal. 590; *Williams v. Butler*, 35 Ill. 544; *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *Sentell v. Kennedy*, 29 La. Ann. 679; *Taymouth Tp. v. Koehler*, 35 Mich. 22; *Armitage v. Widoes*, 36 Mich. 124; *Pollock v. Cohen*, 32 Ohio St. 514.

<sup>102</sup> *McDonald v. McCoy*, 121 Cal. 55.

<sup>103</sup> *Fleckner v. United States Bank*, 8 Wheat. (U. S.) 338, 363; *Law v. Cross*, 1 Black (U. S.) 533; *Everett v. United States*, 6 Port. (Ala.) 166, 30 Am. Dec. 584; *Blen v. Bear River & A. W. & Min. Co.*, 20 Cal. 602, 81 Am. Dec. 132; *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623; *Church v. Sterling*, 16 Conn. 388; *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665; *Wheeler v. Home Sav. & State Bank*, 188 Ill. 34, 80 Am. St. Rep. 161; *Beach v. Miller*, 130 Ill. 162, 17 Am. St. Rep. 291; *Cairo v. St. L. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Frankfort & S. T. Co. v. Churchill*, 6 T. B. Mon. (Ky.) 427, 17 Am. Dec. 159; *Nims v. Mount Hermon Boys'*

tion cannot ratify acts or contracts which it could not have entered into itself; and if an officer or other agent enters into, on behalf of the corporation, acts or contracts which are beyond the powers of the corporation, it cannot ratify such acts or contracts, so as to make them effective.<sup>104</sup> Thus, where a contract is not made in the mode prescribed by charter or statute, it cannot be ratified and made obligatory in disregard of that mode by any subsequent action of the corporation.<sup>105</sup> So the unauthorized acts of the directors

School, 160 Mass. 177, 39 Am. St. Rep. 467; *Inhabitants of Arlington v. Peirce*, 122 Mass. 270; *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315; *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 9 Am. Dec. 111; *Burrill v. Nahant Bank*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; *Scopp v. First Free Methodist Church*, 50 Mich. 528; *City of Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Planters' Bank v. Sharp*, 4 Smedes & M. (Miss.) 75, 43 Am. Dec. 470; *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 28 Am. St. Rep. 405; *Clarke v. Lyon County*, 8 Nev. 181; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Kinsley v. Norris*, 60 N. H. 131; *Leggett v. New Jersey Mfg. & Banking Co.*, 1 Saxt. Ch. (N. J.) 541, 23 Am. Dec. 728; *Scott v. Middletown, U. & W. G. R. Co.*, 86 N. Y. 200; *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 84 Am. Dec. 298; *Peterson v. City of New York*, 17 N. Y. 449; *Moss v. Rossie Lead Min. Co.*, 5 Hill (N. Y.) 137; *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454; *Kelsey v. Crawford County Nat. Bank*, 69 Pa. 426; *Gordon v. Preston*, 1 Watts (Pa.) 385, 26 Am. Dec. 75; *Whitwell v. Warner*, 20 Vt. 425; *Kickland v. Menasha Wooden Ware Co.*, 68 Wis. 34, 60 Am. Rep. 831. See *Clark & M. Private Corp.* § 714 et seq.

<sup>104</sup> *Ashbury R. Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676; *Grogan v. San Francisco*, 18 Cal. 590; *San Diego Water Co. v. San Diego*, 59 Cal. 517; *Zottman v. San Francisco*, 20 Cal. 102, 81 Am. Dec. 96; *McCracken v. San Francisco*, 16 Cal. 591; *Wheeler v. Home Sav. & State Bank*, 188 Ill. 34, 80 Am. St. Rep. 161; *Tippecanoe County v. Lafayette, M. & B. R. Co.*, 50 Ind. 86; *Bangor Boom Corp. v. Whiting*, 29 Me. 123; *Highway Com'rs v. Van Dusan*, 40 Mich. 429; *Taymouth Tp. v. Koehler*, 35 Mich. 22; *Jefferson County Sup'rs v. Arrighi*, 54 Miss. 668; *Green v. City of Cape May*, 41 N. J. Law, 45; *Smith v. City of Newburgh*, 77 N. Y. 130; *Horton v. Town of Thompson*, 71 N. Y. 513. See *Clark & M. Private Corp.* § 714 et seq.

<sup>105</sup> *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Jefferson County Sup'rs v. Arrighi*, 54 Miss. 668; *Brady v. City of New York*, 20 N. Y. 312; *People v. Flag*, 17 N. Y. 589; *Spence v.*

of a corporation can be ratified only by bona fide stockholders of such corporation,<sup>106</sup> and if ratified in any other manner it will not be binding on the corporation. But the same men sitting merely as temporary stockholders of a corporation to approve what they have just done as directors thereof are not bona fide stockholders for the purpose of ratifying an unauthorized act of the directors.<sup>107</sup> The acceptance and appropriation of work done for the use and benefit of the corporation under an unauthorized contract may amount to a ratification, where it is accepted with full knowledge of all the facts.<sup>108</sup>

Contracts made by promoters of a corporation in anticipation of its organization may be adopted by it after its incorporation, and such adoption may be inferred from acts or acquiescence on its part, or that of its authorized agents, as well as from the formal acts of its board of directors.<sup>109</sup> But where the promoters of a corporation act with fraud towards the stockholders, knowledge of such fraud by the directors is not knowledge by the stockholders, and the directors cannot ratify such fraud.<sup>110</sup> If a corporation adopts a contract made by its promoters, such adoption cannot relate back to the making of the contract by the promoter; for the corporation having at that time no existence, and no power to contract, no act on its part can ratify such a contract as of a date anterior to the creation of the corporation.<sup>111</sup>

### § 121. Ratification by municipal corporations.

A municipal corporation may, through its officers and agents, ratify, the same as an individual, acts or contracts

Wilmington Cotton Mills, 115 N. C. 210; *Hague v. City of Philadelphia*, 48 Pa. 528; *Pratt v. Town of Swanton*, 15 Vt. 147.

<sup>106</sup> *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203.

<sup>107</sup> *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *Appeal of Crum*, 66 Pa. 474.

<sup>108</sup> *Taymouth Tp. v. Koehler*, 35 Mich. 22.

<sup>109</sup> *McArthur v. Times Print. Co.*, 48 Minn. 319, 31 Am. St. Rep. 653. *Clark & M. Private Corp.*, §§ 714, 715, and § 101(c).

<sup>110</sup> *Burbank v. Dennis*, 101 Cal. 90.

<sup>111</sup> *McArthur v. Times Print. Co.*, 48 Minn. 319, 31 Am. St. Rep. 653.

which have been unauthorizedly entered into on its behalf, if it could have originally authorized such acts or contracts.<sup>112</sup> The legislature of a state may ratify acts entered into by its agent without authority, where it could originally have authorized the acts.<sup>113</sup> But mere silence or acquiescence on the part of a municipal corporation will not amount to a ratification; there must be some affirmative action in that respect or action from which ratification can be inferred.<sup>114</sup>

A municipal corporation cannot, however, through its officers or agents, ratify an act which it is unlawful for it to do;<sup>115</sup> nor a contract which it has no power to make.<sup>116</sup> An unauthorized and void conveyance of real property of a municipal corporation cannot be made valid by a parol ratification or by acquiescence.<sup>117</sup>

The officers of a municipal corporation must act strictly according to the statutes in making contracts for the corporation. If they do not so act the corporation will not be bound by such contract, nor can the officers ratify it so as to bind the corporation. Where persons deal with the officers of a municipal corporation they have notice of the statute under which it acts and they are bound to see that such statute is complied with; if they do not do so, the contract cannot be made binding on the corporation by any subsequent act of the officers.<sup>118</sup> Thus, a municipal corporation cannot be held liable for the acts of an independent board created by its charter, on the ground that it ratified them,

<sup>112</sup> *McCormick's Appeal*, 165 Pa. 386, 44 Am. St. Rep. 671; *Murphy v. City of Albina*, 22 Or. 106, 29 Am. St. Rep. 578; *Commercial Elec. Light & Power Co. v. Tacoma*, 20 Wash. 288, 72 Am. St. Rep. 103.

<sup>113</sup> *State v. Torinus*, 26 Minn. 1, 37 Am. Rep. 395.

<sup>114</sup> *Murphy v. City of Albina*, 22 Or. 106, 29 Am. St. Rep. 578; *City of Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535. And see post, § 141(j).

<sup>115</sup> *Highway Com'rs v. Van Dusan*, 40 Mich. 429.

<sup>116</sup> *Horton v. Town of Thompson*, 71 N. Y. 513.

<sup>117</sup> *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29.

<sup>118</sup> *Smith v. Newburgh*, 77 N. Y. 130; *San Diego Water Co. v. San Diego*, 59 Cal. 517; *Jefferson County Sup'rs v. Arrighi*, 54 Miss. 668.

where the matters involved are not within the scope of the powers conferred on it by its charter.<sup>119</sup>

**§ 122. Ratification by husband of wife's acts.**

A husband may ratify the acts of his wife the same as he may ratify the acts of any other agent performed on his behalf. It has been seen in a preceding chapter that a husband may appoint his wife as his agent, and that this appointment may either be given expressly, or it may be implied from the circumstances. If then a wife assumes to act as agent for her husband in certain matters, after acquiring knowledge of all the facts, he may ratify her acts as his assumed agent, and this ratification may be given expressly, or it may be implied from his words, acts, or conduct, as from his silence or acquiescence.<sup>120</sup> If a husband promises to pay for necessities or other articles furnished his wife on his credit when there was no authority on her part to bind him, he ratifies her purchase of the same, and it can make no difference that he accompanies such promise by a direction not to sell her any more articles on his credit.<sup>121</sup> And the fact that the husband's promise is induced by the fraud of the wife cannot affect the creditor's rights, if he is not privy to the fraud.<sup>122</sup> So the fact that the husband and wife are living apart at the time of the ratification, and were so living at the time of the wife's purchase, is altogether immaterial.<sup>123</sup> A husband becomes liable for goods purchased by his wife on his credit without authority, on the ground of implied ratification, if, having knowledge of the purchase, he allows her to use or retain the goods, provided he has such control over them as to be able to return them.<sup>124</sup> And if

<sup>119</sup> *Murray v. Omaha* (Neb.) 92 N. W. 299.

<sup>120</sup> *Millard v. Harvey*, 34 Beav. 237; *Waithman v. Wakefield*, 1 Camp. 120; *Heney v. Sargent*, 54 Cal. 396; *Mickelberry v. Harvey*, 58 Ind. 523; *Conrad v. Abbott*, 132 Mass. 330; *Allen v. Aldrich*, 29 N. H. 63; *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209; *Woodward v. Barnes*, 43 Vt. 330; *Day v. Burnham*, 36 Vt. 37.

<sup>121</sup> *Conrad v. Abbott*, 132 Mass. 330.

<sup>122</sup> *Allen v. Aldrich*, 29 N. H. 63.

<sup>123</sup> *Mickelberry v. Harvey*, 58 Ind. 523.

<sup>124</sup> *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713; *Woodward v.*

he has such control, it can make no difference that his wife is living separate from him.<sup>125</sup> The rule does not apply, however, where a tradesman sells goods to a wife on her husband's credit after the husband has given him notice not to do so.<sup>126</sup>

A wife's unauthorized sale of her husband's property may be ratified, and it is ratified if the husband afterwards delivers the property to the purchaser,<sup>127</sup> or if, after the property has been delivered by the wife, he uses or allows her to use the proceeds.<sup>128</sup>

In order that a husband may become bound, by ratification, on a contract made by his wife, she must have contracted as his agent and on his behalf, and not on her own account merely. If a wife purchases goods or enters into any other contract, and the credit is given to her, the purchase or contract cannot be ratified by the husband and thus be rendered binding on him.<sup>129</sup> His promise to pay the debt would be simply a promise to answer for the debt of another (of the wife), and would be subject to all the rules applicable to such a promise, and to the statute of frauds.

### § 123. Ratification by an agent.

As a general rule an agent cannot ratify an unauthorized act done by himself or his servants, so as to bind his principal thereby; if such were the case an agent might enlarge his powers to any extent without his principal's consent.<sup>130</sup> Thus, where the articles of a joint stock associa-

Barnes, 43 Vt. 330; *Heney v. Sargent*, 54 Cal. 396; *Ogden v. Prentice*, 33 Barb. (N. Y.) 160; *Walling v. Hannig*, 73 Tex. 580; *Hamilton v. Peck* (Tex. Civ. App.) 38 S. W. 403. Compare, however, *Atkins v. Curwood*, 7 Car. & P. 756.

<sup>125</sup> *Walthman v. Wakefield*, 1 Camp. 120.

<sup>126</sup> *Segelbaum v. Ensminger*, 117 Pa. 248; *Devendorf v. Emerson*, 66 Iowa, 698. Compare *Rennick v. Ficklin*, 3 B. Mon. (Ky.) 166.

<sup>127</sup> *Pike v. Baker*, 53 Ill. 163.

<sup>128</sup> *Delano v. Blanchard*, 52 Vt. 578. See, also, *Huff v. Price*, 50 Mo. 228.

<sup>129</sup> *Bentley v. Griffin*, 5 Taunt. 356; *Happek v. Hartby*, 7 Baxt. (Tenn.) 411; *Melners v. Munson*, 53 Ind. 138. See, also, *West v. Wheeler*, 2 Car. & K. 714; *Freestone v. Butcher*, 9 Car. & P. 643.

<sup>130</sup> *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795. An agent

tion prohibits its officers intrusted with the conduct of its business from making purchases on credit, and they nevertheless make such purchases, they cannot themselves ratify such unauthorized act.<sup>131</sup> So a general agent has no power to ratify the acts of an assumed agent done in the name of his principal, unless he has the power to appoint such agent to do such acts.<sup>132</sup> Nor does such an agent ratify the contract of another agent to compensate an employe in a certain manner by failing to deny liability where the employe demands such compensation after performing the service.<sup>133</sup> Nor, where there are two or more joint agents, can one of them ratify the unauthorized acts of the other co-agents.<sup>134</sup>

Where, however, an agent has authority to do certain acts, he may ratify their performance by another who had not such authority;<sup>135</sup> and where the matter is within the scope of another agent, knowledge by him of the unauthorized act is sufficient to uphold a ratification.<sup>136</sup>

Especially is this doctrine called into effect in the case of corporations. As their business is conducted wholly through officers or agents, the latter are frequently called upon to authorize the doing of certain acts by sub-agents or to ratify them when they have been done without authority; and if the act is one which the officer or agent could himself have done or authorized he may subsequently ratify it, if done without authority by another.<sup>137</sup> But such agent or officer

having authority to do lawful things cannot, by virtue of such authority, ratify his own unauthorized or illegal acts so as to bind his principal. *Fay v. Slaughter*, 194 Ill. 157, reversing 94 Ill. App. 111.

<sup>131</sup> *Hotchin v. Kent*, 8 Mich. 526.

<sup>132</sup> *Ironwood Store Co. v. Harrison*, 75 Mich. 197.

<sup>133</sup> *Deffenbaugh v. Jackson Paper Mfg. Co.*, 120 Mich. 242.

<sup>134</sup> *Penn v. Evans*, 28 La. Ann. 576.

<sup>135</sup> *Mound City M. L. Ins. Co. v. Huth*, 49 Ala. 529; *Singer Mfg. Co. v. Belgart*, 84 Ala. 519; *Whitehead v. Wells*, 29 Ark. 99; *Palmer v. Cheney*, 35 Iowa, 281.

<sup>136</sup> *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565.

<sup>137</sup> *Anglo-Californian Bank v. Mahoney Min. Co.*, 5 Sawy. 255, Fed. Cas. No. 392; *Indianapolis Rolling-Mill Co. v. St. Louis, Ft. S. & W. R. Co.*, 26 Fed. 140, 120 U. S. 256; *Bibb v. Hall*, 101 Ala. 79;

cannot ratify an act done by another without authority if it was not an act which he could have authorized, nor can he ratify an unauthorized act performed by himself.<sup>138</sup> Thus, an agent of a municipal corporation cannot ratify the unauthorized act of another agent of the same corporation, if he has no authority over such act.<sup>139</sup>

#### § 124. Ratification by partner.

As a partner may bind the firm by acts done by himself in the firm business and for its benefit, so he may ratify, on behalf of the firm, acts which have been done by another without authority, and which he could have originally authorized. As in the case of other agents, this ratification may be either express or implied.<sup>140</sup> Thus, where one partner had knowledge of unauthorized acts performed by an agent in behalf of the firm, and he made no further inquiries in the matter or gave no directions in reference thereto, it was held that this was a virtual ratification of the unauthorized acts of the agent; and that the whole firm was

*Washington Times Co. v. Wilder*, 12 App. D. C. 62; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Toledo, W. & W. R. Co. v. Prince*, 50 Ill. 26; *Wood v. Whelen*, 93 Ill. 155; *Darst v. Gale*, 83 Ill. 136; *Toledo, W. & W. R. Co. v. Rodrigues*, 47 Ill. 188, 95 Am. Dec. 484; *White v. Elgin Creamery Co.*, 108 Iowa, 522; *Pacific R. Co. v. Thomas*, 19 Kan. 256; *Poche v. New Orleans Home Inv. Co.*, 52 La. Ann. 1287; *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315; *Sherman v. Fitch*, 98 Mass. 59; *Burrill v. Nahant Bank*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; *Chouteau v. Allen*, 70 Mo. 290; *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 84 Am. Dec. 298; *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207; *Dallas v. Columbia Iron & Steel Co.*, 158 Pa. 444; *First Nat. Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555; *Northwestern Fuel Co. v. Lee*, 102 Wis. 426; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 129; *Walworth County Bank v. Farmers' Loan & Trust Co.*, 16 Wis. 629. See *Clark & M. Private Corp.* § 715(b).

<sup>138</sup> *Porter v. Winona & D. Grain Co.*, 78 Minn. 210. See *Clark & M. Private Corp.* § 715(b).

<sup>139</sup> *Sceery v. Springfield*, 112 Mass. 512.

<sup>140</sup> *Forbes v. Hagman*, 75 Va. 168. And see *Callanan v. Van Vleck*, 36 Barb. (N. Y.) 324; *Baldwin v. Leonard*, 39 Vt. 260, 94 Am. Dec. 324.



bound thereby.<sup>141</sup> So it was held a ratification where a note issued by a clerk in the firm name was shown to one of the partners who corrected the date and said it was all right.<sup>142</sup>

### § 125. Ratification by infants.

An infant cannot himself enter into a contract nor appoint an agent, nor can he authorize another to do so for him, and since he cannot ratify that which he is incapable of authorizing, he cannot therefore ratify any acts or contracts entered into on his behalf by another, assuming to be his agent.<sup>143</sup> This doctrine, however, refers to him as an infant; but as to whether he may ratify such act after coming of age depends upon whether the acts so performed for him were void or merely voidable. As has been seen heretofore<sup>144</sup> some acts performed by another on behalf of an infant are absolutely void, and of course cannot be ratified by him. For instance, a contract for the exchange of an infant's lands, and bonds and a deed of the infant, executed on his behalf by his guardian, either as agent or as guardian, as a part of the transaction, cannot be ratified by the infant after coming of age, since they are void.<sup>145</sup> If, however, the act or contract is one that the infant may either affirm or disaffirm after attaining his majority, then it would seem that he may ratify such act.<sup>146</sup>

### § 126. Ratification by married women.

Except in so far as expressly allowed by statute, a married woman is incapable of entering into a contract, and all contracts made by her, outside of such statutory authority, are void and cannot be ratified by her when made by others

<sup>141</sup> *Forbes v. Hagman*, 75 Va. 168.

<sup>142</sup> *Harper v. Devene*, 10 La. Ann. 724.

<sup>143</sup> *Armitage v. Widoe*, 36 Mich. 124; *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *Hiestand v. Kuns*, 8 Blackf. (Ind.) 345; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; *Doe d. Thomas v. Roberts*, 16 Mees. & W. 778.

<sup>144</sup> *Ante*, § 18.

<sup>145</sup> *Dellinger v. Foltz*, 93 Va. 729.

<sup>146</sup> *Ante*, § 18.

on her behalf.<sup>147</sup> And as such contracts are void by reason of her incompetency, she cannot ratify them after discovery, but in order to be bound must enter into a new contract.<sup>148</sup> In reference to her separate estate, however, whatever acts she may have previously performed herself she may subsequently ratify.<sup>149</sup> Where a wife assents to a contract made by her husband for materials to be used in the erection of a building upon her separate estate, and knowingly receives them and assents to their application to her property, she is bound by such contract.<sup>150</sup> So where a married woman, knowing that her husband has in her behalf voted shares of stock owned by her in favor of a transfer by the corporation of all its property for the stock of another corporation to be given to the stockholders of the former corporation, disposes of part of the stock so received, she ratifies her husband's act.<sup>151</sup> Where a husband buys land in his own name with his wife's money, the wife ratifies the transaction by acquiescing therein for several years with knowledge of the facts, or by accepting the application of the land to the payment of her debts.<sup>152</sup>

### § 127. Ratification by incompetents in general.

It is obvious that one cannot ratify an act done in his behalf while he remains incompetent; but as to whether or not after the incompetency is removed he may ratify an act done in his behalf during his incompetency, is not so certain, and depends altogether upon which view is taken of an appointment of an agent during incompetency. If it is considered that such an appointment would be void, then acts

<sup>147</sup> *Macfarland v. Hein*, 127 Mo. 327, 48 Am. St. Rep. 629. See ante, § 21.

<sup>148</sup> *Nesbitt v. Turner*, 155 Pa. 429; *Buchanan v. Hazzard*, 95 Pa. 240; *Brown v. Bennett*, 75 Pa. 423; *Rawlings v. Neal*, 126 N. C. 271.

<sup>149</sup> *Scottish American Mortg. Co. v. Deas*, 35 S. C. 42, 28 Am. St. Rep. 832; *Hibernian Sav. Inst. v. Luhn*, 34 S. C. 184; *Horne v. Pollak*, 118 Ala. 617, 72 Am. St. Rep. 189; *Tarr v. Muir*, 21 Ky. L. R. 988, 53 S. W. 663. See ante, § 21.

<sup>150</sup> *Bodey v. Thackara*, 143 Pa. 171, 24 Am. St. Rep. 526.

<sup>151</sup> *Hoene v. Pollak*, 118 Ala. 617, 72 Am. St. Rep. 189.

<sup>152</sup> *Thompson v. Stringfellow*, 119 Ala. 317.

performed by such agent will be void and cannot be ratified, nor could he ratify the acts of an unauthorized agent. If, however, such appointment is considered to be subject to the affirmance or disaffirmance of the incompetent when competency is restored, then acts performed under such appointment may be ratified after the incompetency is removed, whether such acts were authorized or unauthorized, and whether the agent was an assumed one or one who has merely exceeded his authority.<sup>153</sup>

#### V. HOW RATIFICATION MAY BE MADE.

##### § 128. In general.

It may be stated as a general rule that the ratification of an unauthorized act or contract may be made in any manner in which authority to do the act or enter into the contract may have been given; and except in those cases where such ratification is required to be in a special form, it may be either express or implied, or as is the case with the original authority it may be either written or oral.<sup>154</sup> "All that the law requires is such a manifestation of the intent of the principal to adopt the act of the agent as would lead the ordinarily prudent man to conclude that the principal has assented."<sup>155</sup> In some states there are special statutory provisions to this effect. Thus it is expressly provided by statute in California that a ratification can be made only in the manner it would have been necessary to confer an original authority, or where an oral authorization would suffice, by accepting or retaining the benefit of the act.<sup>156</sup>

The question as to what amounts to a ratification is one

<sup>153</sup> See ante, § 19.

<sup>154</sup> *Taylor v. Conner*, 41 Miss. 722; *Veazie v. Williams*, 8 How. (U. S.) 134; *Goss v. Stevens*, 32 Minn. 472. And see cases cited hereafter.

An instruction which tells the jury that, to amount to ratification, the defendant must have expressly agreed by and with the plaintiff, or his duly and legally authorized agent, that such act of the agent was ratified and approved, does not correctly state the law, and is error. *Fant v. Campbell*, 8 Okl. 586.

<sup>155</sup> *Huffcut*, Ag. (1st Ed.) § 34.

<sup>156</sup> Cal. Civ. Code, § 2310; *Goetz v. Goldbaum* (Cal.) 37 Pac. 646.

of much importance, and one which is called into litigation perhaps more than any other subject of the law of ratification, and especially is this so in cases of implied ratification. The principal distinction between an express and an implied ratification is one merely of evidence, it requiring stronger proof to establish an implied ratification than an express one. In the case of an express ratification there is a strong presumption that the principal had a full knowledge of all the material facts, unless he has intentionally and deliberately ratified, not caring to be fully informed in the matter; whereas in the case of an implied ratification strong proof must be introduced to show that he has such knowledge, the degree of proof required depending to a great extent upon the other circumstances in the case.

What amounts to a ratification is a question of law for the court, if the facts are undisputed; but if such facts are not determined, and their legal effect when determined is known, then it is a question of fact for the jury.<sup>157</sup> Thus whether mere silence of a principal, and failure to repudiate his agent's acts, within a reasonable time after knowledge thereof, amounts to a ratification, is a question of fact for the jury.<sup>158</sup> So where one having no authority ordered work to be done for another, and the latter, after a full understanding of the transaction, wrote to the one with whom the contract was made, requesting that the work be hurried, and threatening to have an order made discontinuing the work, the question whether the letter was a ratification was for the jury.<sup>159</sup> But where the only testimony on the question of a ratification of an agent's act was the agent's answer "Yes," to a question asking if such ratification had taken

<sup>157</sup> *American Min. & Smelting Co. v. Converse*, 175 Mass. 449; *Fischer v. Jordan*, 54 App. Div. (N. Y.) 621; *Iron City Nat. Bank v. Fifth Nat. Bank* (Tex. Civ. App.) 47 S. W. 533; *Hesse v. Travelers' Protective Ass'n*, 72 Mo. App. 598; *Paul v. Berry*, 78 Ill. 158; *Henderson v. Cummings*, 44 Ill. 325.

<sup>158</sup> *Iron City Nat. Bank v. Fifth Nat. Bank* (Tex. Civ. App.) 47 S. W. 533; *Fischer v. Jordan*, 54 App. Div. (N. Y.) 621. See post, § 141(f).

<sup>159</sup> *Hesse v. Travelers' Protective Ass'n*, 72 Mo. App. 598.

place, the evidence was insufficient to submit that issue to the jury.<sup>160</sup>

A ratification procured by misrepresentation is nevertheless effectual and binding, if the parties to be benefitted by the ratification did not participate in the misrepresentation.<sup>161</sup>

#### A. *Express Ratification.*

#### § 129. In general.

As a general rule, express ratification may be made in any manner in which express authority may have been given. If the authority in the first instance may have been given by parol then the ratification may be by parol, but if "the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification except in the same manner."<sup>162</sup> Thus, if the authority to do certain acts is required to be in writing, then a subsequent ratification of such acts in writing only will be effective.<sup>163</sup> So if the original authority was required to be under seal, there must ordinarily be a ratification in the same form.<sup>164</sup> Where, however, the authority need not be in writing or under seal, although a writing may be required to effectually exercise such authority, a ratification of such an act unauthorizedly performed need not be written.

#### § 130. By subsequent authority antedated.

An agent's unauthorized act may also be expressly ratified and made valid by an authority given subsequent to the per-

<sup>160</sup> *Rapid Hook & Eye Co. v. De Ruyter*, 117 Mich. 547.

<sup>161</sup> *Fitzpatrick v. School Com'rs*, 7 Humph. (Tenn.) 224, 46 Am. Dec. 76.

<sup>162</sup> *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Golinsky v. Allison*, 114 Cal. 458.

<sup>163</sup> *Farmers' Loan & Trust Co. v. Memphis & C. R. Co.*, 83 Fed. 870; *Pollard & Co. v. Gibbs*, 55 Ga. 45; *Kozel v. Dearlove*, 144 Ill. 23, 36 Am. St. Rep. 416; *Ragan v. Chenault*, 78 Ky. 545; *Palmer v. Williams*, 24 Mich. 328; *Grove v. Hodges*, 55 Pa. 504. See post, § 133.

<sup>164</sup> Post, § 132; *Pollard & Co. v. Gibbs*, 55 Ga. 45; *Grove v. Hodges*, 55 Pa. 504.

formance of such act but antedated so as to appear as given prior thereto. If a principal dates back a power of attorney so as to legalize a prior act of the agent, he will be held to have expressly ratified such act and cannot escape liability therefor by showing that the power was executed subsequent to the performance. Thus, where an attorney appointed by parol, executes a bond in the name of the principal, and afterwards the principal gives him a regular power of attorney dated prior to the bond, this is a good ratification of the bond.<sup>165</sup> And a letter written by the principal authorizing certain acts was held to be a ratification, where it was not received until after the acts were performed.<sup>166</sup> But a letter subsequent to an unauthorized sale, giving an agent power to sell, does not ratify such previous sale, if it is in excess of the power given by such letter.<sup>167</sup> So collections made by an agent on a note after the death of his principal, and before direction by the executors to proceed to collect the note, have been held not ratified by such direction.<sup>168</sup>

**§ 131. By answer in equity.**

A sale of lands under parol authority is confirmed, by an admission of the authority by the principal, in his answer to a bill in equity, in which the transaction is relied upon.<sup>169</sup>

**§ 132. Ratification of instruments under seal.**

(a) **In general—At common law.**—It is a general principle of the common law that a power of attorney to convey lands must be of the same solemnity and possess the same general requisites as the conveyance itself must have. And in order that a deed may be valid and effectual it is necessary that it be under seal; so a power to execute a deed must be in writing and under seal. And as a stream can rise no higher than its source, a ratification of such acts, requiring a

<sup>165</sup> *Milliken v. Coombs*, 1 Me. 343, 10 Am. Dec. 70; *Riggan v. Crain*, 36 Ky. 249; *United States Exp. Co. v. Rawson*, 106 Ind. 215.

<sup>166</sup> *Rice v. McLarren*, 42 Me. 157.

<sup>167</sup> *Stillman v. Fitzgerald*, 37 Minn. 186; *Moore v. Lockett*, 2 Bibb (Ky.) 67, 4 Am. Dec. 683.

<sup>168</sup> *Hill v. Bess* (Tex. Civ. App.) 40 S. W. 202.

<sup>169</sup> *Stoney v. Schultz*, 1 Hill (N. Y.) 465, 27 Am. Dec. 429.

seal, must be in the same form as the power should have been. Hence where such acts or contracts, as require a power under seal to execute them, have been entered into without authority as a general rule, no prior authority or subsequent ratification, either written or verbal, without seal, would be sufficient to give validity to such an unauthorized act or contract as the deed of the principal.<sup>170</sup> The later American authorities, however, have been inclined to depart from the strictness of the common-law rule, and in some of the states statutes have been passed expressly providing that the omission of a seal shall be immaterial in some cases where before it was required. Where such is the case, the former rule as to requiring a ratification to be under seal would likewise be relaxed.

(b) **Estoppel in pais.**—Although the above is probably the correct rule with reference to express ratifications as evidence of legal title, or to such acts of recognition and acquiescence as operate merely as evidence of assent, yet it can hardly be doubted but that such acts as would operate as an estoppel in pais would be held sufficient in our courts to confirm a contract under seal, made by an agent without

<sup>170</sup> *City of Oxford v. Crow* [1893] 3 Ch. Div. 535, 69 Law T. (N. S.) 228; *Taylor v. Robinson*, 14 Cal. 400; *Videau v. Griffin*, 21 Cal. 390; *Drumright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738; *Pollard & Co. v. Gibbs*, 55 Ga. 46; *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549; *Paine v. Tucker*, 21 Me. 138, 38 Am. Dec. 255; *Spofford v. Hobbs*, 29 Me. 148, 48 Am. Dec. 521; *Stetson v. Patten*, 2 Me. 358, 11 Am. Dec. 111; *Heath v. Nutter*, 50 Me. 378; *Palmer v. Williams*, 24 Mich. 328; *Adams v. Power*, 52 Miss. 828; *Hawkins v. McGroarty*, 110 Mo. 550; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Blood v. Goodrich*, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152; *Id.*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; *Peter-son v. City of New York*, 4 E. D. Smith (N. Y.) 417; *Vanderbilt v. Persse*, 3 E. D. Smith (N. Y.) 430; *Hanford v. McNair*, 9 Wend. (N. Y.) 54; *Wells v. Evans*, 20 Wend. (N. Y.) 251; *Bellas v. Hays*, 5 Serg. & R. (Pa.) 427, 9 Am. Dec. 385; *Grove v. Hodges*, 55 Pa. 504; *Cooper v. Rankin*, 5 Bin. (Pa.) 613; *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338; *Smith v. Dickinson*, 6 Humph. (Tenn.) 261, 44 Am. Dec. 386; *Turbeville v. Ryan*, 1 Humph. (Tenn.) 113, 34 Am. Dec. 622; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Zimpelman v. Keating*, 72 Tex. 318. And see *Harrison v. McMurray*, 71 Tex. 122.

legal authority.<sup>171</sup> Thus, where a sale of real estate is made in the presence of the principal, and the purchaser takes possession under his contract, and makes valuable improvements with the knowledge of the principal, who instructed such agent to make out a contract of sale, and who received the purchase money, it is immaterial that the agent was not authorized in writing, nor need a ratification be in that form.<sup>172</sup> But such estoppel must be certain to every intent, and not be taken by argument or inference.<sup>173</sup> Thus, the owner of land is not estopped from denying the authority of his attorney to execute a deed therefor, because he has received payment of a promissory note and mortgage given to secure the purchase price, unless such instruments recite the purposes for which they were given.<sup>174</sup>

(c) **Parol acknowledgment of authority.**—And again, although a parol ratification of an unauthorized execution of a sealed instrument is invalid, yet a subsequent parol acknowledgment that an agent had prior authority under seal to execute such an instrument is competent evidence of such authority; but if the agent had no such prior authority, the subsequent parol acknowledgment would not be a ratification and binding on the principal.<sup>175</sup> A mere acknowledgment of the deed, however, is not sufficient; it must be an acknowledgment that the agent had authority to execute the sealed instrument. "If one partner, who does not execute, acknowledges that he gave an authority, I must presume that it was a legal authority; and that must be under seal and produced. One man cannot authorize another to execute a

<sup>171</sup> *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Zimpelman v. Keating*, 72 Tex. 318; *Fouch v. Wilson*, 59 Ind. 93; *Palmer v. Williams*, 24 Mich. 328; *Hawkins v. McGroarty*, 110 Mo. 546; *Hyatt v. Clark*, 118 N. Y. 563; *Grove v. Hodges*, 55 Pa. 504.

<sup>172</sup> *Karns v. Olney*, 80 Cal. 90, 13 Am. St. Rep. 101.

<sup>173</sup> *Spofford v. Hobbs*, 29 Me. 148, 48 Am. Dec. 521.

<sup>174</sup> *Spofford v. Hobbs*, 29 Me. 148, 48 Am. Dec. 521.

<sup>175</sup> *Blood v. Goodrich*, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152, 9 Wend. 68, 24 Am. Dec. 121; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Videau v. Griffin*, 21 Cal. 390; *Rhode v. Louthain*, 8 Blackf. (Ind.) 413. But see *Paine v. Tucker*, 21 Me. 138, 38 Am. Dec. 255.



deed for him but by deed. No subsequent acknowledgment will do."<sup>176</sup> Where a person, whose name has been signed to a deed in his absence by the grantee, duly acknowledges and delivers the deed, he thereby adopts the signature as his own, and there is no question of agency or ratification.<sup>177</sup>

(d) **Exception to rule—In case of partners.**—An exception to the general rule, however, is made in the case of partnership. In such cases it is held that one partner may be authorized by parol by another partner to execute a sealed instrument which will be binding as such upon the firm; or if one partner executes such instrument without such authorization, the other partner or partners may subsequently ratify it either by words or by writing not under seal.<sup>178</sup> Not only may this subsequent ratification be by parol, but it may be implied from declarations or from acts and circumstances, or from other evidence tending to show assent or ratification.<sup>179</sup>

<sup>176</sup> *Steiglitz v. Egginton*, Holt N. P. 141.

<sup>177</sup> *Bartlett v. Drake*, 100 Mass. 174, 1 Am. Rep. 101, 97 Am. Dec. 92; *Lovejoy v. Richardson*, 68 Me. 386; *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386; *Lewis v. Watson*, 98 Ala. 479, 39 Am. St. Rep. 82. And see ante, § 99.

<sup>178</sup> *Tischler v. Kurtz*, 35 Fla. 323; *Jeffreys v. Coleman*, 20 Fla. 536; *Drumright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738; *Peine v. Weber*, 47 Ill. 41; *Edwards v. Dillon*, 147 Ill. 14, 37 Am. St. Rep. 199; *Price v. Alexander*, 2 G. Greene (Iowa) 427, 52 Am. Dec. 526; *Haynes v. Seachrest*, 13 Iowa, 455; *Pike v. Bacon*, 21 Me. 280, 38 Am. Dec. 259; *Cady v. Shepherd*, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; *McIntyre v. Park*, 11 Gray (Mass.) 102, 71 Am. Dec. 690; *Dillon v. Brown*, 11 Gray (Mass.) 179, 71 Am. Dec. 700; *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Swan v. Stedman*, 4 Metc. (Mass.) 548; *Gwinn v. Rooker*, 24 Mo. 291; *Skinner v. Dayton*, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; *Smith v. Kerr*, 3 N. Y. 150; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *Gram v. Seton*, 1 Hall (N. Y.) 262; *Purviance v. Sutherland*, 2 Ohio St. 486; *McNaughten v. Partridge*, 11 Ohio, 223, 38 Am. Dec. 731; *Kramer v. Dinsmore*, 152 Pa. 264; *Schmertz v. Shreeve*, 62 Pa. 460, 1 Am. Rep. 440; *Bond v. Aitkin*, 6 Watts & S. (Pa.) 165, 40 Am. Dec. 550; *Johns v. Battin*, 30 Pa. 84; *Hull v. Young*, 30 S. C. 121; *Lowery v. Drew*, 18 Tex. 786; *McDonald v. Eggleston*, 26 Vt. 154, 60 Am. Dec. 303. And see *Harrison v. Jackson*, 7 Term R. 207.

<sup>179</sup> *Edwards v. Dillon*, 147 Ill. 14, 37 Am. St. Rep. 199, and cases cited; *Wilcox v. Dodge*, 12 Ill. App. 517; *Walsh v. Lennon*, 98 Ill.

As has been said: "We think it may be safely said the modern rule is that one partner may, in furtherance of partnership business and for its benefit, execute a deed under seal, which will be binding on the other, if he has foreknowledge, or subsequently ratifies it, and this may be proved by acts and circumstances, or by his verbal declarations and admissions."<sup>180</sup> And much slighter acts will produce that effect where the subject-matter of the agreement is within the partnership dealings, than where it has no connection therewith; and from which the firm derives no benefit.<sup>181</sup> Especially can such a ratification by a partner be made if it was unnecessary that the seal be attached to the instrument executed by the other partner.<sup>182</sup>

The common-law rule cannot be applied with all its severity in the concerns of co-partners, whose intimate connection and mutual interest require such large power and ample confidence in the integrity and prudence of each other to give to their operations efficiency, vigor and success. "The pressure of these considerations has induced a relaxation of the common-law rule, to adapt it to the exigencies of commercial co-partnerships and other associations of individuals operating with joint funds for the common benefit. The rule itself remains, but the restrictions it imposes are qualified by the application of other principles. The general authority of a partner, for example, derived from his relation to his co-partners, does not empower him to seal an instrument for them, so as to make it binding upon them, without their assent and against their will. An absent partner is not bound by a deed executed for him by his co-partner, without his previous authority or permission, or his subsequent adoption. But the previous authority or permission of one partner to another to seal for him, or his subsequent adoption of the seal as his own, will impart efficacy to the instrument as his deed; and that previous authority or subsequent adoption may be by parol."<sup>183</sup>

27, 38 Am. Rep. 75; *Swan v. Stedman*, 4 Metc. (Mass.) 548; and cases cited in note above.

<sup>180</sup> *Peine v. Weber*, 47 Ill. 41.

<sup>181</sup> *McDonald v. Eggleston*, 26 Vt. 154, 60 Am. Dec. 303.

<sup>182</sup> *Edwards v. Dillon*, 147 Ill. 14, 37 Am. St. Rep. 199. *Infra*, (e).

<sup>183</sup> By Jones, Ch. J., in *Gram v. Seton*, 1 Hall (N. Y.) 262.

It has been held, however, that authority under seal is necessary to enable one co-partner to bind the other by a note under seal in the name of the partnership; and previous parol assent or subsequent ratification will not render the unauthorized bond of a co-partner binding on the other.<sup>184</sup>

— **Rule in Massachusetts.** In Massachusetts it has been expressly held, although a different rule obtains elsewhere, that an instrument under seal, unauthorizedly executed, may be ratified by parol, whether it is a case of partnership or not.<sup>185</sup> It will be noted, however, that although the judges use language to that effect, yet most, if not all, of the cases in which such language is used, were cases of partnerships and properly came under the exception to the general rule above stated, so that such language is properly mere dicta, although it seems to be recognized as a rule in that state. And although Gray, C. J., in *Holbrook v. Chamberlin* says: "The law is settled in this commonwealth, that the unauthorized execution of a deed in the name either of a partnership or of an individual may be ratified by parol," it will be noticed that that case and the other cases cited in support of the Massachusetts rule are partnership cases, so that the language used by the Chief Justice in reference to individuals is mere dicta. And although the various text books and authorities seem to recognize Massachusetts as having a rule different from the other states, it will be seen from an examination of the cases that it is practically the same; that is, that a partner may by parol ratify an unauthorized sealed instrument entered into by his partner in reference to partnership business.

(e) **Where seal is superfluous.**—Again a sealed instrument may be ratified by parol, if the seal is mere surplusage. If it was not necessary that an instrument should be under seal, and such an instrument is unauthorizedly executed by an agent and a seal put thereon by him, the principal may never-

<sup>184</sup> *Turbeville v. Ryan*, 1 Humph. (Tenn.) 113, 34 Am. Dec. 622; *Smith v. Dickinson*, 6 Humph. (Tenn.) 261, 44 Am. Dec. 306.

<sup>185</sup> *McIntyre v. Park*, 11 Gray (Mass.) 102, 71 Am. Dec. 690; *Cady v. Shepherd*, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; *Swan v. Stedman*, 4 Metc. (Mass.) 548; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665.

theless ratify such instrument by parol, disregarding the unnecessary seal.<sup>186</sup> Thus, if an instrument executed by one partner in the firm name under seal is valid without a seal, and within the scope of the partnership business, and within the powers belonging to each partner, the seal may be disregarded, and the instrument ratified as a simple contract of the firm.<sup>187</sup>

**§ 133. Ratification of contracts requiring written authority.**

In some of the states it is expressly provided by statute that where a contract is required to be "in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized," such authority by an agent must also be in writing. From this it follows that where an agent has, without authority, executed such a contract, a ratification thereof must also be in writing, in the absence of some element of equitable estoppel.<sup>188</sup> Thus, where the statute requires that authority to make a lease of lands for a longer period than a certain number of years shall be in writing, such a lease by an unauthorized agent, can only be ratified by the owner in writing.<sup>189</sup> A parol ratification of such a lease would give it no greater force or effect than if the owner had himself leased it by parol, which would

<sup>186</sup> *Drumright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738; *Adams v. Power*, 52 Miss. 828; *Hammond v. Hannin*, 21 Mich. 374; *Minor v. Willoughby*, 3 Minn. 225 (Gil. 154); *Gwinn v. Rooker*, 24 Mo. 290; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; *Hanford v. McNair*, 9 Wend. (N. Y.) 54; *Evans v. Wells*, 22 Wend. (N. Y.) 340; *Lawrence v. Taylor*, 5 Hill (N. Y.) 113; *State v. Spartanburg & U. R. Co.*, 8 Rich. (S. C.) 129. And see *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203. But see *Pollard & Co. v. Gibbs*, 55 Ga. 45; *Rowe v. Ware*, 30 Ga. 278.

<sup>187</sup> *Edwards v. Dillon*, 147 Ill. 14, 37 Am. St. Rep. 199; *Walsh v. Lennon*, 98 Ill. 27, 38 Am. Rep. 75; *Sterling v. Bock*, 40 Minn. 11; *Human v. Cuniffe*, 32 Mo. 316; *Robinson v. Crowder*, 4 McCord (S. C.) 519, 17 Am. Dec. 762.

<sup>188</sup> *Kozel v. Dearlove*, 144 Ill. 23, 36 Am. St. Rep. 416; *Ragan v. Chenault*, 78 Ky. 546; *Palmer v. Williams*, 24 Mich. 328; *Hawkins v. McGroarty*, 110 Mo. 546; *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338.

<sup>189</sup> *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338. See ante, § 129.

be to create an estate at will; and if the tenant was permitted to hold it for a year or more, an estate from year to year, which could be terminated only by giving a three months' notice to quit.<sup>190</sup> So where the statute provides that an agent's authority to make a contract of suretyship shall be in writing, a ratification of such a contract unauthorizedly executed by the agent should be in writing; and a subsequent parol ratification by the principal of such contract, would not make it effective.<sup>191</sup>

It must be noticed, however, that there is a distinction between ratification where the contract only is required to be in writing and where the authority also must be written. In the latter case, as we have just seen, the ratification of such an unauthorized contract must also be in writing. But although the statute expressly provides that certain contracts shall be in writing, yet if it is not required that authority to execute such a contract shall also be written, such a contract executed without authority may be ratified by parol.<sup>192</sup> Thus, in some states authority to make leases of land for less than a certain number of years need not be in writing. Where such is the case an unauthorized lease thereof for less than such period may be ratified without writing, as by the owner accepting the rents as they become due.<sup>193</sup> And a written contract for the sale of lands made by an unauthorized agent may be ratified by parol, and the statute of frauds will be satisfied; but where such a contract is made by one to whom such power could not be delegated, as by one assuming to act for an executor who is by the will donee of a power to sell, the ratification must be in writing to satisfy the statute of frauds.<sup>194</sup>

<sup>190</sup> *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338.

<sup>191</sup> *Ragan v. Chenault*, 78 Ky. 545.

<sup>192</sup> *Maclean v. Dunn*, 4 Bing. 722; *Soames v. Spencer*, 1 Dowl. & R. 32; *Powell v. Gossom*, 18 B. Mon. (Ky.) 179; *Hammond v. Hannin*, 21 Mich. 374; *Goss v. Stevens*, 32 Minn. 472; *Dickerman v. Ashton*, 21 Minn. 538; *Brown v. Eaton*, 21 Minn. 409; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Favill v. Roberts*, 3 Lans. (N. Y.) 25; *Breithaupt v. Thurmond*, 3 Rich. Law (S. C.) 216.

<sup>193</sup> *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338. And see cases in preceding note.

<sup>194</sup> *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89.

*B. Implied Ratification.***§ 134. In general.**

As has been seen, except where an agent's authority is required to be given in a special form, as by instrument under seal or by simple writing, it may be given by parol. And as the ratification of an unauthorized act is in effect giving authority after the act is performed, and may be made in the same manner in which the original authority could have been given, so a ratification, except where required to be in a special form, may be by parol, and may be implied from the acts, words, or silence of the principal. If the principal either by his conduct, by his words, or by his silence, has led others to believe that he has sanctioned an unauthorized act performed in his behalf by his agent or by an assumed agent, he will be held to have ratified such act, whether it was his actual intention to do so or not. Although ratification is presumed to be based upon the intention of the parties, yet it may in some cases be effected contrary to the principal's real intention, for if by his acts he has induced others to believe that it was his intention to ratify the unauthorized acts, and such others have acted accordingly, the law will conclusively presume that such was his intention, and he will not be permitted to deny it. In all cases of implied ratification, as will be discussed more at length in the following sections, the principal must have a full knowledge of all the material facts in the case, unless he is willfully ignorant, and it is error to instruct a jury that they may find that the principal, by his acts, ratified a contract of the agent, when there is no evidence that the principal knew of the contract at the time he performed the acts.<sup>195</sup>

**§ 135. Intention to ratify.**

As a ratification can only be made by the assent, express or implied, of the principal, it is necessary that there should have been an intention, express or implied, on the part of the principal to ratify. In implied ratification, this intention can only be determined from the acts of the principal; and accordingly ratification can only be inferred from acts which

<sup>195</sup> Nebraska Wesleyan University v. Parker, 52 Neb. 453.

evinced clearly and unequivocally the intention to ratify, and not from acts which may be readily and satisfactorily explained without involving any such intention.<sup>196</sup> It has been held that in order that a ratification may be presumed, the acts must be such as to be inconsistent with any other intention.<sup>197</sup> But this is thought to be stating the doctrine rather too strongly.

It is not necessary, however, that it should have been the actual intention of the principal to ratify. In fact his actual intention might have been otherwise. If the facts of the case show a ratification, the law will imply that he intended to ratify, and it is immaterial whether he actually intended to do so or not.<sup>198</sup>

### § 136. Prejudice to third party.

It has also been held that in order that the acts of the principal may be sufficient to warrant an implied ratification, they must be such that the other party by relying upon them has been prejudiced.<sup>199</sup> But as has been seen in a former section,<sup>200</sup> this is not an essential element of ratification, as the circumstances of the case may be such as to show a ratification although the third party is in no way prejudiced or misled. But in the absence of such other circumstances the third party must be misled or prejudiced in order that the principal's conduct may amount to ratification. The distinction may be said to be this: If the principal's acts or conduct clearly manifest an intention to ratify the agent's unauthorized acts, then a ratification will be implied as a matter of fact, notwithstanding the third party may or may not have been prejudiced by such acts or conduct. If, however, the principal's acts or conduct do not manifest an inten-

<sup>196</sup> *Breaux v. Sarvoie*, 39 La. Ann. 243; *Delabigarre v. Second Municipality of New Orleans*, 3 La. Ann. 230; *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 8 Am. St. Rep. 512.

<sup>197</sup> *Taylor v. Agricultural & M. Ass'n*, 68 Ala. 229; *Heyn v. O'Hagen*, 60 Mich. 150.

<sup>198</sup> *Hazard v. Spears*, 2 Abb. App. Dec. (N. Y.) 353.

<sup>199</sup> *Doughaday v. Crowell*, 11 N. J. Eq. 201; *Heyn v. O'Hagen*, 60 Mich. 150.

<sup>200</sup> *Ante*, § 110.

tion to ratify, but they have been such that the third party, acting in good faith and with due discretion, has been led to believe that he had such an intention, and relying thereupon has acted to his prejudice, then a ratification will be implied as a matter of law, and the principal will be estopped to deny that he had such intention.

### § 137. Construction of principal's acts.

We have seen in a previous section that ratification depends upon the principal's intention, express or implied, and that this intention must be determined from the principal's acts. As a general rule a principal's acts will be liberally construed in favor of a ratification;<sup>201</sup> but if the facts in any case are uncertain or doubtful, the question should be left to the jury, and a ratification will not be presumed.<sup>202</sup> Thus, the mere retention in service of an agent does not of itself ratify an unauthorized act committed by him, but the question should be left to the jury under the evidence.<sup>203</sup>

### § 138. Modes of implied ratification—In general.

It can readily be seen that the modes or manner of implied ratification are infinite, and that no definite rule can be

<sup>201</sup> *Szymanski v. Plassan*, 20 La. Ann. 90, 96 Am. Dec. 382; *Flower v. Jones*, 7 Mart. N. S. (La.) 143; *Terril v. Flower*, 6 Mart. O. S. (La.) 584; *Byrne v. Doughty*, 13 Ga. 46; *Codwise v. Hacker*, 1 Calnes (N. Y.) 527.

<sup>202</sup> *Lewis v. Read*, 13 Mees. & W. 834; *Abbott v. May*, 50 Ala. 97; *Gimon v. Terrell*, 38 Ala. 208; *Byrne v. Doughty*, 13 Ga. 46; *Burr & Co. v. Howard*, 58 Ga. 564; *Paul v. Berry*, 78 Ill. 158; *Robinson v. Chapline*, 9 Iowa, 91; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *American Min. & Smelting Co. v. Converse*, 175 Mass. 449; *Hesse v. Travelers' Protective Ass'n*, 72 Mo. App. 598; *Stokes v. Mackay*, 140 N. Y. 649; *Fischer v. Jordan*, 54 App. Div. (N. Y.) 621; *Garrett v. Gonter*, 42 Pa. 143; *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 753; *Iron City Nat. Bank v. Fifth Nat. Bank* (Tex. Civ. App.) 47 S. W. 533; *Hortons v. Townes*, 6 Leigh (Va.) 47; *Robinson v. Superior Rapid Transit R. Co.*, 94 Wis. 345, 59 Am. St. Rep. 897; *Heath v. Paul*, 81 Wis. 532; *Cooper v. Schwartz*, 40 Wis. 54. See ante, § 128.

<sup>203</sup> *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 753; *Robinson v. Superior Rapid Transit R. Co.*, 94 Wis. 345, 59 Am. St. Rep. 897. See post, § 143.



laid down as to what will constitute an implied ratification in any particular case, except in so far as has been said heretofore that the acts must be such as to show an intention on the part of the principal to ratify or to estop him to deny such intention. It may be stated generally, however, that if a principal with a full knowledge of all the facts, so acts or conducts himself as to make it appear that he has sanctioned the agent's unauthorized acts or if with such knowledge he has so acted as to lead the third party to believe that he has sanctioned them, and the latter has acted upon such belief in good faith, and it would be to his prejudice to allow the principal to deny such acts, he will be held to have impliedly ratified them.<sup>204</sup> It is a universal rule of law that, "if a man, either by word or conduct, has intimated that he consents to an act which has been done and will offer no opposition thereto, although it could not lawfully have been done without his consent, and thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act, so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."<sup>205</sup> And especially will a ratification be implied where the unauthorized acts are for the principal's benefit; as where a policy of insurance for whom it may concern, was obtained by R. and an action was brought thereon for the use of M., the owner.<sup>206</sup> It is obviously useless to attempt the statement of all the circumstances from which a ratification will be implied, and only the most usual forms of implied ratification will be discussed, giving also such illustrations that

<sup>204</sup> *Cairncross v. Lorimer*, 7 Jur. (N. S.) 149; *Ward v. Williams*, 26 Ill. 447, 79 Am. Dec. 385; *Searing v. Butler*, 69 Ill. 575; *Szyman-ski v. Plassan*, 20 La. Ann. 90, 96 Am. Dec. 382; *Ward v. Warfield*, 3 La. Ann. 468; *Flower v. Downs*, 6 La. Ann. 540; *Truesdall v. Ward*, 24 Mich. 117; *Heyn v. O'Hagen*, 60 Mich. 150; *Taylor v. Conner*, 41 Miss. 722, 97 Am. Dec. 419; *Linn v. Wright*, 18 Tex. 317, 70 Am. Dec. 282; *Burgess v. Harris*, 47 Vt. 322.

<sup>205</sup> By Ld. Chancellor in *Cairncross v. Lorimer*, 7 Jur. (N. S.) 149; *Truesdall v. Ward*, 24 Mich. 117-134, and cases cited; *Heyn v. O'Hagen*, 60 Mich. 150.

<sup>206</sup> *Fleming v. Marine Ins. Co.*, 4 Whart. (Pa.) 59, 33 Am. Dec. 33.

one may deduce therefrom a rule as near as possible for any given facts or circumstances.

**§ 139. Ratification implied from similar acts.**

A ratification may be implied from the previous acts of the principal under similar circumstances.<sup>207</sup> Thus, if, in consequence of a notorious agency, the agent is in the habit of drawing bills, which the principal has regularly paid, this is such an affirmance of his power to draw, that the principal will be bound to pay other bills, though the agent should misapply the money raised by such bills.<sup>208</sup> Or it may be implied from the express ratification of subsequent acts of a similar nature.<sup>209</sup> But the fact that the principal has expressly authorized the doing of an act in the future will not imply a ratification of that act already accomplished without the principal's knowledge.<sup>210</sup> And where an agent does an act which he was prohibited to do, as where he makes a forbidden purchase of goods, the fact that the principal appropriates and sells other goods purchased at another time is not a ratification of the first purchase.<sup>211</sup>

**§ 140. Ratification by accepting and retaining benefits.**

(a) *In general.*—Perhaps the most common method of implied ratification is by acceptance by the principal, with a full knowledge of all the facts, of the benefits of the agent's unauthorized acts performed in his behalf. If the unauthorized act is such a one as can be ratified by parol, and the principal, knowing all the facts, accepts and retains the benefits of such act, he will be held to have ratified it. This rule is based on the doctrine of ratification in toto, which

<sup>207</sup> See *Austin v. Burroughs*, 62 Mich. 181; *Gallinger v. Lake Shore Traffic Co.*, 67 Wis. 529; *Wheeler v. McGuire*, 86 Ala. 398; *Chicago & N. W. R. Co. v. James*, 24 Wis. 388; *Gibson v. Snow Hardware Co.*, 94 Ala. 346.

<sup>208</sup> *Hooe v. Oxley*, 1 Wash. (Va.) 19, 1 Am. Dec. 425.

<sup>209</sup> *Hall v. Chicago, M. & St. P. R. Co.*, 48 Wis. 317. See *Oglesby v. Smith*, 38 Mo. App. 67.

<sup>210</sup> *Moore v. Lockett*, 2 Bibb (Ky.) 67, 4 Am. Dec. 683. But see *Farmers' Mut. Fire Ins. Co. v. Marshall*, 29 Vt. 23; *Rice v. McLaren*, 42 Me. 157.

<sup>211</sup> *Schollay v. Moffitt-West Drug Co.* (Colo. App.) 67 Pac. 182.

has been treated in a previous section.<sup>212</sup> As was there seen a principal must either ratify the whole transaction or repudiate the whole. He cannot separate the transaction and ratify the part only that is beneficial to him, repudiating the remainder; but if he, of his own election and with full knowledge, accepts and retains the benefits of an unauthorized transaction, he must also accept the part that is not beneficial, and will be held to have ratified the whole.<sup>213</sup> The

<sup>212</sup> Ante, §§ 108, 109.

<sup>213</sup> *United States*: *Veazie v. Williams*, 8 How. 134; *Columbia Bank v. Patterson's Adm'r*, 7 Cranch, 299; *Gold Min. Co. v. National Bank*, 96 U. S. 640; *Robinson v. Mutual Ben. Life Ins. Co.*, 16 Blatchf. 194, Fed. Cas. No. 11,961.

*Alabama*: *Herring v. Skaggs*, 73 Ala. 446; *Taylor v. Agricultural & Mech. Ass'n*, 68 Ala. 229; *Jones v. Atkinson*, 68 Ala. 167; *Blevins v. Pope*, 7 Ala. 371.

*Arkansas*: *Kelly v. Carter*, 55 Ark. 112; *Daniels v. Brodie*, 54 Ark. 216; *Snow v. Grace*, 29 Ark. 131; *Pike v. Douglass*, 28 Ark. 59.

*Colorado*: *Moffitt-West Drug Co. v. Lyneman*, 10 Colo. App. 249; *Breed v. Central City First Nat. Bank*, 4 Colo. 481.

*Connecticut*: *Dunn v. Hartford & W. H. R. Co.*, 43 Conn. 434.

*Georgia*: *Howard v. Cassels*, 105 Ga. 412, 70 Am. St. Rep. 44; *McDowell v. McKenzie*, 65 Ga. 630; *Turner v. Wilcox*, 54 Ga. 593; *Murray v. Walker*, 44 Ga. 58; *Ketchum v. Verdell*, 42 Ga. 534; *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665.

*Illinois*: *Carlin v. Brown*, 80 Ill. App. 541; *Connett v. Chicago*, 114 Ill. 233; *Aurora Agricultural & Horticultural Soc. v. Paddock*, 80 Ill. 263; *Cochran v. Chitwood*, 59 Ill. 53; *Pope v. Lowitz*, 14 Ill. App. 96.

*Indiana*: *Terry v. Provident Fund Soc.*, 13 Ind. App. 1, 55 Am. St. Rep. 217; *Wallace v. Lawyer*, 90 Ind. 499; *Hauss v. Niblack*, 80 Ind. 407; *Fouch v. Wilson*, 59 Ind. 93.

*Iowa*: *Beldman v. Goodell*, 56 Iowa, 592; *Eadie v. Ashbaugh*, 44 Iowa, 519; *Fleishman v. Ver Does*, 111 Iowa, 322; *Elkenberry v. Edwards*, 67 Iowa, 14; *Warder v. Pattee*, 57 Iowa, 515.

*Kansas*: *Ehrsam v. Mahan*, 52 Kan. 245; *Durham v. Carbon Coal & Min. Co.*, 22 Kan. 232; *Waterson v. Rogers*, 21 Kan. 529; *Babcock v. Deford*, 14 Kan. 408.

*Kentucky*: *Ward v. Small's Adm'r*, 90 Ky. 198; *Logan County Bank v. Townsend*, 8 Ky. L. R. 694, 3 S. W. 122; *Singer Mfg. Co. v. Stephens*, 21 Ky. 946, 53 S. W. 525.

*Louisiana*: *Szymanski v. Plassam*, 20 La. Ann. 90, 96 Am. Dec. 382; *Massieu's Succession*, 24 La. Ann. 237.

principal's acts of acceptance may show a ratification, even though he has expressly declared that he will not assent to

*Maine:* Hastings v. Bangor House Proprietors, 18 Me. 436; Newhall v. Dunlap, 14 Me. 180, 31 Am. Dec. 45.

*Maryland:* Maddux v. Bevan, 39 Md. 485; Reynolds v. Davison, 34 Md. 662.

*Massachusetts:* Ely v. James, 123 Mass. 36; Churchhill v. Palmer, 115 Mass. 310; Harrod v. McDaniels, 126 Mass. 413; Narragansett Bank v. Atlantic Silk Co., 3 Metc. 282.

*Michigan:* Bacon v. Johnson, 56 Mich. 182; Vaughn v. Sheridan, 50 Mich. 155; Nichols v. Shaffer, 63 Mich. 599; Gardner v. Warren, 52 Mich. 309.

*Minnesota:* Payne v. Hackney, 84 Minn. 195.

*Mississippi:* Taylor v. Conner, 41 Miss. 722, 97 Am. Dec. 419.

*Missouri:* Barrett v. Davis, 104 Mo. 549; Ruggles v. Washington County, 3 Mo. 496; Bohlmann v. Rossi, 73 Mo. App. 312; Huttig Sash & Door Co. v. Gitchell, 69 Mo. App. 115; J. T. Donovan Real Estate Co. v. Clark, 84 Mo. App. 163.

*Nebraska:* Hughes v. North American Ins. Co., 40 Neb. 626; United States School-Furniture Co. v. School Dist. No. 87, 56 Neb. 645; Brong v. Spence, 56 Neb. 638 (although he is misinformed as to some of the provisions of a contract); Swartz v. Duncan, 38 Neb. 782.

*New Hampshire:* Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Low v. Connecticut & P. Rivers R. Co., 46 N. H. 284; Hatch v. Taylor, 10 N. H. 538.

*New Jersey:* Keim v. Lindley (N. J. Eq.) 30 Atl. 1063; Gullick v. Grover, 33 N. J. Law, 463, 97 Am. Dec. 728; Cooley v. Perrine, 41 N. J. Law, 322, 32 Am. Rep. 210; Tooker v. Sloan, 30 N. J. Eq. 394.

*New York:* Fowler v. New York Gold Exch. Bank, 67 N. Y. 138; Hobkirk v. Green, 26 Misc. 18; West v. Banigan, 51 App. Div. 328; Moss v. Rossie Lead Min. Co., 5 Hill, 137; Palmerton v. Huxford, 4 Denio, 166; Houghton v. Dodge, 5 Bosw. 326; Bliven v. Lydecker, 130 N. Y. 102.

*North Carolina:* Rudasill v. Falls, 92 N. C. 222.

*Ohio:* State v. Perry, Wright, 662; Frank v. Jenkins, 22 Ohio St. 597.

*Oklahoma:* Faut v. Campbell, 8 Okl. 586.

*Oregon:* Coleman v. Stark, 1 Or. 115.

*Pennsylvania:* Kramer v. Dinsmore, 152 Pa. 264; Wright v. Burbank, 64 Pa. 247; Mundorff v. Wickersham, 63 Pa. 87, 3 Am. Rep. 531.

*Tennessee:* Seago v. Martin, 6 Helsk. 308.

*Texas:* Hicks v. Ross, 71 Tex. 358; Sessums v. Henry, 38 Tex. 37.

*Utah:* Brown v. Parsons, 10 Utah, 223.

the agent's unauthorized act.<sup>214</sup> But where the principal is represented by an authorized agent, and a third person assumes, without the principal's knowledge or consent, to make certain statements or representations for the purpose of promoting the transaction, the principal's acceptance of the transaction negotiated by his agent does not amount to a ratification of such statements or representations.<sup>215</sup>

It must be observed here, as in all other cases, that it is essential that the principal should have had full knowledge of all the material facts in the case, or else he should have intentionally received and retained the benefits, cognizant of his want of knowledge, and without trying to become better informed. If one or the other of these circumstances does not exist, his mere accepting the benefits will not amount to a ratification.<sup>216</sup> Thus, where a principal took security from an agent for the payment of moneys which he had

*Vermont:* Baptist Convention v. Ladd, 58 Vt. 95; State v. Smith, 48 Vt. 266.

*Washington:* Konnerup v. Frandsen, 8 Wash. 551.

*Wisconsin:* Saveland v. Green, 40 Wis. 431; Reid v. Hibbard, 6 Wis. 175; Miles v. Ogden, 54 Wis. 573; Morse v. Ryan, 26 Wis. 356; Parish v. Reeve, 63 Wis. 315; Moody & Meckelburg Co. v. Methodist Episcopal Church Trustees, 99 Wis. 49; Andrews v. Robertson, 111 Wis. 334, 87 Am. St. Rep. 870.

<sup>214</sup> Hatch v. Taylor, 10 N. H. 538.

<sup>215</sup> Tecumseh Nat. Bank v. Chamberlain Banking House, 63 Neb. 163.

<sup>216</sup> Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43; Schutz v. Jordan, 32 Fed. 55; Bell v. Cunningham, 3 Pet. (U. S.) 69; Wheeler v. Northwestern Sleigh Co., 39 Fed. 349; Herring v. Skaggs, 73 Ala. 446; Howe Mach. Co. v. Ashley, 60 Ala. 496; Bott v. McCoy, 20 Ala. 578, 56 Am. Dec. 223; Ballard v. Nye (Cal.) 69 Pac. 481; Oxford Lake Line v. First Nat. Bank, 40 Fla. 349; Manning v. Gasharle, 27 Ind. 399; Roberts v. Rumley, 58 Iowa, 301; Bohart v. Oberne, 36 Kan. 284; Gaskill v. Huffaker, 20 Ky. L. R. 1555, 49 S. W. 770; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; Pennsylvania, D. & M. Steam Nav. Co. v. Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543; Manning v. Leland, 153 Mass. 510; Thacher v. Pray, 113 Mass. 291, 18 Am. Rep. 480; Kelley v. Newburyport & A. Horse R. Co., 141 Mass. 496; Combs v. Scott, 12 Allen (Mass.) 493; Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Boehm v. Yanquell, 15 Ohio Cir. Ct. R. 454, 8 Ohio Dec. 184; Fargo v. Cravens, 9 S. D. 646; Aetna Ins. Co. v. Northwestern Iron Co., 21 Wis. 458.

previously and without authority collected from debtors of the principal, and wrongfully appropriated to his own use, this would not amount to a ratification of payments made to the agent where the principal had not full knowledge of all the material facts when the security was taken.<sup>217</sup> But it has been held that where a principal accepts security for a debt he will be presumed to have taken it with full knowledge, and to have ratified the arrangements made by his agent.<sup>218</sup> Nor does a principal, by accepting the benefits of a person employed by an agent without authority, ratify the employment, where he supposed that the servant was engaged by the agent in his individual interest, and he settled with the agent on that theory.<sup>219</sup> Where an agent makes a contract outside of his actual and apparent power, and the fruits of his contract are received by his principals in ignorance of the material facts, and without any knowledge that the contract had been made in their behalf or names, but were received and retained by them upon the information and understanding that the money was paid to satisfy in part a liability existing against the agent and in their favor, such receipt and retention will not amount to a ratification of the unauthorized contract.<sup>220</sup>

(b) **Illustrations.**—Thus, a principal will be held to have made an implied ratification where, with the full knowledge of all the facts, he receives and retains the consideration for an unauthorized mortgage of personal estate,<sup>221</sup> or appropriates the proceeds of a trespass by his agent,<sup>222</sup> or receives and applies money for his own benefit in the manner expressed in the receipt given therefor by his agent,<sup>223</sup> or where he makes a settlement with his agent and pays over or re-

<sup>217</sup> *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157. And see *Gaskill v. Huffaker*, 20 Ky. L. R. 1555, 49 S. W. 770.

<sup>218</sup> *Meehan v. Forrester*, 52 N. Y. 277.

<sup>219</sup> *Swayne v. Union M. L. Ins. Co.* (Tex. Civ. App.) 49 S. W. 518; *Williams v. Moore*, 24 Tex. Civ. App. 402.

<sup>220</sup> *Bohart v. Oberne*, 36 Kan. 284.

<sup>221</sup> *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

<sup>222</sup> *Exum v. Brister*, 35 Miss. 391; *Byne v. Hatcher*, 75 Ga. 289.

<sup>223</sup> *Lyman v. Norwich University*, 28 Vt. 560.

ceives from him the balance due;<sup>224</sup> or where he receives notes of his agent in settlement in full, it will be a ratification of the agent's acts in collecting the amounts remitted;<sup>225</sup> or where he retains the title to land, he thereby ratifies his agent's unauthorized act in accepting a conveyance thereof, in payment of a debt due the principal, or otherwise.<sup>226</sup> So part payment of an amount claimed on a grain deal has been held as a ratification of the agency of a telegraph company in transmitting messages, by which such deal was made.<sup>227</sup> So a principal will be held to have ratified a settlement made by his agent without authority, where with full knowledge he accepts and retains the money received on such settlement;<sup>228</sup> or where he accepts and uses confederate currency which his agent has received in payment of the principal's note, though the usual rule is that an agent cannot receive anything but lawful money in payment of his principal's claim.<sup>229</sup> A contract of a minister for the repair of a church is ratified by the trustees, who, knowing thereof and of the progress of the work, make no objection, but make part payments, and accept and use the building with full knowledge of the facts.<sup>230</sup> Though a power of attorney to sell land does not authorize a conveyance to be made, yet if the agent, acting under the power, makes a conveyance as well as a sale, and the principal, being informed thereof, approves what has been done in his name, and accepts notes and mortgages given by the purchaser, and insists upon their payment, he ratifies the conveyance, and

<sup>224</sup> *Turner v. Wilcox*, 54 Ga. 593; *Francis v. Kerker*, 85 Ill. 190; *Sentell v. Kennedy*, 29 La. Ann. 679; *Warneken v. Marchand*, 18 La. Ann. 147; *Reed v. Ritchey*, 2 La. Ann. 797; *Beall v. January*, 62 Mo. 434; *Richmond Mfg. Co. v. Starks*, 4 Mason, 296, Fed. Cas. No. 11,802; *Himes v. Herr*, 3 Pa. Super. Ct. 124, 39 Wkly. Notes Cas. 568.

<sup>225</sup> *Luckie v. Johnston*, 89 Ga. 321; *Lafitte v. Godchaux*, 35 La. Ann. 1161; *Cushman v. Loker*, 2 Mass. 106.

<sup>226</sup> *Miles v. Ogden*, 54 Wis. 573. Compare *Carter v. Roland*, 53 Tex. 540; *Meehan v. Forrester*, 52 N. Y. 277.

<sup>227</sup> *Culver v. Warren*, 36 Kan. 391.

<sup>228</sup> *National Imp. & Const. Co. v. Maiken*, 103 Iowa, 118.

<sup>229</sup> *Murray v. Walker*, 44 Ga. 58.

<sup>230</sup> *Moody & Meckelburg Co. v. Trustees of M. E. Church*, 99 Wis. 49.

the effect of the power of attorney under which the agent acted becomes immaterial.<sup>231</sup>

If a principal in any manner deals with the notes of his agent as his own, a ratification of unauthorized acts in the principal's name in reference thereto will be implied thereby.<sup>232</sup> Thus, it was held that an indorsement, by a principal whose name had been indorsed upon a note without authority, of a waiver thereon of payment, presentment, protest, and notice, was sufficient ratification of the prior indorsement by the attorney.<sup>233</sup> But where an agent forged an assignment by his principal of a certificate of stock, and deposited the check received therefor to the principal's credit, the mere fact that such agent afterwards withdrew the moneys under a power of attorney from his principal to draw checks does not show a ratification of the assignment.<sup>234</sup>

If a person assuming to act as the agent of a corporation, but without legal authority, makes a contract, and the corporation receives the benefit of it, and uses the property acquired under it, such acts will ratify the contract, and render the corporation liable thereon.<sup>235</sup> Where an unauthorized person solicits an application for insurance, and the insurance company recognizes the regularity of the application, it thereby recognizes such person as its agent, and the payment of the first advance premium to him is payment to the company, and estops it from denying such payment to the home office.<sup>236</sup>

(c) **Ratification of compromise by accepting proceeds.**—If an agent, without authority from his principal, enters into a compromise on the latter's behalf, a ratification thereof

<sup>231</sup> *Delano v. Jacoby*, 96 Cal. 275, 31 Am. St. Rep. 201.

<sup>232</sup> *Harrod v. McDaniels*, 126 Mass. 413; *Dow's Ex'r v. Spenny's Ex'r*, 29 Mo. 386; *Baer v. Lichten*, 24 Ill. App. 311; *Commercial Bank v. Warren*, 15 N. Y. 577.

<sup>233</sup> *Allin v. Williams*, 97 Cal. 403.

<sup>234</sup> *Chicago Edison Co. v. Fay*, 164 Ill. 323.

<sup>235</sup> *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665; *Episcopal Charitable Soc. v. Episcopal Church*, 1 Pick. (Mass.) 372; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch (U. S.) 299.

<sup>236</sup> *Terry v. Provident Fund Soc.*, 13 Ind. App. 1, 55 Am. St. Rep. 217.



will be implied where the principal, with full knowledge, accepts the proceeds of such compromise.<sup>237</sup> So the compromise of a suit by the agent will be ratified by the principal abandoning the suit.<sup>238</sup>

(d) **Ratification of unauthorized purchase by receiving property.**—Where an unauthorized purchase of property has been made on behalf of a principal, by another as agent, a ratification of such purchase will be implied, if the principal receives and uses or disposes of such property, or pays the purchase money.<sup>239</sup> “Where one professes to act as agent of another, even if he has no authority at all, and as such agent obtains goods which in fact go to the use and

<sup>237</sup> *Hauss v. Niblack*, 80 Ind. 407; *National Imp. & Const. Co. v. Maiken*, 103 Iowa, 118; *Culverhouse v. Marx*, 39 La. Ann. 809; *De-laney v. Levi*, 19 La. Ann. 251; *Kelley v. Newburyport & A. Horse R. Co.*, 141 Mass. 496; *Jackson v. Badger*, 35 Minn. 52; *Adams v. Smith*, 19 Nev. 259; *Tooker v. Sloan*, 30 N. J. Eq. 394; *Keeler v. Salisbury*, 33 N. Y. 648; *Haar v. Industrial Ben. Ass'n*, 71 Hun (N. Y.) 554; *Lowenstein v. McIntosh*, 37 Barb. (N. Y.) 251; *Ives v. Ives*, 80 Hun (N. Y.) 136; *Tate v. Marco*, 27 S. C. 493; *Higginbotham v. May*, 90 Va. 233; *Strasser v. Conklin*, 54 Wis. 102; *Burke v. Milwaukee, L. S. & W. R. Co.*, 83 Wis. 410.

<sup>238</sup> *Holt v. Cooper*, 41 N. H. 111.

<sup>239</sup> *Cornwal v. Willson*, 1 Ves. Sr. 509; *Willinks v. Hollingsworth*, 6 Wheat. (U. S.) 241; *Clark's Ex'rs v. Van Riemsdyk*, 9 Cranch (U. S.) 153; *Lorraine v. Cartwright*, 3 Wash. C. C. 151, Fed. Cas. No. 8,500; *Bell v. Cunningham*, 3 Pet. (U. S.) 81; *Pike v. Douglass*, 28 Ark. 59; *Moffitt-West Drug Co. v. Lyneman*, 10 Colo. App. 249; *Witcher v. Gibson*, 15 Colo. App. 163; *Duncan v. Kearney*, 72 Conn. 585; *McDowell v. McKenzie*, 65 Ga. 630; *Ketchum v. Verdell*, 42 Ga. 534; *Haney School-Furniture Co. v. Hightower Baptist Inst.*, 113 Ga. 289; *Campbell v. Millar*, 84 Ill. App. 208; *Evans v. Chicago & Rock Island R. Co.*, 26 Ill. 189; *Howe v. Combs*, 18 Ky. L. R. 1002, 38 S. W. 1052; *Southern Lumber Co. v. Wireman*, 19 Ky. L. R. 585, 41 S. W. 297; *Henry Vogt Mach. Co. v. Lingenfelser*, 23 Ky. L. R. 38, 62 S. W. 499; *Slocomb v. Cage*, 22 La. Ann. 165; *Woods v. Rochi*, 32 La. Ann. 210; *Hastings v. Bangor House Proprietors*, 18 Me. 436; *Odiorne v. Maxcy*, 13 Mass. 178; *Sartwell v. Frost*, 122 Mass. 184; *Bearce v. Bowker*, 115 Mass. 129; *Wright v. Vineyard M. E. Church*, 72 Minn. 78; *Scott v. Middletown, U. & W. G. R. Co.*, 86 N. Y. 200; *Kraus v. J. H. Mohlman Co.*, 18 Misc. (N. Y.) 430; *Haworth v. Truby*, 138 Pa. 222. But see *Carson v. Cummings*, 69 Mo. 325.

benefit of the principal, the seller may at any time, before the principal has settled with the pretended agent, notify the principal of the truth of the case and demand payment. If the principal accepts the property knowing all the facts, that is a ratification of the agency, but even if he knows nothing of the facts, but accepts the property as sold him by the agent, yet if the agent was not in fact the true owner and the seller so notifies the purchaser before any settlement, the right of action in the seller exists."<sup>240</sup> Thus, the ratification of an unauthorized purchase will be implied where the principal, with a full knowledge of all the facts, does not deny the agent's authority, but merely complains of the manner in which it was executed,<sup>241</sup> or says that it is all right and directs that the goods be paid for;<sup>242</sup> or, where the goods are unauthorizedly purchased on credit, by retaining the goods after notice of such fact;<sup>243</sup> or where he claims title to goods which have been sent to him under an unauthorized purchase or exchange by his agent.<sup>244</sup> So where the pastor of a church, who was chairman of the building committee, ordered an organ for the church, and the trustees voted three different times not to accept the organ, but it was put up, and the seller was not notified of the trustees' decision until after it had been used three years, the purchase by the pastor was thereby ratified, whether he had authority to order the organ or not.<sup>245</sup> So the principal's entry and making improvements or sale of land purchased, leased, or exchanged by an unauthorized agent, will amount to a ratification of such purchase, lease, or exchange.<sup>246</sup> Likewise where a principal accepts a deed and retains land, unauthorizedly purchased by an agent, he thereby ratifies the same and will be liable on

<sup>240</sup> By McCay, J., in *Ketchum v. Verdell*, 42 Ga. 534.

<sup>241</sup> *Johnson v. Jones*, 4 Barb. (N. Y.) 369.

<sup>242</sup> *Hess v. Baar*, 14 Misc. (N. Y.) 286.

<sup>243</sup> *Welch v. Clifton Mfg. Co.*, 55 S. C. 568.

<sup>244</sup> *Brooks v. Fletcher*, 56 Vt. 624; *Jones v. Atkinson*, 68 Ala. 167; *Cochran v. Chitwood*, 59 Ill. 53.

<sup>245</sup> *Wright v. Vineyard M. E. Church*, 72 Minn. 78.

<sup>246</sup> *Ehrmantraut v. Robinson*, 52 Minn. 333; *Hall v. White*, 123 Pa. 95; *Vanderbilt v. Persse*, 3 E. D. Smith (N. Y.) 428; *Chambers v. Haney*, 45 La. Ann. 447.

a mortgage given in part payment of such purchase.<sup>247</sup> But a mere declaration of ownership by the alleged principal, has been held insufficient to ratify an unauthorized purchase of stock in his name by an alleged agent.<sup>248</sup> Nor can the ratification of an unauthorized purchase be implied from an agreement to give a note for the removal of a lien upon such goods where there was no promise to pay for the goods.<sup>249</sup> So where an agent makes a prohibited purchase of goods, the fact that his principal appropriates and sells goods purchased at another time does not amount to a ratification of this purchase.<sup>250</sup>

— **Principal should restore property or benefits, or pay for the same.** When a principal, upon receiving property or other benefits, is informed that they were obtained in his name, it is not enough that he merely informs the seller that the purchase or other obtaining of benefits was unauthorized; but he should also, within a reasonable time either restore the property or benefits, or pay for them if he converts them to his own use.<sup>251</sup> Where an agent in charge of a store purchased goods which are mingled with the rest of the stock and sold, the principal cannot keep the proceeds, and repudiate the purchase on the ground that it was unauthorized.<sup>252</sup> So a principal who receives notes and machinery as part of a transaction negotiated by an agent cannot retain such property and repudiate a condition in the agreement by which they were obtained.<sup>253</sup> And where a principal, sued on an unauthorized contract made by his agent in his name, learns on the trial that he has accepted

<sup>247</sup> *McKinstry v. Citizens' Bank of Wichita*, 57 Kan. 279.

<sup>248</sup> *Rutland & B. R. Co. v. Lincoln*, 29 Vt. 206.

<sup>249</sup> *Cassidy v. Aldhous*, 58 N. Y. St. Rep. 49.

<sup>250</sup> *Schollay v. Moffitt-West Drug Co.*, 17 Colo. App. 126.

<sup>251</sup> *Pike v. Douglass*, 28 Ark. 59; *First Nat. Bank of Las Vegas v. Oberne*, 121 Ill. 25; *Smith v. Holbrook*, 99 Ga. 256; *Kraus v. J. H. Mohlman Co.*, 18 Misc. (N. Y.) 430; *Cran v. Sickel*, 51 Neb. 323, 66 Am. St. Rep. 478; *Russ v. Hansen* (Iowa) 93 N. W. 502; *Fleishman v. Ver Does*, 111 Iowa, 322; *Andrews v. Robertson*, 111 Wis. 334, 37 Am. St. Rep. 870.

<sup>252</sup> *Moffitt-West Drug Co. v. Lyneman*, 10 Colo. App. 249; *Aultman Co. v. McDonough*, 110 Wis. 263.

<sup>253</sup> *Aultman Co. v. McDonough*, 110 Wis. 263.

and retained the benefits of the contract, but fails to return or tender a return thereof to the other contracting party, he ratifies the contract.<sup>254</sup>

If, however, the principal, upon being informed of the unauthorized purchase, attempts to separate the goods so purchased from the rest of his stock, with which they had been mixed by the agent, so as to return them to the seller, but was unable to do so because of his inability to identify them, a retention under such circumstances does not amount to a ratification.<sup>255</sup> Nor is the principal bound to make such restoration as a condition of repudiation, where the knowledge that the agent has exceeded his authority does not reach the principal until it is out of his power to restore what he received through the transaction which he seeks to repudiate.<sup>256</sup> Thus, the principal may, upon learning that the agent exceeded his authority, repudiate the act without restoring the property, if, before he learned of the unauthorized act, he had disposed of the property so that he could not restore it, or if its restoration would be of no practical value to the other party.<sup>257</sup> So where defendant authorized an agent to obtain for a certain sum a release of plaintiff's interest in land, and the agent obtained the release, but agreed that, as part of the consideration, defendant should assume a debt of plaintiff, and defendant, in ignorance of such unauthorized agreement, sold the land, his failure, after being informed of it, to restore the property, was not a ratification.<sup>258</sup> Nor would the retaining of personal property by the principal be a ratification of the agent's unauthorized act in obtaining the property, where the principal, without the agent's acts, was entitled thereto.<sup>259</sup>

The unauthorized act of an agent in making an accommo-

<sup>254</sup> *Farmers' & Merchants' Bank v. Farmers' & Merchants' Nat. Bank*, 49 Neb. 379.

<sup>255</sup> *Schutz v. Jordan*, 32 Fed. 55.

<sup>256</sup> *Humphrey v. Havens*, 12 Minn. 298 (Gil. 196); *Martin v. Hickman*, 64 Ark. 217; *Swayne v. Union M. L. Ins. Co.* (Tex. Civ. App.) 49 S. W. 518.

<sup>257</sup> *Humphrey v. Havens*, 12 Minn. 298 (Gil. 196).

<sup>258</sup> *Martin v. Hickman*, 64 Ark. 217.

<sup>259</sup> *Baldwin Fertilizer Co. v. Thompson*, 106 Ga. 480.

dation note in the principal's name is not ratified, because part of the proceeds thereof are paid by the accommodated party to the agent in satisfaction of an unauthorized loan of the principal's money previously made by the agent, and because the principal, upon disavowing the act of his agent in executing the accommodation paper, does not voluntarily offer to repay this money to the person who discounted the paper; for the money was not obtained by the principal through the unauthorized act of the agent, but was received by the voluntary appropriation of the person for whose sole benefit the notes were discounted, in satisfaction of a precedent debt contracted without the knowledge or authority of the principal.<sup>260</sup>

**(e) Ratification of unauthorized loan by accepting proceeds.**

—The ratification of an unauthorized loan made on behalf of a principal will be implied where the latter, having knowledge of the facts, accepts the proceeds or benefits of such loan.<sup>261</sup> Thus, where an agent without the authority or knowledge of his principal borrows money and applies it to the payment and discharge of the legal liabilities of his principal, and the principal knowingly retains the benefit of such payment, the lender may recover therefor in an action against the principal for money had and received.<sup>262</sup> So the ratification of an unauthorized loan will be implied, where the principal, with full knowledge, sets up as a defense a mortgage on which the loan was obtained;<sup>263</sup> or

<sup>260</sup> *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728.

<sup>261</sup> *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640; *Taylor v. Agricultural & Mechanical Ass'n*, 68 Ala. 229; *Campbell v. Campbell*, 133 Cal. 33; *First Nat. Bank of Las Vegas v. Oberne*, 121 Ill. 25; *J. P. Calnan Const. Co. v. Brown*, 110 Iowa, 37; *McLean v. Ficke*, 94 Iowa, 283; *Perkins v. Boothby*, 71 Me. 91; *Episcopal Charitable Soc. v. Episcopal Church*, 1 Pick. (Mass.) 372; *Watson v. Bigelow*, 47 Mo. 413; *First Nat. Bank of Trenton v. Badger Lumber Co.*, 54 Mo. App. 327; *Shiras v. Morris*, 8 Cow. (N. Y.) 60; *Hazard v. Spears*, 4 Keyes (N. Y.) 469; *Thurston v. James*, 6 R. I. 103; *Marks v. Taylor*, 23 Utah, 152, 470; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

<sup>262</sup> *Perkins v. Boothby*, 71 Me. 91.

<sup>263</sup> *Gibson v. Norway Sav. Bank*, 69 Me. 579.

where he refuses to return the money;<sup>264</sup> or where he remains silent or promises to repay the money so borrowed.<sup>265</sup>

The above rule applies also to corporations. Thus, where a corporation retains and uses money borrowed for it by one of its officers without authority, it will be held to have ratified the loan.<sup>266</sup> So where all the negotiations respecting a loan made by a building and loan association are conducted by a clerk in the office of the agents of the association, and the papers are executed by the mortgagor under his direction, the association cannot repudiate his agency after accepting the benefits of the instruments procured by him.<sup>267</sup>

But if the money thus unauthorizedly borrowed goes into the principal's business without his knowledge, a ratification of such act cannot be inferred from the mere fact that the money borrowed went into his business, or was beneficial or advantageous to the principal, and the principal would not be liable therefor unless he promised to pay.<sup>268</sup> Thus, where a ship's husband has borrowed money on the vessel's account without the authority of the owners, the latter cannot be held to have impliedly ratified such act merely because the borrowed money has been expended in making repairs upon the vessel.<sup>269</sup>

(f) **Ratification of unauthorized sale or lease by acceptance.**—Where an agent makes an unauthorized sale of goods or land, or an unauthorized lease of land, in behalf of his principal, and the latter, with a full knowledge of all the

<sup>264</sup> *McDermott v. Jackson*, 97 Wis. 64.

<sup>265</sup> *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565; *Breed v. First Nat. Bank*, 4 Colo. 481; *Collins v. Cooper*, 65 Tex. 460.

<sup>266</sup> *Willis v. St. Paul Sanitation Co.*, 53 Minn. 370; *Taylor v. Agricultural & Mechanical Ass'n*, 68 Ala. 229; *Lyman v. Norwich University*, 28 Vt. 560. Compare *Holderness v. Baker*, 44 N. H. 414.

<sup>267</sup> *Pioneer Sav. & Loan Co. v. Baumann* (Tex. Civ. App.) 58 S. W. 49.

<sup>268</sup> *Arey v. Hall*, 81 Me. 17, 10 Am. St. Rep. 232; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 531; *Henry v. Wilkes*, 37 N. Y. 562; *Spooner v. Thompson*, 48 Vt. 259; *Heath v. Paul*, 81 Wis. 532.

<sup>269</sup> *Arey v. Hall*, 81 Me. 17, 10 Am. St. Rep. 232.

circumstances, accepts and makes use of the purchase price or rents from such sale or lease, he thereby impliedly ratifies the agent's unauthorized acts in making the same.<sup>270</sup> So a ratification of an unauthorized sale will be implied where the principal executes or joins in the execution of a conveyance of the property so sold;<sup>271</sup> or where he accepts and fills an order, and receives the consideration, for goods

<sup>270</sup> *Lindroth v. Litchfield*, 27 Fed. 894; *Abbott v. May*, 50 Ala. 97; *Snow v. Grace*, 29 Ark. 131; *Creson v. Ward*, 66 Ark. 209; *Burkhard v. Mitchell*, 16 Colo. 376; *Turner v. Wilcox*, 54 Ga. 593; *Harris v. Simmerman*, 81 Ill. 413; *Nicholson v. Doney*, 37 Ill. App. 531; *Barnett v. Gluting*, 3 Ind. App. 419; *Wallace v. Lawyer*, 90 Ind. 499; *C. Aultman & Co. v. Richardson*, 21 Ind. App. 211; *Palmer v. Cheney*, 35 Iowa, 281; *Deering v. Grundy County Nat. Bank*, 81 Iowa, 222; *Chamberlain v. Collinson*, 45 Iowa, 429; *Des Moines Nat. Bank v. Meredith*, 114 Iowa, 9; *Powell v. Gossom*, 18 B. Mon. (Ky.) 179; *Givens v. Cord* (Ky.) 44 S. W. 665; *White v. Sanders*, 32 Me. 188; *Reynolds v. Davison*, 34 Md. 662; *Vaughn v. Sheridan*, 50 Mich. 155; *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617; *Norton v. Bull*, 43 Mo. 113; *Reed v. Morton*, 24 Neb. 760, 8 Am. St. Rep. 247; *Clark v. Hyatt*, 55 N. Y. Super. Ct. 98; No. 121 Madison Ave. v. *Osgood*, 44 N. Y. State Rep. 489; *Krumm v. Beach*, 25 Hun (N. Y.) 293; *Johnson v. Jones*, 4 Barb. (N. Y.) 369; *Warden v. Eichbaum*, 3 Grant Cas. (Pa.) 42; *Hetfield v. Addicks*, 154 Pa. 1; *Central School Supply House v. School Board of South Middleton Tp.*, 9 Pa. Super. Ct. 110; *Robinson v. Bailey*, 19 R. I. 464; *Seago v. Martin*, 6 Helsk. (Tenn.) 308; *Houston & T. C. R. Co. v. Wright*, 15 Tex. Civ. App. 151; *Lyman v. Norwich University*, 28 Vt. 560; *Norman v. Bennett*, 32 W. Va. 614; *Parish v. Reeve*, 63 Wis. 315; *Walworth County Bank v. Farmers' Loan & Trust Co.*, 16 Wis. 629. See *Torrence v. Shedd*, 112 Ill. 466.

<sup>271</sup> *Mahoney v. Ungrich*, 39 N. Y. St. Rep. 139; *McClintock v. South Penn Oil Co.*, 146 Pa. 144; *Townsend v. Kennedy*, 6 S. D. 47; *Hartley State Bank v. McCorkell*, 91 Iowa, 660.

When one sells the land of another at auction, assuming to act as his agent, and receives a portion of the purchase-money, which he returns to the purchaser because of an alleged defect in the title, after the owner has tendered a deed to the purchaser, and has notified the agent in writing not to return the money, the acts of the owner are such a ratification of the agent's acts as will entitle the former, upon showing a good record title, to recover of the latter the purchase-money returned, as money received and had to the use and benefit of the former. *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122.

sold by an agent without authority;<sup>272</sup> or where he compromises with the agent a claim against the latter growing out of such unauthorized sale;<sup>273</sup> or where he enters into negotiations with such assumed agent, without reservation, for a settlement, on the basis that the latter is accountable for the price;<sup>274</sup> or where, when called upon to perform the contract, he did not repudiate it, but defended his non-compliance by stating that he had suffered losses which prevented his performance.<sup>275</sup> And the same is true where one, with the knowledge of the principal, purchases land as his agent, and conveys the same, in like capacity, by general warranty, and the principal accepts the benefits of the transaction, by collecting the purchase notes, although the grantee had no knowledge of an agency when he purchased.<sup>276</sup> So a principal will ratify an unauthorized lease made by his agent, by excepting from the general warranty in a deed from him a certain lease to the land,<sup>277</sup> or by otherwise recognizing its existence in a subsequent conveyance.<sup>278</sup>

But the mere receipt of a part of the proceeds of an unauthorized sale or lease, without evidence of any other circumstances, will not imply a ratification thereof.<sup>279</sup> As soon, however, as the principal learns that he has received the benefit of a portion of the proceeds of such a sale, he

<sup>272</sup> *Hitchcock v. Griffin*, 99 Mich. 447, 41 Am. St. Rep. 624; *Billings v. Mason*, 80 Me. 496; *Boyden v. Baldwin*, 12 Misc. (N. Y.) 549; *Blaess v. Nichols*, 115 Iowa, 373.

<sup>273</sup> *Ogden v. Marchand*, 29 La. Ann. 61; *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9.

<sup>274</sup> *Sanders v. Peck*, 87 Fed. 61.

<sup>275</sup> *Hartlove v. William Falt Co. of Baltimore City*, 89 Md. 254.

<sup>276</sup> *Rutherford v. Montgomery*, 14 Tex. Civ. App. 319.

<sup>277</sup> *Christopher v. National Brewery Co.*, 72 Mo. App. 121.

<sup>278</sup> *Appelbaum v. Galewski*, 34 Misc. (N. Y.) 281.

<sup>279</sup> *Harris v. Miner*, 28 Ill. 135; *Turner v. Brooks*, 2 Tex. Civ. App. 451; *Smith v. Tracy*, 36 N. Y. 79; *Oxford Lake Line v. First Nat. Bank*, 40 Fla. 349 (where the principal had no knowledge of certain unauthorized acts). An unauthorized contract for the sale of real estate, where the agent afterwards tenders back the cash received, and no deed is signed or delivered, will not be ratified by the mere fact that the owner retained the purchase notes. *Bromley v. Aday*, 70 Ark. 351.



should return or tender to the purchaser such sum; if he does not do so it will constitute a ratification of the sale.<sup>280</sup> If the principal expressly repudiates the lease, the fact that he allows the tenant to remain and accepts rent from him at the rate specified in the lease does not constitute a ratification thereof.<sup>281</sup> Nor will the receipt of the proceeds of an unauthorized sale of goods necessarily amount to a ratification, if the principal would have the right to receive them without ratifying.<sup>282</sup> Nor will the ratification of an unauthorized sale be inferred from a letter from the principal to the purchaser requesting him to give up or decline the purchase;<sup>283</sup> or from the fact that the principal, in ignorance of the unauthorized sale, received and collected a check, and applied the proceeds to the payment of a debt due to him from the agent, in payment of which it was given, although the check was drawn to the agent by the purchaser.<sup>284</sup> Nor will such a sale be ratified, where an attorney in fact, in excess of his authority, conveys lands of his principal, and the latter himself afterwards sells other lands, adjoining thereto, and describes it as being bounded by the land deeded by his attorney.<sup>285</sup>

If the principal's goods have been sold by an agent without his authority, he may recover them or their value although he has already received the proceeds of sale, where he was ignorant of the facts in the case.<sup>286</sup>

**(g) Ratification of unauthorized representations by accepting benefits.**—If a contract is brought about by an agent by means of unauthorized or fraudulent representations, a ratification of such contract, with full knowledge of all the facts, by accepting and retaining the benefits thereunder, also ratifies such unauthorized representations of the agent and

<sup>280</sup> *Johnston v. Milwaukee & W. Inv. Co.*, 49 Neb. 68. And see *infra* (d).

<sup>281</sup> *Owens v. Swanton*, 25 Wash. 112.

<sup>282</sup> *White v. Sanders*, 32 Me. 188.

<sup>283</sup> *Johnson v. Craig*, 21 Ark. 533.

<sup>284</sup> *Thacher v. Pray*, 113 Mass. 291, 18 Am. Rep. 480.

<sup>285</sup> *Rice v. Tavernier*, 8 Minn. 248, 83 Am. Dec. 778.

<sup>286</sup> *Thacher v. Pray*, 113 Mass. 291; *Thompson v. Craig*, 16 Abb. Pr. (N. S.; N. Y.) 29.

the principal will not be permitted to deny them.<sup>287</sup> The principal cannot separate the transaction and accept the advantages or benefits of the contract and reject the fraudulent or unauthorized means by which it was obtained. Thus, if false representations are made by an agent employed to sell property as to the price paid for it by his principal, they must be regarded as made by the principal if he accepts their fruits. He cannot accept the property secured by means of such representations and then disclaim responsibility for the fraud through which the property was secured.<sup>288</sup> If, however, the principal does not know of such fraudulent representations when he ratifies the transaction, he cannot be held liable in an action of deceit.<sup>289</sup> Nor will he under such circumstances be held to have ratified such unauthorized representations.<sup>290</sup> The fact that lumber is used in repairing a building for the owner is not a ratification of the contractor's unauthorized representations that he was authorized to purchase the lumber for the owner.<sup>291</sup>

(h) Endeavor to prevent loss not ratification.—Cases may sometimes arise in which the principal is placed in such a position that unless he acts at once he will suffer greater loss by reason of the agent's unauthorized acts. In such cases if the principal repudiates the unauthorized acts, the fact that he endeavors to prevent further loss, as by taking or

<sup>287</sup> *Herring v. Skaggs*, 73 Ala. 446; *Riser v. Walton*, 78 Cal. 490; *Wilder v. Beede*, 119 Cal. 646; *Mitchell v. Finnell*, 101 Cal. 614; *Du Souchet v. Dutcher*, 113 Ind. 249; *Higbee v. Trumbauer*, 112 Iowa, 74; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698; *Albitz v. Minneapolis & Pac. R. Co.*, 40 Minn. 476; *Mayer v. Dean*, 115 N. Y. 556; *Smith v. Tracy*, 36 N. Y. 83; *Krumm v. Beach*, 25 Hun (N. Y.) 293; *Union Trust Co. v. Phillips*, 7 S. D. 225; *Barnard v. Roane Iron Co.*, 85 Tenn. 139; *Franklin v. Ezell*, 1 Sneed (Tenn.) 497; *Gulf, Colo. & S. F. R. Co. v. Pittman*, 4 Tex. Civ. App. 167; *American Nat. Bank v. Cruger*, 91 Tex. 446; *Morse v. Ryan*, 26 Wis. 356.

<sup>288</sup> *Fairchild v. McMahon*, 139 N. Y. 290, 36 Am. St. Rep. 701.

<sup>289</sup> *Keefe v. Sholl*, 181 Pa. 90.

<sup>290</sup> *Day v. National Mut. Bldg. & Loan Ass'n*, 96 Va. 484; *L. D. Garrett Co. v. McComb*, 58 App. Div. (N. Y.) 419.

<sup>291</sup> *Parker v. Brown*, 131 N. C. 264.

retaining security for that purpose, will not constitute a ratification of such acts.<sup>292</sup> A ratification will not be implied, where the principal accepts the results of an unauthorized act in order to prevent further loss and protect himself.<sup>293</sup> So a voluntary payment of a certain sum to indemnify for expenses incurred in a service voluntarily rendered is not a ratification which makes the payee the agent of the principal in regard to such services.<sup>294</sup> The fact that a principal transmits a check for payment is not a ratification of the agent's unauthorized act in remitting to him in that manner, contrary to instructions, so as to relieve the agent from liability to his principal for the unauthorized act.<sup>295</sup>

**§ 141. Ratification by silence or acquiescence.**

(a) **In general.**—Mere silence, as a general rule, does not amount to an assent, but, taking it together with other circumstances, there are many cases in which silence or acquiescence will warrant a conclusive presumption that assent has been given. If the principal, with a full knowledge of all the facts, acquiesces therein or stands by and permits another to believe that he has assented to the unauthorized acts, and to act thereupon to his prejudice, the principal will be conclusively presumed to have ratified such acts; and will not thereafter be allowed to plead the agent's lack of authority as a defense to an action against him on such acts. This doctrine is based upon the well known principle that he who keeps silent when he should speak will not be permitted to speak when in equity and good conscience he should keep silent. If the rule were otherwise, the principal could stand quietly by and await the development of the case, electing to ratify the unauthorized transaction if to his advantage, or to repudiate it if to his disadvantage. This the law will not allow; and consequently it may be stated as a general rule that if a principal, with a full knowledge of

<sup>292</sup> *Lazard v. Merchants' & Miners' Transp. Co.*, 78 Md. 1; *Nye v. Swan*, 49 Minn. 431; *Jordan v. Humphrey*, 31 Minn. 495; *Crooker v. Appleton*, 25 Me. 131.

<sup>293</sup> *Triggs v. Jones*, 46 Minn. 277.

<sup>294</sup> *Camp v. United States*, 113 U. S. 648.

<sup>295</sup> *Walker v. Walker*, 5 Heisk. (Tenn.) 425.

the unauthorized acts of his agent or of an assumed agent, remains silent in reference thereto, he will be held to have impliedly ratified the same.<sup>296</sup> As has been said: "Where, with a knowledge of the facts, the principal acquiesces in the act of the agent, under such circumstances as would make it his duty to repudiate such acts if he would avoid

<sup>296</sup> *United States*: *Courcier v. Ritter*, 4 Wash. C. C. 549, Fed. Cas. No. 3,282; *Marsh v. Whitmore*, 21 Wall. 178; *The Henrietta*, 91 Fed. 675.

*Alabama*: *Lee's Adm'rs v. Fontaine*, 10 Ala. 755, 44 Am. Dec. 505; *Pollock v. Gantt*, 69 Ala. 374, 44 Am. Rep. 519.

*Colorado*: *King v. Rea*, 13 Colo. 69; *Lynch v. Smyth*, 25 Colo. 103.

*Connecticut*: *Curnane v. Scheidel*, 70 Conn. 13.

*Georgia*: *Owsley v. Woolhopter*, 14 Ga. 124.

*Illinois*: *Sammis v. Poole*, 89 Ill. App. 118; *Hall v. Harper*, 17 Ill. 82; *Swartwout v. Evans*, 37 Ill. 442; *Williams v. Merritt*, 23 Ill. 623.

*Iowa*: *Farwell v. Howard*, 26 Iowa, 381; *Alexander v. Jones*, 64 Iowa, 207; *State Bank of Tabor v. Kelly*, 109 Iowa, 544.

*Kansas*: *Kaffer v. Walters*, 9 Kan. App. 291; *Lewis v. Bourbon County Com'rs*, 12 Kan. 186.

*Louisiana*: *Raymond v. Palmer*, 41 La. Ann. 425, 17 Am. St. Rep. 398; *Allison & Co. v. Watson*, 36 La. Ann. 616; *Ward v. Warfield*, 3 La. Ann. 468; *Lafitte v. Godchaux*, 35 La. Ann. 1161.

*Maryland*: *Maddux v. Bevan*, 39 Md. 485.

*Massachusetts*: *Amory v. Hamilton*, 17 Mass. 102; *Matthews v. Fuller*, 123 Mass. 446.

*Michigan*: *Scott v. First Free Methodist Church*, 50 Mich. 528; *Cooper v. Mulder*, 74 Mich. 375; *Hurley v. Watson*, 68 Mich. 532.

*New Jersey*: *Lyle v. Addicks*, 62 N. J. Eq. 123.

*New York*: *Hanks v. Drake*, 49 Barb. 186; *Bryce v. Clark*, 42 N. Y. State Rep. 471; *Hazard v. Spears*, 2 Abb. Dec. 353; *Hill v. Coates*, 34 Misc. 535.

*North Carolina*: *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454.

*Pennsylvania*: *Himes v. Herr*, 3 Pa. Super. Ct. 124, 39 Wkly. Notes Cas. 568; *Auge v. Darlington*, 185 Pa. 111.

*Texas*: *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

*Vermont*: *Tier v. Lampson*, 35 Vt. 179, 82 Am. Dec. 634.

*Virginia*: *Forbes v. Hageman*, 75 Va. 168.

*West Virginia*: *Curry v. Hale*, 15 W. Va. 867.

*Wisconsin*: *Saveland v. Green*, 40 Wis. 431; *Roundy v. Erspamer*, 112 Wis. 181.

them, such acquiescence is a confirmation of the acts of the agent."<sup>297</sup> If at the same time that the principal silently acquiesces in the transaction he retains possession of the property, which is the subject of the unauthorized acts, there is a much stronger reason for implying ratification.<sup>298</sup>

Thus, where the principal was present and did not object to the unauthorized sale of his goods by another, as his agent, he was presumed to have consented to the same.<sup>299</sup> Where the unauthorized act is a contract for the sale of land, it has been held that acquiescence, to bind the principal, must be by such act as will operate as an estoppel when the agreement is required to be in writing.<sup>300</sup> So a principal will be deemed to have ratified an unauthorized collection of pay for goods sold by an agent for him, where, after making a demand on the buyer for payment, and being informed that payment was made to the agent, he made no further attempt to collect from the buyer, but endeavored to collect from the agent, and on the latter's informing him that he would pay the amount collected at a certain time, stated that such arrangement would be satisfactory, though he did not inform the buyer that he would look to the agent.<sup>301</sup>

A ratification will not be implied, however, by a general agent of a contract of another agent to compensate an employe with a share of the principal's business, because such general agent fails to deny liability when the employe demands such compensation for his services;<sup>302</sup> nor does the

<sup>297</sup> *Curry v. Hale*, 15 W. Va. 875.

<sup>298</sup> *Miles v. Ogden*, 54 Wis. 573; *McConnell v. Bowdry's Heirs*, 4 T. B. Mon. (Ky.) 392; *Plano Mfg. Co. v. Buxton*, 36 Minn. 203; *Knight v. Beckwith Commercial Co.*, 6 Wyo. 500.

<sup>299</sup> *Owsley v. Woodhopper*, 14 Ga. 124.

<sup>300</sup> *Zimpelman v. Keating*, 72 Tex. 318. Where the grantor of a deed executed by a firm purporting to have power of attorney, does not question the firm's authority for 30 years, and executes a deed to other lands, in which he admits the execution of the former deed by the firm as his attorneys, the existence of the power of the firm will be presumed. *McCulloch County Land & Cattle Co. v. Whiteford*, 21 Tex. Civ. App. 314.

<sup>301</sup> *Glor v. Kelly*, 49 App. Div. 617, affirmed 166 N. Y. 589.

<sup>302</sup> *Deffenbaugh v. Jackson Paper Mfg. Co.*, 120 Mich. 242.

principal ratify such contract by merely permitting the employee's salary to be overdrawn.<sup>303</sup>

Although silence may amount to a ratification so far as third parties are concerned, it may not amount to that in favor of the agent.<sup>304</sup> Thus, after an agent's authority has been revoked, a principal is not bound, as between himself and the agent, to notify the latter of his dissent from acts done by such agent in pursuance of the original authority.<sup>305</sup>

It is not exactly proper to say that acts or acquiescence ratify unauthorized contracts, but rather they authorize judges and juries to presume consent or ratification.<sup>306</sup>

(b) **Knowledge necessary.**—It is necessary, in order that the principal's silence or acquiescence may amount to a ratification, that he should do so with full knowledge of all the material facts in the case, unless he is willfully ignorant, and that he should have an opportunity to repudiate the unauthorized act or contract.<sup>307</sup> Thus, one will be bound by an assumed agency, if he fails to repudiate it after he is charged with notice that an agent employed by him in the commencement of a transaction is continuing to act in the same capacity in which he commenced.<sup>308</sup> But the acts of a principal will not amount to a ratification of a contract, where they are entirely based upon the representations of the agent, who was himself deceived as to the real existence of the thing which was the object of the contract.<sup>309</sup>

<sup>303</sup> *Deffenbaugh v. Jackson Paper Mfg. Co.*, 120 Mich. 242.

<sup>304</sup> *Triggs v. Jones*, 46 Minn. 277.

<sup>305</sup> *Kelly v. Phelps*, 57 Wis. 425.

<sup>306</sup> *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *De Land v. Dixon Nat. Bank*, 111 Ill. 323.

<sup>307</sup> *Golinsky v. Allison*, 114 Cal. 458; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565; *American Exch. Bank v. Loretta Min. Co.*, 165 Ill. 103, 56 Am. St. Rep. 233; *Adams' Exp. Co. v. Trego*, 35 Md. 69; *State v. Kirkley*, 29 Md. 109; *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Williams v. Storm*, 6 Cold. (Tenn.) 203; *Saville v. Welch*, 58 Vt. 683; *Ladd v. Hildebrant*, 27 Wis. 135, 9 Am. Rep. 445. See ante, § 106; and see cases cited in preceding section.

<sup>308</sup> *Quinn v. Dresbach*, 75 Cal. 159, 7 Am. St. Rep. 138.

<sup>309</sup> *Mummy v. Haggerty*, 15 La. Ann. 268.

It makes no difference that ignorance of facts arises from want of inquiry by the principal, or neglect to ascertain facts. "Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of the principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make inquiries concerning it. Where there is no legal obligation or duty to do an act, there can be no negligence in an omission to perform it."<sup>310</sup> Knowledge by the principal will not be presumed from the fact that he had a reasonable opportunity to acquire it.<sup>311</sup> But where there has once been a ratification, he cannot afterwards avoid the effect thereof by showing that he was not acquainted with all the facts of the transactions ratified, where he was in possession of the means of learning them.<sup>312</sup>

Although as a general rule, a principal must have full knowledge of all the facts, as we have seen before, yet the principal cannot purposely remain ignorant, where the means of information is within his control, so as to escape the effect of his acts that would otherwise amount to a ratification. Thus, where a principal knows that his name has been signed to a certain bond by one assuming to act as his agent, though not knowing the exact terms of the bond, or the extent of his liability thereon, he cannot escape the consequences of his silence by purposely closing his eyes to a means of information within his control regarding the details.<sup>313</sup> So if the principal signs a contract for the sale of land brought to him by his agent, without reading it, he will be bound by the provisions therein.<sup>314</sup>

It is not essential that the principal should have a knowledge of the legal effect of the facts, but it is sufficient if he is informed of the facts.<sup>315</sup>

<sup>310</sup> *Combs v. Scott*, 12 Allen (Mass.) 493.

<sup>311</sup> *Sehrt-Patterson Mill. Co. v. Hughes*, 8 Kan. App. 514. Compare *Lynch v. Smyth*, 25 Colo. 103.

<sup>312</sup> *Glor v. Kelly*, 49 App. Div. 617, affirmed 166 N. Y. 589.

<sup>313</sup> *Lynch v. Smyth*, 25 Colo. 103.

<sup>314</sup> *Liska v. Lodge*, 112 Mich. 635.

<sup>315</sup> *Powell v. Smith*, L. R. 14 Eq. 85, 41 Law J. Ch. 734; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Hyatt v. Clark*, 118 N. Y. 563, 567; *Kelley v. Newburyport & A. Horse R. Co.*, 141 Mass. 496.

If, then, the principal assents to the act while ignorant of the facts attending it, and such ratification has not been intentional and deliberate, he may disaffirm the act, when informed of it, and be relieved from the effects thereof.<sup>316</sup> But it seems that if the contract or act is a divisible one and the principal's ratification has been made under a misapprehension of the full scope of such act or contract, such ratification would be voidable only to the extent of the part to which the mistake applies.<sup>317</sup>

(c) **Act must be performed on behalf of the principal.**—It must be remembered, also, that the doctrine above discussed applies only to unauthorized acts performed in the name of the assumed principal. "The general doctrine that one may, by affirmative acts, and even by silence, ratify the acts of another who has assumed to act as his agent, is not disputed. It is illustrated by many cases to be found in the books, and set forth by all the text writers upon the law of agency. But the doctrine properly applies only to cases where one has assumed to act as agent for another, and then a subsequent ratification is equivalent to an original authority."<sup>318</sup>

(d) **Prejudice to third party.**—It is also held that the interests of the other party to the transaction must be prejudiced before silence on the part of the principal can be held to imply a ratification. Unless the principal disaffirms an unauthorized act of his agent within a reasonable time after

But it has been held that to render an act of ratification by a corporation of a sale of its property to a director effective and conclusive, the corporation must, at the time of the ratification, be fully aware of every material circumstance of the transaction, and of the real value of the property; must have acted with perfect freedom of volition; and must have been not only aware of the facts, but apprised of the law as to how those facts would be dealt with if brought before a court of equity. *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311.

<sup>316</sup> *Adams' Exp. Co. v. Trego*, 35 Md. 47; *Bannon v. Warfield*, 42 Md. 22, and see cases in preceding note.

<sup>317</sup> *Miller v. Board of Education*, 44 Cal. 166; *Lester v. Kinne*, 37 Conn. 9; *Pacific Rolling Mill Co. v. Dayton, S. & G. R. R. Co.*, 7 Sawy. 61, 5 Fed. 852.

<sup>318</sup> By *Earl, J.*, in *Hamlin v. Sears*, 82 N. Y. 327; *Garvey v. Jarvis*, 46 N. Y. 310, 7 Am. Rep. 335.



he has notice thereof, his silence will be conclusive evidence of his assent, where the delay will be prejudicial; but if no change in the position of the parties can occur by reason of the principal's delay to approve or disapprove the act, mere silence on his part affords an instance of ratification to be considered by the jury, but is not conclusive evidence thereof.<sup>319</sup> It is not absolutely essential, however, that silence should be prejudicial, as silence of the alleged principal when advised of what has been done in his behalf by another without authority may, together with other circumstances, be sufficient from which to infer a ratification of the unauthorized act, though the other party has not been misled or prejudiced by such silence.<sup>320</sup>

(c) **Within what time principal should elect.**—It is impossible to state what length of acquiescence or silence will amount to a ratification. Where a principal obtains knowledge of an unauthorized transaction in his behalf, it is his duty to elect whether he will ratify or repudiate such act. Within what time this election must be made the authorities are not entirely in harmony. Of course if it is essential to the validity of an act that it should be performed within a certain time, the act cannot be ratified after the expiration of that time, if by so doing the rights of any third person are prejudiced.<sup>321</sup> Thus, where an agent without the authority of

<sup>319</sup> *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248; *Breed v. First Nat. Bank*, 4 Colo. 481; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565; *Hoosac Min. & Mill. Co. v. Donat*, 10 Colo. 529; *Lynch v. Smyth*, 25 Colo. 103; *Smith v. Fletcher*, 75 Minn. 189; *Robbins v. Blanding*, 87 Minn. 246. *Somerville, J.*, in *Mobile & M. R. Co. v. Jay*, 65 Ala. 113, says: "It is true that mere knowledge on the part of the principal, of an agent's unauthorized action, will not make silence or non-interference, in all cases, amount to ratification. But it would in those cases where the party dealing with the agent is misled or prejudiced; or where the usage of trade requires, or fair dealing demands, a prompt reply from the principal. In all such cases the principal, if dissatisfied with the act of the agent and fully informed of what has been done, must express his dissatisfaction within a reasonable time."

<sup>320</sup> *Lynch v. Smyth*, 25 Colo. 103.

<sup>321</sup> *Lord Audley v. Pollard*, Cro. Eliz. 561; *Dibbins v. Dibbins* [1896] 2 Ch. Div. 348, 75 Law T. (N. S.) 137, 65 Law J. Ch. Div. 724.

his landlord gives a tenant notice to quit, the notice cannot be ratified after the time for giving notice has expired.<sup>322</sup>

Some of the cases seem to hold that it is the principal's duty, if he wishes to avoid an unauthorized act, to repudiate it and give notice thereof to the other party as soon as he is fully informed of such act, and unless he does so he will be held to have ratified it.<sup>323</sup> It is thought, however, that the language used in these cases is not in effect much different from the rule given hereafter. For example, the use of the word "promptly" in an instruction was held not to mean that the principal should use the utmost possible dispatch in disavowing the sale, but it implied only that he should not be dilatory, or should not be guilty of any unnecessary delay.<sup>324</sup> And where in any case it is necessary that prompt or immediate disavowal should be made, there is usually something in the circumstances of the case that require it to be so made, so that under the circumstances of that case a prompt disavowal is but a disavowal within a reasonable time. Thus, where the usage of trade requires it, or where a delay might mislead the agent or other parties, upon knowledge by the principal, it is his duty to promptly repudiate the act if he wishes to escape liability therefor.<sup>325</sup>

The better rule, however, and the one supported by the weight of authority is to the effect that it is the duty of the principal, if he desires to avoid it, to disaffirm or repudiate the unauthorized act of his agent, and give notice thereof,

<sup>322</sup> *Doe d. Mann v. Walters*, 10 Barn. & C. 626.

<sup>323</sup> *Ward v. Williams*, 26 Ill. 447, 79 Am. Dec. 385; *Johnston v. Berry*, 3 Ill. App. 256; *Meister v. Cleveland Dryer Co.*, 11 Ill. App. 227; *Booth v. Wiley*, 102 Ill. 84; *Pitts v. Shubert*, 11 La. Ann. 286, 30 Am. Dec. 718; *Kehlor v. Kemble*, 26 La. Ann. 713; *Bonneau v. Poydras*, 2 Rob. (La.) 1; *Foster v. Rockwell*, 104 Mass. 167; *Crane v. Bedwell*, 25 Miss. 507; *Myers v. New York Mut. Life Ins. Co.*, 32 Hun (N. Y.) 321; *Kelsey v. Crawford County Nat. Bank*, 69 Pa. 426; *Bredin v. Dubarry*, 14 Serg. & R. (Pa.) 27; *Hart v. Dixon*, 73 Tenn. 336; *Fort v. Coker*, 58 Tenn. 579; *Williams v. Storm*, 46 Tenn. 203.

<sup>324</sup> *Clay v. Spratt*, 7 Bush (Ky.) 334.

<sup>325</sup> *Meister v. Cleveland Dryer Co.*, 11 Ill. App. 227; *Oliver v. Johnston*, 24 La. Ann. 460; *Ball v. Bender*, 22 La. Ann. 496; *Bredin v. Dubarry*, 14 Serg. & R. (Pa.) 27.

within a reasonable time after he has obtained full knowledge thereof, otherwise he will be conclusively presumed to have ratified such act.<sup>326</sup> Thus, where the agent notifies his principal of his acts by letter but receives no reply or a very

<sup>326</sup> *Prince v. Clark*, 1 Barn. & C. 186; *Metropolitan Asylum Board v. Kingham*, 6 Times Law R. 217; *Norris v. Cook*, 1 Curt. 464, Fed. Cas. No. 10,305; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640; *Abbe v. Rood*, 6 McLean, 106, Fed. Cas. No. 6; *Law v. Cross*, 1 Black (U. S.) 533; *Richmond Mfg. Co. v. Starks*, 4 Mason, 296, Fed. Cas. No. 11,802; *Lorie v. North Chicago City R. Co.*, 82 Fed. 270; *Mobile & M. R. Co. v. Jay*, 65 Ala. 113; *Breed v. First Nat. Bank*, 6 Colo. 235; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565; *Lynch v. Smyth*, 25 Colo. 103; *Bray v. Gunn*, 53 Ga. 144; *McDermid v. Cotton*, 2 Ill. App. 297; *Williams v. Merritt*, 23 Ill. 623; *McGeoch v. Hooker*, 11 Ill. App. 649; *Miller v. Excelsior Stone Co.*, 1 Ill. App. 273; *Alexander v. Jones*, 64 Iowa, 207; *Farwell v. Howard*, 26 Iowa, 381; *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa, 67; *State Bank of Tabor v. Kelly*, 109 Iowa, 544; *Clay v. Spratt*, 7 Bush (Ky.) 334; *Lafitte v. Godchaux*, 35 La. Ann. 1161; *Johnson v. Wingate*, 29 Me. 404; *Leavitt v. Fairbanks*, 92 Me. 521; *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 203; *Brigham v. Peters*, 1 Gray (Mass.) 139; *Pratt v. Fram*, 13 Mass. 361; *Heyn v. O'Hagen*, 60 Mich. 157; *Wright v. Vineyard M. E. Church*, 72 Minn. 78; *Robbins v. Blanding*, 87 Minn. 246; *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617; *Cram v. Sickel*, 51 Neb. 828, 66 Am. St. Rep. 478; *Wright v. Boynton*, 37 N. H. 9, 72 Am. Dec. 319; *Hatch v. Taylor*, 10 N. H. 538; *Vianna v. Barclay*, 3 Cow. (N. Y.) 281; *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 300; *Benedict v. Smith*, 10 Paige (N. Y.) 127; *Hamlin v. Sears*, 82 N. Y. 327; *Walker v. Walker*, 7 Baxt. (Tenn.) 260; *E. Bement & Sons v. Armstrong* (Tenn. Ch. App.) 39 S. W. 899 (though the principal did immediately notify the agent of his dissatisfaction); *Angel v. Miller*, 16 Tex. Civ. App. 679; *Iron City Nat. Bank v. Fifth Nat. Bank* (Tex. Civ. App.) 47 S. W. 533; *Ruffner v. Hewitt*, 7 W. Va. 585; *Parish v. Reeve*, 63 Wis. 315; *Saveland v. Green*, 40 Wis. 431; *Cooper v. Schwartz*, 40 Wis. 54. "The principal, within a reasonable time, must elect to approve or disapprove the unauthorized act of the agent, of which he has been informed. He cannot remain silent and await the vicissitudes of a fluctuating market, and, if the price rises, disaffirm and claim the difference; or, if it declines, acquiesce in the sale. If the factor is under orders to hold for a better market, the principal takes the risk of a decline. He cannot where his instructions have been disobeyed, receive the money and silently wait and watch the market, and if the price advances claim the difference." *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 621.

late one, a ratification may be inferred.<sup>327</sup> So ratification has been implied where the principal did not give notice of his repudiation of an alleged unauthorized guaranty contract, executed by the agent, until after default of the debtor;<sup>328</sup> or where an agent made an unauthorized sale of bonds and invested the proceeds in new bonds for his principal, and she made no objection until four years after she had received the new bonds, and had been advised of the transaction, though both parties lived in the same town, and she had ample means of knowing the exact situation.<sup>329</sup>

Where a principal resisted payment on a contract on the ground that the agent making the contract had expended more money than he was authorized to do, the fact that he did not make such objection when the claim was first presented is strong evidence that the principal acquiesced in the contract of the agent.<sup>330</sup> The principal's mere delay, however, for a reasonable time, to disapprove his agent's unauthorized act, is not of itself conclusive evidence of ratification, and it is error so to instruct the jury.<sup>331</sup> And the fact that a principal has been negligent in not preventing his agent from performing unauthorized acts does not estop him from repudiating such acts.<sup>332</sup>

Even if the principal elects to repudiate an unauthorized transaction of his agent, he must give notice thereof to the other party to the transaction. Unless he does so, the mere fact that he has repudiated the transaction will not save him from an implied ratification.<sup>333</sup> But where the principal has given his agent a special and limited authority, which the latter has violated, it is not his duty, upon learning of such violation, to seek out the third party, and give him no-

<sup>327</sup> *Teasdale v. McPike*, 25 Mo. App. 341; *Lindsley v. Malone*, 23 Pa. 24; *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 300; *Foster v. Rockwell*, 104 Mass. 167; *Francis v. Kerker*, 85 Ill. 190. But see *Bosseau v. O'Brien*, 4 Biss. 395, Fed. Cas. No. 1,667.

<sup>328</sup> *Oberne v. Burke*, 50 Neb. 764.

<sup>329</sup> *Auge v. Darlington*, 185 Pa. 111.

<sup>330</sup> *Fischer v. Jordan*, 54 App. Div. (N. Y.) 621.

<sup>331</sup> *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

<sup>332</sup> *Schmidt v. Garfield Nat. Bank*, 64 Hun (N. Y.) 298; *McIntosh v. Battel*, 68 Hun (N. Y.) 216.

<sup>333</sup> *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565.

tice of his claim; and his omission to do so, and his mere silence, are not ordinarily to be construed at a ratification.<sup>334</sup> As between the principal and his agent, however, a failure to notify the agent of his dissent from the unauthorized acts will not be held as a ratification of the acts.<sup>335</sup>

Whether mere silence of a principal, and failure to repudiate his agent's acts, within a reasonable time after knowledge thereof, amounts to a ratification, is a question of fact for the jury.<sup>336</sup>

(f) **What is a reasonable time.**—What is a reasonable time in this as in all other cases, depends upon the circumstances of each case. If the facts are undisputed it is a question of law for the court; if, however, there is something equivocal in those circumstances, or material facts in dispute, the question should be submitted to the jury with instructions.<sup>337</sup> Thus, a delay of two months, with full knowledge, was held to amount to a ratification of an unauthorized sale.<sup>338</sup> So a principal is bound by his agent's unauthorized act, where he neglects to disavow it for over three years after notice of a claim founded thereon.<sup>339</sup> In another case, a delay of one month has been held to effect a ratification.<sup>340</sup> On the other hand, a disaffirm-

<sup>334</sup> *White v. Langdon*, 30 Vt. 599.

<sup>335</sup> *Lewin v. Dille*, 17 Mo. 64; *Kelly v. Phelps*, 57 Wis. 425.

<sup>336</sup> *Iron City Nat. Bank v. Fifth Nat. Bank* (Tex. Civ. App.) 47 S. W. 533.

<sup>337</sup> *Hoosac Min. & Mill. Co. v. Donat*, 10 Colo. 529 (three months' silence held to amount to ratification); *McDermid v. Cotton*, 2 Ill. App. 297; *Alexander v. Jones*, 64 Iowa, 207; *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa, 67; *Kingsley v. Wallis*, 14 Me. 57; *Bassett v. Brown*, 105 Mass. 557; *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray (Mass.) 432; *Holbrook v. Burt*, 22 Pick. (Mass.) 546; *Pratt v. Farrar*, 10 Allen (Mass.) 519; *Wright v. Vineyard M. E. Church*, 72 Minn. 78; *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. 329, 70 Am. Dec. 128; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Iron City Nat. Bank v. Fifth Nat. Bank* (Tex. Civ. App.) 47 S. W. 533; *Cooper v. Schwartz*, 40 Wis. 54.

<sup>338</sup> *McWhinne v. Martin*, 77 Wis. 182.

<sup>339</sup> *Ketchem v. Marsland*, 18 Misc. (N. Y.) 450.

<sup>340</sup> *E. Bement & Sons v. Armstrong* (Tenn. Ch. App.) 39 S. W. 899.

ance given within ten days was held to be within a reasonable time.<sup>341</sup>

(g) **Where acts are performed by a stranger.**—Although the authorities seem to be well settled that a ratification may be made by silence or acquiescence, where acts have been performed by an agent in excess of his authority, there has been some dispute as to such ratification where the acts were done by a mere stranger, who had no previous authority whatever from the assumed principal. By one view of the doctrine it is held that, “where a stranger, in the name of another, does an unauthorized act, the latter need take no notice of it, although informed of the act thus done in his name, and he shall only be bound by an affirmative ratification,”<sup>342</sup> although if there are other circumstances in the case it might be some evidence of ratification. This view of the doctrine is laid down by an eminent text writer as follows: “Where the relation of principal and agent does in fact exist, although in the particular transaction the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal who has received a letter informing him what has been done on his account. But when the person doing the business is a mere volunteer, who has officiously interfered in the affairs of another person, and has effected an insurance or made a purchase for him, I do not conceive that the other person is bound to answer a letter from the intermeddler informing him of the contracts so made in his name, nor that his silence can be construed into a ratification.”<sup>343</sup>

On the other hand the better opinion seems to be that in this, as in the case where an agency exists, the approval of the principal may be inferred from his silence and acquiescence, together with other circumstances, when informed of what has been done in his name or on his behalf; although all the authorities agree that the relations of the parties are of great consequence in determining the question of ratifica-

<sup>341</sup> *McDermid v. Cotton*, 2 Ill. App. 297.

<sup>342</sup> *Ward v. Williams*, 26 Ill. 447, 79 Am. Dec. 385; *Searing v. Butler*, 69 Ill. 575; *White v. Langdon*, 30 Vt. 599.

✕ <sup>343</sup> 1 *Livermore*, Ag. p. 50.

tion, the presumption arising from acquiescence being much stronger where the agency exists than in case of a mere stranger.<sup>344</sup> For this reason evidence is admissible to show that one whose acts are claimed to have been ratified by a principal was his agent.<sup>345</sup> Thus, it has been held that, if an act is done without authority, under an assumed agency, it is the duty of the principal, if he would avoid responsibility therefor, to disavow and repudiate it in a reasonable time after information of the transaction.<sup>346</sup> And where silence with knowledge of the facts is likely to injure or mislead third parties especially would the same rule apply here as in the case of agents who exceed their authority, and that is that silence under such circumstances should amount to a ratification, although the unauthorized acts were performed by a mere stranger.<sup>347</sup> As was said in a late Minnesota case: "A failure to disavow the acts of a mere volunteer, who meddlingly assumes to act without authority, as the agent of another, will not constitute a ratification. But where a person in good faith assumes to act as

<sup>344</sup> *Lynch v. Smyth*, 25 Colo. 103; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248; *Haggerty v. Juday*, 58 Ind. 158; *Foster v. Rockwell*, 104 Mass. 167; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Hurley v. Watson*, 68 Mich. 531, 13 West. Rep. 543; *Carson v. Cummings*, 69 Mo. 325; *Myers v. New York Mut. Life Ins. Co.*, 32 Hun (N. Y.) 321; *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. 329, 70 Am. Dec. 128; *Massey v. Ins. Co.*, 3 Phila. (Pa.) 202; *Hall v. Vanness*, 49 Pa. 464; *Saveland v. Green*, 40 Wis. 431; *Ladd v. Hildebrant*, 27 Wis. 135, 9 Am. Rep. 445.

<sup>345</sup> *Lynch v. Smyth*, 25 Colo. 103.

<sup>346</sup> *Central Railroad & Banking Co. v. Cheatham*, 85 Ala. 592, 7 Am. St. Rep. 48; *Mobile & M. R. Co. v. Jay*, 65 Ala. 113.

<sup>347</sup> *Heyn v. O'Hagen*, 60 Mich. 157; *Saveland v. Green*, 40 Wis. 438. In *Heyn v. O'Hagen*, *supra*, the court by Chaplin, J., says: "Whether silence operates as a presumptive proof of ratification of the act of a mere volunteer, must depend upon the particular circumstances of the case. If those circumstances are such that the inaction or silence of the party sought to be charged as principal would be likely to cause injury to the person giving credit to and relying upon such assumed agency, or to induce him to believe such agency did in fact exist, and to act upon such belief to his detriment, then such silence or inaction may be considered as a ratification of the agency."

the agent of another, but without authority in fact, in any particular transaction, the latter, upon being fully informed thereof, must, in cases where his silence might prejudice the assumed agent or innocent third parties, disavow the act within a reasonable time, or he will be held to have ratified it."<sup>348</sup>

It is not required that the information concerning the unauthorized acts of the stranger should be given to the principal by any particular method, and he may acquire it by letter as well as in any other manner.<sup>349</sup>

(h) **Real distinction between the two classes.**—The real distinction, then, between the two classes is in reference to the amount of evidence required to prove a ratification by silence or acquiescence. Ratification of an unauthorized act of a stranger may not be implied as a conclusion of law from the silence of the party affected by the act, but it does not follow that it is incompetent to be submitted to the jury; and it may, as a circumstance, with others, be submitted to the jury as facts from which they may imply such ratification.<sup>350</sup> "It is a rule in the law of agency, that when the unauthorized act of the agent is done in the execution of a power conferred, in a mode not sanctioned by its terms, and in excess or misuse of the authority given, ratification by the principal is more readily implied from slight acts of confirmation. The duty to disaffirm at once, on knowledge of the act, is said to be more imperative in such cases, because the confidence of the principal in the fitness and fidelity of the person he has selected as an agent is shown by the relations already established between them."<sup>351</sup> Thus, the fact that a depositor in a bank remained silent for two years after

<sup>348</sup> *Robbins v. Blanding*, 87 Minn. 246.

<sup>349</sup> *Searing v. Butler*, 69 Ill. 575; *Ward v. Williams*, 26 Ill. 447, 79 Am. Dec. 385; *Pittsburg, C. & St. L. R. Co. v. Woolley*, 12 Bush (Ky.) 451; *Kehlor v. Kemble*, 26 La. Ann. 713; *Foster v. Rockwell*, 104 Mass. 167; *Jennison v. Parker*, 7 Mich. 355; *Ruffner v. Hewitt*, 7 W. Va. 585; *Cooper v. Schwartz*, 40 Wis. 54.

<sup>350</sup> *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. 329, 70 Am. Dec. 128.

<sup>351</sup> *Harrod v. McDaniels*, 126 Mass. 413, 415; *Foster v. Rockwell*, 104 Mass. 167; *Brigham v. Peters*, 1 Gray (Mass.) 139, 147.



being informed that the cashier had signed his name to a check, and took no measures to assert his rights, may be regarded as a strong circumstance tending to show that the cashier was authorized to draw the check; but it is error to instruct the jury, as a matter of law, that if the depositor neglected to repudiate the act within a reasonable time after being informed of the facts, he thereby ratified and confirmed the act of the bank in charging him with such check.<sup>352</sup>

This doctrine is ably discussed in a leading case as follows: "It must be admitted that the act of a mere stranger or volunteer is capable of ratification, for all the authorities are so; but the argument is that the silence of the party to be affected, whatever the attending circumstances, cannot amount to a ratification of the act of a stranger. In *Wilson v. Tuman*, 6 M. & G. 242, C. J. Tindal, on the authority of several old cases, considered that the effect of a ratification was dependent on the question whether the person assuming to act had acted for another and not for himself. \* \* \* If, then, the principle of law be that I can ratify that only which is done in my name, but when I have ratified whatever is done in my name I am bound for it, as by the act of an authorized agent, it is apparent that my silence, in view of what has been done, is to be regarded simply as evidence of ratification, more or less expressive, according to the circumstances in which it occurs. It is not ratification of itself, but only evidence of it, to go to the jury along with all the circumstances that stand in immediate connection with it. Among these, the prior relations of the parties are very important. If the party to be charged has been accustomed to contract through the agency of the individual assuming to act for him, or had intrusted property to his keeping, or if he were a child or servant, partner or factor, the relation, conjunctionis favor, would make silence strong evidence of assent. On the other hand, if there had been no former agency and no peculiarity whatever in the relations of the parties, silence—a refusal to respond to a mere impertinent interference—would be a very inconclusive, but not absolutely irrelevant circumstance. The man who will

<sup>352</sup> *De Land v. Dixon Nat. Bank*, 111 Ill. 324.

not speak when he sees his interests affected by another must be content to let a jury interpret his silence. It is a clear principle of equity that where a man stands by knowingly and suffers another person to do acts in his own name, without any opposition or objection, he is presumed to have given authority to do those acts. If mental assent may be inferred from circumstances, silence may indicate it as well as words or deeds. To say that silence is no evidence of it is to say there can be no implied ratification of an unauthorized act—or at least to tie up the possibility of ratification to the accident of prior relations. Neither reason nor authority justifies such a conclusion. A man who sees what has been done in his name and for his benefit, even by an intermeddler, has the same power to ratify and confirm it that he would have to make a similar contract for himself; and if the power to ratify be conceded to him, the fact of ratification must be proved by the ordinary means. \* \* \* The prior relations of the parties lend great importance to the fact of silence, but it is a mistake to make the competency of the fact dependent on those relations. \* \* \* It is one thing to say that the law will not imply a ratification from silence, and a very different thing to say that silence is a circumstance from which with others a jury may imply it.”<sup>353</sup>

(i) **Application of rule to private corporations.**—This rule, as to ratification by silence or acquiescence, applies as well to corporations as to natural persons. If the officers or agents of a corporation exceed their powers in the doing of acts or making of contracts on behalf of the corporation, it is the duty of the latter, when it has full knowledge thereof, if it does not wish to ratify such acts or contracts, to repudiate them and not permit others to act in reliance upon the belief that such acts or contracts were either authorized or ratified. If it, having knowledge of the facts, fails to repudiate or acquiesces therein, it will be estopped to deny a ratification or a ratification will be implied.<sup>354</sup>

<sup>353</sup> By Woodward, J., in *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. 329, 70 Am. Dec. 128.

<sup>354</sup> *United States: Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co.*, 120 U. S. 256, 26 Fed. 140; *Union Pac. R. Co. v. Chicago*,

Where the directors of a corporation enter into contracts or do other acts which are beyond their powers, but within

*R. I. & P. R. Co.*, 163 U. S. 564; *Augusta, T. & G. R. Co. v. Kittel*, 2 U. S. App. 409, 2 C. C. A. 615, 52 Fed. 63; *Central Trust Co. v. Ashville Land Co.*, 18 C. C. A. 590, 72 Fed. 361; *G. V. B. Min. Co. v. First Nat. Bank of Halley*, 36 C. C. A. 633, 95 Fed. 23; *Armstrong v. Chemical Nat. Bank*, 27 C. C. A. 601, 83 Fed. 556.

*Alabama*: *Alabama G. S. R. Co. v. South & N. Ala. R. Co.*, 84 Ala. 570, 5 Am. St. Rep. 401; *Mobile & Kansas City R. Co. v. Owen*, 121 Ala. 505.

*Arkansas*: See *Atlanta Nat. Bldg. & Loan Ass'n v. Bollinger*, 63 Ark. 212.

*California*: *Phillips v. Sanger Lumber Co.*, 130 Cal. 431; *Illinois Trust & Sav. Bank v. Pacific R. Co.*, 117 Cal. 332.

*Colorado*: *Henry v. Colorado Land & Water Co.*, 10 Colo. App. 14; *McCornick v. Bittlinger*, 13 Colo. App. 170; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 531.

*Illinois*: *Wheeler v. Home Sav. & State Bank*, 188 Ill. 34, 80 Am. St. Rep. 161; *Atwater v. American Exch. Nat. Bank*, 152 Ill. 605; *Ragland v. McFall*, 137 Ill. 81; *Meister v. Cleveland Dryer Co.*, 11 Ill. App. 227.

*Indiana*: *Hawkins v. Fourth Nat. Bank*, 150 Ind. 117; *Smith v. Wells Mfg. Co.*, 148 Ind. 333; *White Water Valley Canal Co. v. Hawkins*, 4 Ind. 474.

*Iowa*: *Marshall County High School Co. v. Iowa Evangelical Synod*, 28 Iowa, 360; *Burlington, C. R. & N. R. Co. v. City of Columbus Junction*, 104 Iowa, 110.

*Kentucky*: *Deposit Bank of Carlisle v. Fleming*, 19 Ky. L. R. 1947, 44 S. W. 961; *Pittsburgh, C. & St. L. R. Co. v. Woolley*, 12 Bush 451; *Bell & Coggeshall Co. v. Kentucky Glass-Works*, 20 Ky. L. R. 1089, 48 S. W. 440.

*Louisiana*: *Bezou v. Pike*, 23 La. Ann. 788.

*Maryland*: *Stokes v. Detrick*, 75 Md. 256; *Miller v. Matthews*, 87 Md. 464; *Elysville Mfg. Co. v. Akisko Co.*, 5 Md. 152, 1 Md. Ch. 392.

*Massachusetts*: *Melledge v. Boston Iron Co.*, 5 Cush. 158, 51 Am. Dec. 59.

*Missouri*: *Smith v. Richardson*, 77 Mo. App. 422; *Campbell v. Pope*, 96 Mo. 468.

*Nebraska*: *Omaha Consolidated Vinegar Co. v. Burns*, 49 Neb. 229; *German Nat. Bank v. First Nat. Bank of Hastings*, 59 Neb. 7; *Nebraska Nat. Bank v. Ferguson*, 49 Neb. 109, 59 Am. St. Rep. 522; *Alexander v. Culbertson Irrigation & Water-Power Co.*, 61 Neb. 333.

*New Jersey*: *In re West Jersey Traction Co.*, 59 N. J. Eq. 63; *Flaherty v. Atlantic Lumber Co.*, 58 N. J. Eq. 467.

*New York*: *Sheldon Hat Blocking Co. v. Eickemeyer Hat Block-*

the powers conferred upon the corporation, the stockholders ratify the same if they acquiesce therein with full knowledge of all the facts.<sup>355</sup> And "when the president of a corporation executes in its behalf and within the scope of its charter a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his act."<sup>356</sup> So a railroad company will be

ing Mach. Co., 90 N. Y. 607; *Hooker v. Eagle Bank of Rochester*, 30 N. Y. 83, 86 Am. Dec. 351; *Davies v. New York Concert Co.*, 59 Hun, 623; *New Britain Nat. Bank v. A. B. Cleveland Co.*, 91 Hun, 447, 158 N. Y. 722; *Mesinger v. Mesinger Bicycle Saddle Co.*, 44 App. Div. 26; *Jenkins v. John Good Cordage & Machine Co.*, 56 App. Div. 573.

*North Carolina*: *Lewis v. Albemarle & Raleigh R. Co.*, 95 N. C. 179; *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454.

*Oregon*: *Currie v. Bowman*, 25 Or. 364; *Finnegan v. Pacific Vinegar Co.*, 26 Or. 152.

*Pennsylvania*: *Gordon v. Preston*, 1 Watts, 385, 26 Am. Dec. 75; *Cooper v. Potts*, 135 Pa. 115; *Moller v. Keystone Fibre Co.*, 187 Pa. 553; *Balliet v. Brown*, 103 Pa. 546; *Mohrfeld v. Second German South Eastern Bldg. Ass'n*, 194 Pa. 488; *Kelsey v. Crawford County Nat. Bank*, 69 Pa. 426.

*Tennessee*: *First Nat. Bank v. Shook*, 100 Tenn. 436; *Stainback v. Junk Bros. Lumber & Mfg. Co.*, 98 Tenn. 306.

*Texas*: *Texas & Pac. R. Co. v. Davis*, 93 Tex. 378.

*Washington*: *Miller v. Washington Southern R. Co.*, 11 Wash. 414.

*Wisconsin*: *Walworth County Bank v. Farmers' Loan & Trust Co.*, 16 Wis. 629; *Northwestern Fuel Co. v. Lee*, 102 Wis. 426; *McLaren v. First Nat. Bank of Milwaukee*, 76 Wis. 259.

*Wyoming*: *Frank v. Hicks*, 4 Wyo. 502. See *Clark & M. Private Corp.* p. 2188 et seq.

<sup>355</sup> *Clark & M. Private Corp.* p. 2190; *Sewell's Case*, 3 Ch. App. 131; *Eldman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Balliet v. Brown*, 103 Pa. 546; *Payson v. Stoeve*, 2 Dill. 427, Fed. Cas. No. 10,863; *Pneumatic Gas Co. v. Berry*, 113 U. S. 322; *Robinson Mineral Spring Co. v. De Bautte*, 50 La. Ann. 1281; *Stainback v. Junk Bros. Lumber & Mfg. Co.*, 98 Tenn. 306.

<sup>356</sup> *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371; *Augusta, T. & G. R. Co. v. Kittel*, 2 U. S. App. 409, 52 Fed. 63, 2 C. C. A. 615; *Fitzgerald & M. Const. Co. v. Fitzgerald*, 137 U. S. 109; *Walworth County Bank v. Farmers' Loan & Trust Co.*, 16 Wis. 629.

held to have ratified an act of a conductor or other officer in employing a physician, where, after a full knowledge of all the facts, it does not disaffirm the employment.<sup>357</sup> Where a station agent, without express authority, engaged a surgeon to attend an employe for an injury sustained in the service of the company, and the superintendent knew and did not object to it, but told the surgeon that he would be paid, this will warrant a finding that the company ratified such employment.<sup>358</sup> So, although it is not shown that the person representing a railroad company had authority to agree with the landowner that part of the right of way should be given for street purposes, yet the company by leaving the land unfenced, as, part of the street, and knowing that it was so used, and that improvements were made with a view to its continued use as a street, ratified the agreement.<sup>359</sup> The failure on the part of an insurance company to deny the execution of a policy, and its acceptance of an application therefor, amount to a ratification of the acts of an unauthorized agent, in soliciting the insurance, receiving the application, and conditionally delivering the policy.<sup>360</sup>

If, however, it is necessary that authority to do a particular act or make a particular contract shall be given in a certain form or mode, either by reason of mandatory charter or statutory provision, or by reason of a common-law rule, ratification of such act or contract must be in the prescribed form or mode, and a ratification by acquiescence would not be sufficient.<sup>361</sup> Thus, if a corporation can only authorize a

<sup>357</sup> *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Terre Haute & I. R. Co. v. Stockwell*, 118 Ind. 100; *Toledo, W. & W. R. Co. v. Prince*, 50 Ill. 26; *Toledo, W. & W. R. Co. v. Rodriguez*, 47 Ill. 188, 95 Am. Dec. 484; *Indianapolis & St. L. R. Co. v. Morris*, 67 Ill. 295.

<sup>358</sup> *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Toledo, W. & W. R. Co. v. Prince*, 50 Ill. 26.

<sup>359</sup> *Burlington, C. R. & N. R. Co. v. Columbus Junction*, 104 Iowa, 110.

<sup>360</sup> *Terry v. Provident Fund Soc.*, 13 Ind. App. 1, 55 Am. St. Rep. 217; *Home Ins. Co. v. Gilman*, 112 Ind. 7; *Kerlin v. National Accident Ass'n*, 8 Ind. App. 628.

<sup>361</sup> *Ante*, § 129; *Clark & M. Private Corp.* p. 2190; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

particular act or contract by a power under seal, or by a formal vote, ratification of such an act or contract must be under seal or by a formal vote as the case may be.<sup>362</sup>

(j) **Application of rule to municipal corporations.**—The above rules also apply to municipal and other corporations exercising only governmental functions. But it would seem that as the operations of such a corporation are more difficult than those of an individual, they would not be required to repudiate unauthorized acts as promptly as an individual, and especially is this so in regard to bodies or boards executing governmental duties. "A presumption from the non-action of a corporation like a school district would be less readily inferable than in the case of individuals, who can more readily act. A district can be bound only by some recorded vote, or some act, or an acquiescence on their part as a corporation, equivalent thereto."<sup>363</sup> Thus, a school district cannot be considered as promising to pay for unauthorized repairs upon their school house by using it afterwards.<sup>364</sup>

It has been held that municipal corporations cannot be presumed to ratify and confirm acts of their officers and agents by silence or acquiescence, but acts of ratification by such bodies politic should be direct, explicit, unequivocal, and with full knowledge of the facts. Agents themselves, not principals, answerable to their constituents, they are not to be presumed to recognize and incidentally ratify and confirm the acts of their officers, done beyond the scope of their authority.<sup>365</sup> As has been said: "Under particular circumstances, the silence of the principal for a very few days, after he is advised of an act done by his agent, may amount

<sup>362</sup> *Clark & M. Private Corp.* p. 2190; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Meloy v. Central Nat. Bank*, 18 D. C. 69, 17 Wash. Law Rep. 63; *Blood v. La Serena Land & Water Co.*, 113 Cal. 221.

<sup>363</sup> *School Dist. No. 6 v. Aetna Ins. Co.*, 62 Me. 330; *Davis v. School Dist. No. 2*, 24 Me. 349; *Chamberlain v. Dover*, 13 Me. 466, 29 Am. Dec. 517; *Bliss v. Clark*, 16 Gray (Mass.) 60; *Fisher v. School Dist. No. 17*, 4 Cush. (Mass.) 494.

<sup>364</sup> *Davis v. School Dist. No. 2*, 24 Me. 349. And see *Fisher v. School Dist. No. 17*, 4 Cush. (Mass.) 494.

<sup>365</sup> *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *Murphy v. Albina*, 22 Or. 106, 29 Am. St. Rep. 578.

to strong presumptive evidence of ratification, especially where such evidence has a tendency to mislead the opposite party. But it will never do to apply so vigorous a rule where a state is the principal."<sup>366</sup>

**(k) Acquiescence or silence of one of two joint agents.—**

The above doctrine of ratification by silent acquiescence refers to the principal only, and not to his agents. Hence an unauthorized act performed by one of two joint agents is not impliedly ratified by the failure of the other joint agent to repudiate such act, upon knowledge of the same.<sup>367</sup> If, however, another agent, with full knowledge, acquiesces in an unauthorized act performed by another, which was within the scope of his authority to perform, he will be held to have impliedly ratified the same.<sup>368</sup>

**(l) Delay in bringing suit.—**A mere delay in bringing a necessary suit does not amount to ratification, where the principal has expressly repudiated an unauthorized act of his agent.<sup>369</sup> So where the agent has unauthorizedly given a receipt for a less amount than the face of a promissory note, in full payment, a ratification thereof did not result from the principal's mere failure to bring suit upon the note for any time less than the limitation, in the absence of knowledge on his part.<sup>370</sup>

**§ 142. Ratification by suit.**

**(a) In general.—**Again the ratification of acts performed by an agent, without authority, on behalf of the principal, may be implied from the principal's bringing a suit or action to enforce rights, or instituting other legal process, based upon such unauthorized acts.<sup>371</sup> Thus, where a principal ap-

<sup>366</sup> *DeLafield v. State of Illinois*, 2 Hill (N. Y.) 160.

<sup>367</sup> *Penn v. Evans*, 28 La. Ann. 576.

<sup>368</sup> *Ante*, § 123; *Singer Mfg. Co. v. Belgart*, 84 Ala. 519.

<sup>369</sup> *McClure v. Ewartson*, 14 Lea (Tenn.) 495.

<sup>370</sup> *Holland v. Van Bell*, 89 Ga. 223.

<sup>371</sup> *Ferguson v. Carrington*, 9 Barn. & C. 59; *Drennen's Adm'r v. Walker*, 21 Ark. 539; *Kyser v. Wells*, 60 Ind. 261; *Knowlton v. School City of Logansport*, 75 Ind. 103; *Warder, Bushnell & Glessner Co. v. Cuthbert*, 99 Iowa, 681; *Eadie v. Ashbaugh*, 44 Iowa, 519; *Bank of Owensboro v. Western Bank*, 13 Bush (Ky.) 526, 26 Am. Rep. 211;

peared in court and presented an attachment which had been sent out in his name by an assumed agent, this was held a full ratification of the authority to execute the bond.<sup>372</sup> So ratification of a demand may be made by a principal by adopting an action founded on such demand.<sup>373</sup> Commencing suit to recover for a loss, and giving a note for the premium, is a sufficient ratification by a principal of a contract of insurance, entered into by an unauthorized agent.<sup>374</sup> Where an agent collects money for another without authority, a suit against him by such other for its conversion ratifies the collection, but not the retention of it thereafter.<sup>375</sup> So an action by the principal against the administrators of an agent ratifies the agent's unauthorized receipt of money, but not the loan thereof without authority.<sup>376</sup> But where an agent lends money without authority and takes insufficient security therefor, a suit by the principal against the borrower to recover the money lent does not necessarily ratify the security taken.<sup>377</sup> Nor does a suit brought in the lessee's

*Blanchard v. Waite*, 28 Me. 51, 48 Am. Dec. 474; *Peters v. Ballistier*, 3 Pick. (Mass.) 495; *Sutton v. Cole*, 3 Pick. (Mass.) 232; *Pratt v. Putnam*, 13 Mass. 361; *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617; *Augusta Bank v. Conrey*, 28 Miss. 667; *Dove v. Martin*, 23 Miss. 588; *D. M. Osborn Co. v. Jordan*, 52 Neb. 465; *Ham v. Boody*, 20 N. H. 411, 51 Am. Dec. 235; *Payne v. Smith*, 12 N. H. 34; *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753; *Wilmot v. Richardson*, 4 Abb. Dec. (N. Y.) 614; *Johnston v. McAusland*, 9 Abb. Pr. (N. Y.) 214; *Woodward v. Suydam*, 11 Ohio, 363; *Plano Mfg. Co. v. Millage*, 14 S. D. 331.

<sup>372</sup> *Augusta Bank v. Conrey*, 28 Miss. 667; *Dove v. Martin*, 23 Miss. 588.

<sup>373</sup> *Town of Grafton v. Follansbee*, 16 N. H. 450, 41 Am. Dec. 736. Or by permitting an action by the agent in regard to the unauthorized transaction. *Curnane v. Scheidel*, 70 Conn. 13.

<sup>374</sup> *Blanchard v. Waite*, 28 Me. 51, 48 Am. Dec. 474; *Howard F. Ins. Co. v. Chase*, 5 Wall. (U. S.) 514; *Finney v. Fairhaven Ins. Co.*, 5 Metc. (Mass.) 192, 38 Am. Dec. 397; *Oliver v. Mutual Commercial Marine Ins. Co.*, 2 Curt. 296, Fed. Cas. No. 10,498.

<sup>375</sup> *Schanz v. Martin*, 37 Misc. (N. Y.) 492. Compare *Holland Coffee Co. v. Johnson*, 38 Misc. (N. Y.) 187.

<sup>376</sup> *Benson v. Liggett*, 78 Ind. 452.

<sup>377</sup> *St. Mary's Bank v. Calder*, 3 Strob. (S. C.) 403.



name to try title ratify a lease made by an agent without authority.<sup>378</sup>

Likewise the ratification may be implied from the defense pleaded by the principal to an action on the unauthorized acts.<sup>379</sup> A bank, by defending a suit brought to recover land acquired by it through its agent, recognizes the authority and acts of the agent in making such acquisition.<sup>380</sup> So where a buyer sues for breach of a warranty made by the seller's agent without authority, the seller ratifies the warranty by declaring in set-off for the price.<sup>381</sup>

(b) **On unauthorized sale.**—So where the owner of goods brings an action against the vendee thereof,<sup>382</sup> or against the agent,<sup>383</sup> for the price of such goods sold by the agent without authority, he thereby impliedly ratifies the former unauthorized sale. Thus, where an agent sells the goods of his principal at an agreed price, to be paid for in services rendered to the agent by the purchaser, and the principal, with full knowledge of the facts, sues the purchaser in *assumpsit* for the price agreed, he thereby affirms the contract of his agent, both as to the sale and the mode of paying the price.<sup>384</sup> Where, however, the owner brings an action of *trover* for the recovery of the goods themselves, this is a direct disaffirmance of the unauthorized sale and does not amount to a ratification.<sup>385</sup> Nor is an unauthorized warranty ratified by bringing a suit to recover the price of a chattel sold by the

<sup>378</sup> *Gillis v. Bailey*, 17 N. H. 18.

<sup>379</sup> *Gibson v. Norway Sav. Bank*, 69 Me. 579; *Peninsular Bank v. Hanmer*, 14 Mich. 208; *Smith v. Plummer*, 5 Whart. (Pa.) 89, 34 Am. Dec. 530.

<sup>380</sup> *Lathrop v. Commercial Bank of Scioto*, 8 Dana (Ky.) 114, 33 Am. Dec. 481.

<sup>381</sup> *Edgar v. Joseph Breck & Sons Corp.*, 172 Mass. 581.

<sup>382</sup> *Bailey v. Pardridge*, 134 Ill. 188; *Pardridge v. Bailey*, 20 Ill. App. 351; *Lloyd v. Brewster*, 4 Paige (N. Y.) 537, 27 Am. Dec. 88; *Shoninger v. Peabody*, 57 Conn. 42, 14 Am. St. Rep. 88. Compare *Salfeld v. Sutler County Land Imp. & Reclamation Co.*, 94 Cal. 546; *Shoninger v. Peabody*, 59 Conn. 588.

<sup>383</sup> *Peters v. Ballistier*, 3 Pick. (Mass.) 495; *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617; *Frank v. Jenkins*, 22 Ohio St. 597; *Beloit Bank v. Beale*, 34 N. Y. 473.

<sup>384</sup> *Shoninger v. Peabody*, 57 Conn. 42, 14 Am. St. Rep. 88.

<sup>385</sup> *Smith v. Hudson*, 4 Term R. 211.

agent;<sup>386</sup> but such a warranty is ratified by the principal's pleading a set-off to a suit brought for the breach of such warranty.<sup>387</sup> Likewise an unauthorized contract of sale is not necessarily ratified by bringing a suit to recover the value of goods upon an implied promise to pay;<sup>388</sup> nor by an action of assumpsit against one to whom the agent has delivered the goods in payment of his own debt.<sup>389</sup>

The suit must be one which recognizes the unauthorized sale and seeks to enforce it. If it is a suit which manifestly shows an intent to disaffirm such sale, but is brought to prevent loss, as in an action of trover or in an action of assumpsit for goods had and received, it does not amount to a ratification, unless taken together with other circumstances such could be implied.

(c) **On unauthorized contracts.**—So if a principal seeks to enforce, as by a suit, an unauthorized contract entered into on his behalf either by his agent or by an assumed agent, it will amount to a ratification thereof.<sup>390</sup> Thus, where he brings an action against the mortgagor to recover possession of land, he ratifies the unauthorized act of procuring the mortgage.<sup>391</sup> So a corporation ratifies the act of an assumed agent by pleading, in a mandamus proceeding in which it was plaintiff, the existence of the contract made by the agent.<sup>392</sup> And if a principal brings suit on notes received by an agent, he ratifies the agent's unauthorized acts in receiving them, or in receiving them in an unauthorized manner.<sup>393</sup> Or where he sues on a note given to his agent

<sup>386</sup> *Cooley v. Perrine*, 41 N. J. Law, 322, 32 Am. Rep. 210. Compare *D. M. Osborn Co. v. Jordan*, 52 Neb. 465.

<sup>387</sup> *Edgar v. Joseph Breck & Sons Corp.*, 172 Mass. 581.

<sup>388</sup> *Carew v. Lillienthall*, 50 Ala. 44.

<sup>389</sup> *Gould v. Blodgett*, 61 N. H. 115.

<sup>390</sup> *Dodge v. Lambert*, 2 Bosw. (N. Y.) 570; *Fiedler v. Smith*, 6 Cush. (Mass.) 336; *Eaton v. Knowles*, 61 Mich. 625; *Partridge v. White*, 59 Me. 564; *Benson v. Liggett*, 78 Ind. 452.

<sup>391</sup> *North Brookfield Sav. Bank v. Flanders*, 161 Mass. 335; *Partridge v. White*, 59 Me. 564; *Beldman v. Goodell*, 56 Iowa, 592.

<sup>392</sup> *Tingley v. Bellingham Bay Boom Co.*, 5 Wash. 644.

<sup>393</sup> *Ingraham v. Barber*, 72 Ga. 158; *Eadie v. Ashbaugh*, 44 Iowa, 519; *Beldman v. Goodell*, 56 Iowa, 592; *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753; *Taylor v. Gardiner*, 8 Manitoba, 310; *Franklin*

for goods sold, he ratifies an unauthorized warranty given by the agent on the sale.<sup>394</sup>

**§ 143. Mere retention of agent not ratification.**

The mere fact that a principal retains in his employment one who has exceeded his authority does not necessarily amount to a ratification of his unauthorized acts, in the absence of other circumstances showing an intention to ratify.<sup>395</sup> As has been seen, ratification cannot be inferred from acts which may be readily explained without involving any intention to ratify. A company cannot, therefore, be held to have ratified an assault and battery committed by its servant, by retaining him in its service, where it believed his account of the affair, and thought it just to maintain the status quo until a judicial determination of the matter had been had. Nor is the case affected by the fact that the servant was criminally convicted of assault and battery, where he was not permitted to testify in his own defense, and he might have been so convicted on evidence falling far short of the outrage charged.<sup>396</sup> Thus, if a railway corporation retains a conductor in its employ after knowledge of a willful and malicious tort on his part, this is evidence of its ratification of such tort, but whether it was ratified or not is a question for the jury.<sup>397</sup> Nor will the failure of the principal to discharge his agent on account of charges made against him, which in no way related to the act in question, make the principal responsible for the act, when he neither authorized, nor gave any person reason to believe he authorized, it.<sup>398</sup>

v. Ezell, 1 Sneed (Tenn.) 497; Cochran v. Chitwood, 59 Ill. 53; Warder, Bushnell & Glessner Co. v. Cuthbert, 99 Iowa, 681.

<sup>394</sup> D. M. Osborn Co. v. Jordan, 52 Neb. 465.

<sup>395</sup> Deacon v. Greenfield, 141 Pa. 467; Dillingham v. Russell, 73 Tex. 47, 15 Am. St. Rep. 753; Robinson v. Superior Rapid Transit R. Co., 94 Wis. 345, 59 Am. St. Rep. 897; Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 8 Am. St. Rep. 512.

<sup>396</sup> Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 8 Am. St. Rep. 512.

<sup>397</sup> Robinson v. Superior Rapid Transit R. Co., 94 Wis. 345, 59 Am. St. Rep. 897; Dillingham v. Russell, 73 Tex. 47, 15 Am. St. Rep. 753.

<sup>398</sup> Fortune v. Stockton, 182 Ill. 454.

**§ 144. Mere payment of money not ratification.**

The mere payment of money to the order of an agent who was exceeding his authority by incurring traveling expenses does not amount to a ratification of such acts.<sup>399</sup> In order that such a payment may amount to a ratification, it should appear that the payment was made with full knowledge of the facts, and with an intention of ratifying them, or that it was made to enable the agent to continue his operations.<sup>400</sup> Nor does a mere unconditional promise to pay, by one whose name has been signed to a note without authority, as a matter of law, amount to a ratification; it is merely evidence from which a ratification may be implied.<sup>401</sup> And the fact that a principal advanced to his agent money to pay certain debts incurred, including an unauthorized one of which he had no knowledge, was not a ratification of the unauthorized act by which such debt was incurred.<sup>402</sup> But payment by the principal of part of a contract price is a ratification of the agent's act in making the contract.<sup>403</sup>

**§ 145. Burden of proof.**

✓ The burden of proving a ratification by a principal of the unauthorized acts of his agent or of an assumed agent is upon the party alleging such ratification.<sup>404</sup>

**VI. EFFECT OF RATIFICATION.****§ 146. Retroactive effect.**

(a) **In general.**—It is a well established rule of law that by a valid ratification the relation of principal and agent, with all its incidental rights and liabilities, is as fully established as by the original appointment, and that such ratifica-

<sup>399</sup> Fuller v. Ellis, 39 Vt. 345, 94 Am. Dec. 327.

<sup>400</sup> Fuller v. Ellis, 39 Vt. 345, 94 Am. Dec. 327. And see Bohanan v. Boston & M. R., 70 N. H. 526.

<sup>401</sup> Bank of Commerce v. Bernero, 17 Mo. App. 313; Owsley v. Phillips, 78 Ky. 517, 39 Am. Rep. 258.

<sup>402</sup> Beebe v. Equitable Mut. Life & Endow. Ass'n, 76 Iowa, 129.

<sup>403</sup> Anderson v. National Surety Co., 196 Pa. 288.

<sup>404</sup> Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Hurley v. Watson, 68 Mich. 531; De Vaughn v. McLeroy, 82 Ga. 687; Dean v. Hipp (Colo. App.) 66 Pac. 804.

tion relates back to the time of performance of the act and supplies or is equivalent to an original authority to do the act—*Omnis ratihabitio retrotrahitur, et mandato priori aequiparatur*. In such cases the principal is bound to the same extent as if the acts had been done in the first instance by his authority, and this is so whether the acts be to his detriment or to his advantage, or whether they are founded in tort or in contract, or whether the act was done merely in excess of authority, or without any authority at all. The reason for this rule is that there was an open assumption to act as agent of the party who subsequently ratified the act, and the agency having been knowingly ratified, the ratification becomes equivalent to original authority.<sup>405</sup> And

<sup>405</sup> *England*: *Wilson v. Tumman*, 46 E. C. L. 242, 6 Man. & G. 242; *Foster v. Bates*, 12 Mees. & W. 226; *Heslop v. Baker*, 8 Exch. 417; *Goodtitle v. Woodward*, 5 E. C. L. 396, 3 Barn. & Ald. 689; *Maclean v. Dunn*, 4 Bing. 722.

*United States*: *Drakely v. Gregg*, 8 Wall. 242; *Clark's Ex'rs v. Van Riemsdyk*, 9 Cranch, 153; *Bronson's Ex'r v. Chappell*, 12 Wall. 681; *Courcier v. Ritter*, 4 Wash. C. C. 549, Fed. Cas. No. 3,282; *Fleckner v. United States Bank*, 8 Wheat. 338; *Cook v. Tullis*, 18 Wall. 332.

*Alabama*: *Clealand v. Walker*, 11 Ala. 1058, 46 Am. Dec. 238; *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612; *Chapman v. Lee's Adm'r*, 47 Ala. 143.

*Arkansas*: *Gist v. Harkrider*, 15 S. W. 187; *Irons v. Reyburn*, 11 Ark. 378.

*California*: *Taylor v. Robinson*, 14 Cal. 396.

*Colorado*: *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248; *Lynch v. Smyth*, 25 Colo. 103.

*Connecticut*: *Church v. Sterling*, 16 Conn. 388; *Hall v. Norwalk F. Ins. Co.*, 57 Conn. 105.

*Georgia*: *Bray v. Gunn*, 53 Ga. 144; *Lee v. West*, 47 Ga. 311; *Weaver v. Ogletree*, 39 Ga. 586; *Perry v. Hudson*, 10 Ga. 362; *Graham v. Williams*, 114 Ga. 716.

*Illinois*: *St. Louis Nat. Stock Yards v. O'Reilly*, 85 Ill. 546; *Ohio & M. R. Co. v. Middleton*, 20 Ill. 629; *Goodell v. Woodruff*, 20 Ill. 191; *Roby v. Cossitt*, 78 Ill. 638.

*Indiana*: *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. Rep. 613; *Persons v. McKibben*, 5 Ind. 261, 61 Am. Dec. 85; *United States Exp. Co. v. Rawson*, 106 Ind. 215; *Louisville, E. & St. L. R. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770.

*Iowa*: *Coffin v. Gephart*, 18 Iowa, 256.

*Kentucky*: *Barbour v. Craig*, Litt. Sel. Cas. 213.

this rule applies as well to corporations as to individuals.<sup>406</sup> For example, where an insurance company has received and retained a premium for insurance from one who is unauthor-

*Louisiana:* Sentell v. Kennedy, 29 La. Ann. 679; Overby v. Overby, 18 La. Ann. 546; Meyers v. Simmons, 19 La. Ann. 370; Dunbar v. Bullard, 2 La. Ann. 810; Dord v. Bounaffee & Co., 6 La. Ann. 563, 54 Am. Dec. 573.

*Maine:* Forsyth v. Day, 46 Me. 176; Fiske v. Holmes, 41 Me. 441; Cowan v. Wheeler, 31 Me. 439; Milliken v. Coombs, 1 Me. 343.

*Massachusetts:* Starks v. Sikes, 8 Gray, 609, 69 Am. Dec. 270; Fisher v. Willard, 13 Mass. 379; Frothingham v. Haley, 3 Mass. 68; Eaton v. Littlefield, 147 Mass. 122; Brigham v. Peters, 1 Gray, 139.

*Michigan:* Detroit v. Jackson, 1 Doug. 106; Hammond v. Hannin, 21 Mich. 374.

*Minnesota:* Lowry v. Harris, 12 Minn. 255 (Gil. 166); Goss v. Stevens, 32 Minn. 472; Sheffield v. Ladue, 16 Minn. 388 (Gil. 346), 10 Am. Rep. 145; Hunter v. Cobe, 84 Minn. 187.

*Mississippi:* Kountz v. Price, 40 Miss. 341; Baker v. Byrne, 2 Smedes & M. 193; Planters' Bank v. Sharp, 4 Smedes & M. 75, 43 Am. Dec. 470.

*Missouri:* Summerville v. Hannibal & St. J. R. Co., 62 Mo. 391; Nesbitt v. Helser, 49 Mo. 383; Golson v. Ebert, 52 Mo. 260; Little v. Stettheimer, 13 Mo. 572.

*Nebraska:* Rich v. State Nat. Bank, 7 Neb. 201, 29 Am. Rep. 382.

*New Hampshire:* Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Grant v. Beard, 50 N. H. 129; Davis v. Haverhill School Dist., 44 N. H. 399.

*New Jersey:* Gulich v. Grover, 33 N. J. Law, 463, 97 Am. Dec. 728.

*New York:* Smith v. Tracy, 36 N. Y. 79; Cairnes v. Bleecker, 12 Johns. 300; Towle v. Stevenson, 1 Johns. Cas. 110; Lawrence v. Taylor, 5 Hill, 107; Hankins v. Baker, 46 N. Y. 666.

*Ohio:* Pollock v. Cohen, 32 Ohio St. 514.

*Pennsylvania:* McMahan v. McMahan, 13 Pa. 376, 53 Am. Dec. 481; Berger's Appeal, 96 Pa. 443; Vanhorne v. Frick, 6 Serg. & R. 90; Kelsey v. Crawford County Nat. Bank, 69 Pa. 426; Himes v. Herr, 3 Pa. Super. Ct. 124, 39 Wkly. Notes Cas. 568.

*Tennessee:* Foster v. Smith, 2 Cold. 474, 88 Am. Dec. 604.

*Texas:* Brock v. Jones' Ex'r, 16 Tex. 461.

*Vermont:* Brooks v. Fletcher, 56 Vt. 624; Bigelow v. Denison, 23 Vt. 564.

*Virginia:* Downer v. Morrison, 2 Grat. 237.

*Wisconsin:* Weiseger v. Wheeler, 14 Wis. 101; Brown v. La Crosse City Gas Light & Coke Co., 21 Wis. 51.

<sup>406</sup> See Clark & M. Private Corp. § 714 et seq.; Planters' Bank

isedly acting for a property owner, there was no hardship on the company in permitting such owner to ratify the act of the unauthorized agent when he obtains knowledge thereof, although it was after a loss had occurred against which the insurance was effected.<sup>407</sup>

The ratification, however, is retroactive in its effect only as to the specific act ratified and does not extend, so as to bind the principal, to other acts in excess of the agent's authority.<sup>408</sup> And as we shall see hereafter, if the principal is not himself bound by an act or contract entered into in his behalf by an agent, he cannot, as long as the contract is executory, ratify the same and have it relate back for the purpose of acquiring affirmative rights against the other party.<sup>409</sup>

There is an apparent exception to the above general rule in cases of contracts entered into by promoters of corporations. not yet organized. But this has been fully discussed in a former section.<sup>410</sup>

(b) **Illustrations.**—Thus, the ratification of an assignment of a note made by an agent not authorized to assign it relates back to the time of the assignment.<sup>411</sup> And if a party agrees to indorse a note, and, after his agent has indorsed it without authority, he ratifies the act of the agent, he is bound by the indorsement.<sup>412</sup> A contract for the sale of land, signed for the vendor by an agent not authorized by writing to sign, will, under the Pennsylvania statute of frauds, have the same force and effect, when ratified in writing by the vendor, as though signed by the agent in pursuance of law-

*v. Sharp*, 4 Smedes & M. (Miss.) 75, 43 Am. Dec. 470; *Moss v. Rossie Lead Min. Co.*, 5 Hill (N. Y.) 137; *Leggett v. New Jersey Mfg. & Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728; *Frankfort & S. Turnpike Co. v. Churchill*, 6 T. B. Mon. (Ky.) 427, 17 Am. Dec. 159; *Everett v. United States*, 6 Port. (Ala.) 166, 30 Am. Dec. 584; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

<sup>407</sup> *Hagedorn v. Oliverson*, 2 Maule & S. 485; *Terry v. Provident Fund Soc.*, 13 Ind. App. 1, 55 Am. St. Rep. 217.

<sup>408</sup> *Baldwin v. Burrows*, 47 N. Y. 199.

<sup>409</sup> *Post*, § 148 (b).

<sup>410</sup> *Ante*, § 99.

<sup>411</sup> *Persons v. McKibben*, 5 Ind. 261, 61 Am. Dec. 85.

<sup>412</sup> *Brown v. Wilson*, 45 S. C. 519, 55 Am. St. Rep. 779.

ful authority in writing, provided the vendee has not rescinded it before such ratification.<sup>413</sup> And where the principal, with full knowledge of all consequences, adopts acts of an agent who has committed a breach of orders, he will be bound by them.<sup>414</sup> Under this doctrine, if a contract is made in one state to be fulfilled there subject to ratification by a party in another state, the contract, when ratified, is to be interpreted by the laws of the first state.<sup>415</sup>

(c) **As to intervening rights.**—Although the general rule is that a ratification relates back to the time of the inception of the transaction, and has a complete retroactive effect, yet if third persons acquire rights, after the act is done and before it has received the sanction of the principal, the ratification cannot act retrospectively so as to overreach and defeat those intervening rights, and it cannot matter whether the third party is an individual, a corporation, or the government of the United States.<sup>416</sup> As long as an unauthorized act or contract remains unratified, third outside parties may look upon such act or contract as if it did not exist. They may deal with property, in respect to which such acts or contracts are entered into, as if it is the property of the party who is unauthorizedly represented, and may acquire

<sup>413</sup> *McClintock v. South Penn Oil Co.*, 146 Pa. 144, 28 Am. St. Rep. 785.

<sup>414</sup> *Szymanski v. Plassan*, 20 La. Ann. 90, 96 Am. Dec. 382.

<sup>415</sup> *Galson v. Ebert*, 52 Mo. 260.

<sup>416</sup> *Parmelee v. Simpson*, 5 Wall. (U. S.) 81; *Cook v. Tullis*, 18 Wall. (U. S.) 332; *Stoddart's Case*, 4 Ct. Cl. (U. S.) 511; *Johnson v. Johnson*, 31 Fed. 700; *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612; *Wittenbrock v. Bellmer*, 57 Cal. 12; *Lampson v. Arnold*, 19 Iowa, 479; *Graham v. Williams*, 114 Ga. 716; *Fiske v. Holmes*, 41 Me. 441; *Clendenning v. Hawk*, 10 N. D. 90; *McMahan v. McMahan*, 13 Pa. 376, 53 Am. Dec. 481. "If an individual pretending to be the agent of another should enter into a contract for the sale of land of his assumed principal, it would be impossible for the latter to ratify the contract, if between its date and the attempted ratification he had himself disposed of the property. He could not defeat the intermediate sale made by himself, and impart validity to the sale made by the pretended agent, for his power over the property or to contract for its sale would be gone." *McCracken v. San Francisco*, 16 Cal. 624.



title thereto or interests therein, the same as if such acts or contracts had not been done or made. Nor can their rights therein be affected by any subsequent ratification by the principal.<sup>417</sup> If the law were otherwise, the principal would have the power of preferring one creditor although his means of payment had been attached by another creditor.<sup>418</sup> A ratification cannot defeat an attachment levied on the property of a debtor after a sale by or to his agent.<sup>419</sup> Thus, if an agent unauthorizedly assigns a debt, and before ratification it is garnished under a writ against the assignor, he cannot defeat such garnishment by a subsequent ratification of the assignment.<sup>420</sup> Nor can an attachment of property be defeated by a subsequent ratification of an unauthorized sale, which had been made before the attachment.<sup>421</sup> Still less shall a party be injuriously affected by a subsequent assent to, or affirmation of, an act, if the party assenting and affirming had, when the act which is in dispute was first communicated, disaffirmed and repudiated the same.<sup>422</sup> So where a deed is made by an agent without sufficient authority, a subsequent ratification relates back to the time of the execution, but not so as to affect the intervening rights of third parties.<sup>423</sup>

But while it is true, as a general rule, that a ratification cannot relate back so as to cut off intervening rights of third persons, this does not apply where the doctrine of relating back is applied merely for the protection of a superior equity, even though such application interferes with claims of third persons resting on an inferior equity.<sup>424</sup> Thus, where an

<sup>417</sup> *Parmelee v. Simpson*, 5 Wall. (U. S.) 84; *Pinckney v. Inglesby*, 28 S. C. 345; *Hardware Co. v. Deere*, 53 Ark. 140.

<sup>418</sup> *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612.

<sup>419</sup> *Norton v. Alabama Nat. Bank*, 102 Ala. 420; *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612; *Taylor v. Robinson*, 14 Cal. 396; *Pollock v. Cohen*, 32 Ohio St. 525; *Kempner v. Rosenthal*, 81 Tex. 12; *Conner v. Littlefield*, 79 Tex. 76.

<sup>420</sup> *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612.

<sup>421</sup> *Pollock v. Cohen*, 32 Ohio St. 514; *Taylor v. Robinson*, 14 Cal. 396; *Norton v. Alabama Nat. Bank*, 102 Ala. 420.

<sup>422</sup> *Fiske v. Holmes*, 41 Me. 441.

<sup>423</sup> *Graham v. Williams*, 114 Ga. 716.

<sup>424</sup> *Williams v. Butler*, 35 Ill. 549.

execution creditor levied upon the assets of a partnership, entered into by an agent with another person in the name of his principal, without authority, for a debt due from such other partner before the creation of the partnership, and the principal subsequently ratified such partnership, he was entitled to have the firm assets first applied to the payment of the firm debts, and the lien of the execution creditor so levying, only attached to whatever interest the other partner had in the assets of the firm after payment of the firm debts.<sup>425</sup>

(d) **Pendente lite.**—For the same reason if a party has a complete cause of action or defense when a suit is commenced, he cannot be deprived thereof, *pendente lite*, by a ratification of some act or contract which at the time the suit was commenced was of no effect because it had not been ratified; nor can the principal by a ratification, *pendente lite*, create a good cause of action in himself, which did not exist before, and thereby prejudice others' rights.<sup>426</sup> Thus, the ratification of an unauthorized assignment of a cause of action will not relate back to the date of such assignment, and thereby support the action<sup>427</sup> or take away a defense which the defendant had at the commencement of the action.<sup>428</sup> So where an agent for the collection of a claim, without any authority to delegate his power, assigns it to another to sue thereon, a ratification by his principal of such act after the commencement of the suit is not equivalent to a precedent authorization as to defendant, since the principal could not, by his act, take away from defendant a defense he had at the commencement of the suit.<sup>429</sup> So, where in an action for trespass, the defendant has a defense at the commencement of the suit, he cannot be deprived thereof by the ratification of a deed by a third person which

<sup>425</sup> *Williams v. Butler*, 35 Ill. 549.

<sup>426</sup> *Dingley v. McDonald*, 124 Cal. 682; *Wittenbrock v. Bellmer*, 57 Cal. 12; *Fiske v. Holmes*, 41 Me. 441; *Johnson v. Johnson*, 31 Fed. 700. But see *Persons v. McKibben*, 5 Ind. 261, 61 Am. Dec. 85; *Ancona v. Marks*, 7 Hurl. & N. 686.

<sup>427</sup> *Read v. Buffum*, 79 Cal. 77, 12 Am. St. Rep. 131.

<sup>428</sup> *Dingley v. McDonald*, 124 Cal. 682.

<sup>429</sup> *Dingley v. McDonald*, 124 Cal. 682.

was without binding force for want of such ratification at the time the suit was brought.<sup>430</sup>

**§ 147. Irrevocability of ratification.**

As has been seen heretofore, where a principal has obtained a full knowledge of all the material facts concerning an unauthorized act or contract, done or entered into on his behalf, he has an election to either ratify or repudiate such act or contract. It has also been seen that if he ratifies the transaction it is as binding on him as if he had authorized it in the first instance. From this it follows, as a well established rule, that where once the principal has made a valid ratification he cannot thereafter recede from his position and revoke the ratification, any more than he could withdraw from any other contract.<sup>431</sup> Thus, where a principal ratifies an unauthorized act of his agent, he cannot afterwards avoid the effect of such ratification by showing that he was not acquainted with all the facts of the transaction ratified, where he was in possession of the means of learning them.<sup>432</sup>

But the fact that the principal has repudiated the unauthorized act of the agent will not prevent him from subsequently ratifying it,<sup>433</sup> unless the third party relying on such repudiation has abandoned the transaction.<sup>434</sup> And it is no bar to a ratification of an unauthorized agency that a self-constituted agent has been allowed, by the laches of his principal, to enjoy, for a series of years, his principal's property.<sup>435</sup>

<sup>430</sup> *Graham v. Williams*, 114 Ga. 716.

<sup>431</sup> *Smith v. Cologan*, 2 Term R. 189 (note); *Sanders v. Peck*, 87 Fed. 61; *Clark's Ex'rs v. Van Riemsdyk*, 9 Cranch (U. S.) 153; *Whitfield v. Riddle*, 78 Ala. 99; *Jones v. Atkinson*, 68 Ala. 167; *Vaughn v. Sheridan*, 50 Mich. 155; *Hunter v. Cobe*, 84 Minn. 187; *Beall v. January*, 62 Mo. 434; *Glor v. Kelly*, 49 App. Div. (N. Y.) 617; *Andrews v. Aetna Life Ins. Co.*, 92 N. Y. 596; *Avila v. Manhattan Chemical Co.*, 32 Hun (N. Y.) 1; *Rowland v. Barnes*, 81 N. C. 234; *Brock v. Jones' Ex'r*, 16 Tex. 461.

<sup>432</sup> *Glor v. Kelly*, 49 App. Div. (N. Y.) 617.

<sup>433</sup> *Woodward v. Harlow*, 28 Vt. 338.

<sup>434</sup> *Wilkinson v. Harwell*, 13 Ala. 660.

<sup>435</sup> *McMahan v. McMahan*, 13 Pa. 376, 53 Am. Dec. 481.

**§ 148. Effect of ratification as between principal and third persons.**

(a) **In general—Liability of principal.**—Where an act is done or a contract is entered into on behalf of a principal, without any authority from him, he is only nominally a party thereto, and is in no way bound or affected thereby unless he subsequently ratifies such act or contract. As soon, however, as he ratifies the unauthorized acts, he becomes the real party thereto, and is bound thereby to the same extent as if he had originally authorized the doing of such acts or the making of the contracts or had done them himself. By such ratification, the principal takes upon himself the same liabilities or obligations as he would have had, had the acts been done by himself or originally authorized by him; and the third party may enforce against the principal all obligations, growing out of the unauthorized transaction, which he has ratified.<sup>436</sup> By ratification, the principal waives, so far as possible, the want of authority in the assumed agent, and binds himself irrevocably by the contract which he has ratified; or if it is a tort which he has ratified and the tort is of such a nature that it can be ratified, he is liable in damages to anyone who has suffered loss thereby. If a principal ratifies the contract of a self-constituted agent who has assumed to act for him without authority, he is bound to inquire and ascertain the extent to which the self-constituted agent assumed to act in his behalf. He is bound by all acts within the scope of the assumed authority of such agent.<sup>437</sup> Thus, where he ratifies

<sup>436</sup> *Maclean v. Dunn*, 4 Bing. 722; *Fleckner v. Bank of U. S.*, 8 Wheat. (U. S.) 338; *Lynch v. Smyth*, 25 Colo. 103; *Haney School-Furniture Co. v. Hightower Baptist Inst.*, 113 Ga. 289; *Taylor v. Bailey*, 169 Ill. 181; *Burns v. Lane*, 23 Ill. App. 504; *Moore v. Pendleton*, 16 Ind. 481; *Des Moines Nat. Bank v. Meredith*, 114 Iowa, 9; *Hewling v. Wiltshire*, 22 Ky. L. R. 1702, 61 S. W. 264; *Busch v. Wilcox*, 82 Mich. 336, 21 Am. St. Rep. 563; *Sheffield v. Ladue*, 16 Minn. 388, 10 Am. Rep. 145; *In re Soulard's Estate*, 141 Mo. 642; *Brong v. Spence*, 56 Neb. 638; *Hess v. Baar*, 14 Misc. (N. Y.) 286; *Watson v. Gray*, 4 Abb. Dec. (N. Y.) 540; *Straub Brew. Co. v. Bonistalli*, 5 Pa. Super. Ct. 415; *Straub Brew. Co. v. Bisl*, 5 Pa. Super. Ct. 422.

<sup>437</sup> *Busch v. Wilcox*, 82 Mich. 336, 21 Am. St. Rep. 563.

the unauthorized signing of his name to a note, he becomes as liable as if he had originally made the note himself.<sup>438</sup> So the principal is liable on a contract made by his agent, although made in the agent's name, if he subsequently ratifies it.<sup>439</sup>

So the ratification of an unauthorized act makes the principal liable in an action of tort for an injury resulting from the negligence or misconduct of an agent in doing the act.<sup>440</sup> If false representations are made or fraud is practiced by an agent in performing acts for his principal, by ratifying such acts the latter also ratifies the fraud or false representations and is responsible therefor. He cannot ratify the acts and seek to take advantage of their benefits and at the same time disclaim responsibility for the fraud through which they were procured; but by the ratification he takes upon himself responsibility for the fraud.<sup>441</sup> If, however, the principal in making a ratification has no knowledge of the agent's fraudulent representations, he cannot be held liable in an action of deceit therefor.<sup>442</sup>

Where one, who is not at the time a servant of the principal, or who is a servant but exceeds his authority, undertakes to do an act as servant for the benefit of his assumed principal, the latter by subsequently ratifying such act, establishes the relation of master and servant between them,

<sup>438</sup> *Bigelow v. Denison*, 23 Vt. 564; *Walter v. School Trustees*, 12 Ill. 63. And see *Fant v. Campbell*, 8 Okl. 586.

<sup>439</sup> *Violett v. Powell's Adm'r*, 10 B. Mon. (Ky.) 347, 52 Am. Dec. 548. See *Durant v. Roberto* [1900] 1 Q. B. 629, 82 Law T. (N. S.) 217, 69 Law J. Q. B. 382.

<sup>440</sup> *Nims v. Mount Herman Boys' School*, 160 Mass. 177, 39 Am. St. Rep. 467; *Morehouse v. Northrop*, 33 Conn. 380, 89 Am. Dec. 211; *Wilder v. Beede*, 119 Cal. 646; *Avakian v. Noble*, 121 Cal. 216; or of one aiding the agent, and by his co-operation, *Singer Mfg. Co. v. Stephens*, 21 Ky. L. R. 946.

<sup>441</sup> *Fairchild v. McMahon*, 139 N. Y. 290, 36 Am. St. Rep. 701; *National L. Ins. Co. v. Minch*, 53 N. Y. 144; *Smith v. Tracy*, 36 N. Y. 79; *Elwell v. Chamberlin*, 31 N. Y. 611; *Busch v. Wilcox*, 82 Mich. 336, 21 Am. St. Rep. 563; *Lane v. Black*, 21 W. Va. 617; *Wilder v. Beede*, 119 Cal. 646.

<sup>442</sup> *Keefe v. Sholl*, 181 Pa. 90.

so as to make himself liable for such act or for the negligence of such servant in doing the act.<sup>443</sup>

**(b) Rights of principal—Cannot create affirmative rights.—**

✓ So where an unauthorized contract is thus ratified, and is made mutual by the other party also showing his assent thereto, the principal will also be entitled to all rights against the other party, arising out of such contract, and may compel performance of the same as effectually as if it had been originally made by himself or by his authority.<sup>444</sup> Thus, the legislature of a state may, by a statute duly enacted for that purpose, in the absence of any constitutional prohibition against it, ratify the act of an agent in making a sale and receiving a note, and the state thereupon may enforce payment of the note the same as an individual.<sup>445</sup>

But as we have seen heretofore,<sup>446</sup> it is necessary that the assent to such contracts be mutual, in order that both parties may be bound thereby. And where the principal by his subsequent ratification seeks to acquire affirmative rights against the other party, he cannot do so unless such other shows an assent to be bound thereby. Although the principal may bind himself by such subsequent ratification, yet he cannot bind the other unless the latter consents to accept the obligation. This consent may be evidenced in various ways, as where he expressly consents thereto, or where he seeks to enforce the contract after it has been ratified by the principal, or where he accepts the benefits thereof, or where in any other manner he shows an intention on his part to take advantage of the contract after its ratification. But until such other party does show some such assent on his part, the principal cannot, by his ratification alone, give rise to affirmative rights, on an executory contract, against the other

<sup>443</sup> *Dempsey v. Chambers*, 154 Mass. 330, 26 Am. St. Rep. 249, and cases there cited; *Gulf, C. & S. F. R. Co. v. Reed*, 80 Tex. 362, 26 Am. St. Rep. 749; *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 753.

<sup>444</sup> *State v. Torinus*, 26 Minn. 1; *Soames v. Spencer*, 1 Dowl. & R. 32.

<sup>445</sup> *State v. Torinus*, 26 Minn. 1.

<sup>446</sup> *Ante*, § 112.

party thereto.<sup>447</sup> As has been said in a leading case: "I am well aware that there are dicta and observations to be found in the books, which, if taken literally, would overthrow the doctrine of the cases to which I have referred. It is said in *Lawrence v. Taylor*, 5 Hill (N. Y.) 107, that 'such adoptive authority relates back to the time of the transaction, and is deemed in law the same to all purposes as if it had been given before.' And in *Newton v. Bronson*, 3 Kern (N. Y.) 587, 67 Am. Dec. 87, the court say: 'That a subsequent ratification is equally effectual as an original authority, is well settled.' Such expressions are, no doubt, of frequent occurrence; and although they display too much carelessness in the use of language, yet, if they are understood as applicable only to cases in which they occur, they may be considered as a correct statement of the law. The inaccuracy consists in not properly distinguishing between those cases where the subsequent act of ratification is put forth as the foundation of a right in favor of the party who has ratified, and those where it is made the basis of a demand against him. There is a broad and manifest difference between a case in which a party seeks to avail himself, by subsequent assent, of the unauthorized act of his own agent, in order to enforce a claim against a third person, and the case of a party acquiring an inchoate right against a principal by an unauthorized act of his agent, to which validity is afterwards given by the assent or recognition of the principal. Paley on Agency, 192, note. The principal in such a case may, by his subsequent assent, bind himself; but, if the contract be executory, he cannot bind the other party. The latter may, if he chooses, avail himself of such assent against the principal, which, if he does, the contract, by virtue of such mutual ratification, becomes mutually obligatory. There are many cases where the acts of parties, though unavailable for their own benefit, may be used against them. It is upon this obvious distinction, I apprehend, that

<sup>447</sup> *Atlee v. Bartholomew*, 69 Wis. 43, 5 Am. St. Rep. 103; *Dodge v. Hopkins*, 14 Wis. 630; *Townsend v. Corning*, 23 Wend. (N. Y.) 435; *Lowber v. Conitt*, 36 Wis. 183; *Dingley v. McDonald*, 124 Cal. 682.

✓ the decisions which I have cited are to be sustained."<sup>448</sup> Thus, the ratification of a contract entered into by a person acting as agent, but without authority so to do, made by the person for whom he assumed to act as principal, cannot validate the contract so as to bind and be enforceable against the other contracting party without his assent.<sup>449</sup>

And where an unauthorized notice of an existing intent is given by an agent, it cannot be subsequently ratified so as to give the principal a right against the person so notified.<sup>450</sup> Thus, a notice to quit by one assuming to act as agent of another, but having no authority, cannot be ratified after the time when the notice is to operate, so as to lay the foundation for summary proceedings under the landlord and tenant act.<sup>451</sup>

**(c) Liability of principal where agent acts for himself.—**

It has been seen in a previous section that in order that an unauthorized act may be ratified, it must have been performed on the behalf of the principal or person who seeks to so ratify. If then the agent performs the unauthorized act for his own benefit or that of another, it cannot be rati-

✓ <sup>448</sup> By Dixon, C. J., in *Dodge v. Hopkins*, 14 Wis. 630, *Huffc. Cas.* 81: "Lawrence v. Taylor and Newton v. Bronson were both actions in which the adverse party claimed rights through the agency of individuals whose acts had been subsequently ratified. And the authorities cited in support of the proposition laid down in the last case (*Weed v. Carpenter*, 4 Wend. [N. Y.] 219; *Corning v. Southland*, 3 Hill [N. Y.] 552; *Moss v. Rossie Lead Min. Co.*, 5 Hill [N. Y.] 137; *Clark's Ex'rs v. Van Riemsdyk*, 9 Cranch [U. S.] 153; *Wilinks v. Hollingsworth*, 6 Wheat. [U. S.] 241), will, when examined, be found to have been cases where the subsequent assent was employed against the persons who had given it, and taken the benefit of the contract."

<sup>449</sup> *Atlee v. Bartholomew*, 69 Wis. 43, 5 Am. St. Rep. 103; *Dodge v. Hopkins*, 14 Wis. 630, 637-641; *Townsend v. Corning*, 23 Wend. (N. Y.) 435.

<sup>450</sup> *Right v. Cuthell*, 5 East, 491; *Doe d. Lyster v. Goldwin*, 2 Q. B. 143; *Stewart v. Kennett*, 2 Camp. 177; *Doe d. Mann v. Walters*, 10 Barn. & C. 626; *Brahn v. Jersey City Forge Co.*, 38 N. J. Law, 74; *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173; *Brower v. Wooten*, 4 N. C. 478 (Tayl. Term Rep. 70); *Pickard v. Perley*, 45 N. H. 188, 86 Am. Dec. 153. See ante, § 114.

<sup>451</sup> *Pickard v. Perley*, 45 N. H. 188, 86 Am. Dec. 153.



fied by the principal so as to make the latter bound thereby. Thus, where an agent, in making a loan, secures a bonus for himself without his principal's knowledge, the principal does not, by receiving the security and seeking to enforce it, ratify such unauthorized act of the agent.<sup>452</sup> "When an act is done for another, by a person not assuming to act for himself but for such other person, though without any precedent authority whatever, it becomes the act of the principal, if subsequently ratified by him. In that case, the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on contract or tort, to the same extent, and with all the consequences, as if done by previous authority. But when the agent did not assume to act for another, but acted for himself and for his own benefit, a subsequent ratification does not bind the principal."<sup>453</sup>

**§ 149. Effect of ratification as between principal and agent.**

(a) **In general.**—We have seen in a previous section that a ratification is equivalent to a prior authority, and from this it follows that, if the unauthorized acts of an agent have been ratified by the principal, and the agent has informed him of all the facts in the case, and has acted in good faith, the agent will be placed in the same position as he would have been, under similar circumstances, had he been previously authorized to do the acts in question.<sup>454</sup> Where an agent performs acts in excess of his authority or without any authority at all, he undertakes to do for another that which he has no authority to do and thereby incurs a liability either to third parties by reason of the unauthorized acts, or to the principal for any loss occasioned thereby. Therefore unless the agent is in some manner relieved he

<sup>452</sup> *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Thompson v. Craig*, 16 Abb. Pr. (N. S.; N. Y.) 33; *Smith v. Tracy*, 36 N. Y. 84; *Austin v. Harrington*, 28 Vt. 130.

<sup>453</sup> *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137, 141; *Wilson v. Tumman*, 6 Man. & G. 238.

<sup>454</sup> *Gelatt v. Ridge*, 117 Mo. 553, 38 Am. St. Rep. 683; *In re Soulard's Estate*, 141 Mo. 642; *Commercial Bank v. Warren*, 15 N. Y. 577; *Kempner v. Rosenthal*, 81 Tex. 12.

has put a heavy responsibility upon himself. But as we have seen that a subsequent ratification is equivalent to a prior authority, and as the agent would be relieved from all liability where he had prior authority to do an act, so if the principal with full knowledge of all facts ratifies the agent's unauthorized acts, the latter is released from liability thereon. By such ratification the principal takes upon himself all the responsibility for the acts or contracts he has thus ratified, as he would have had had he previously authorized them; and he thereby releases the agent from all responsibility thereon, except in so far as the agent may have been responsible had the acts or contracts been previously authorized.<sup>455</sup> Nor after ratification can the principal hold the assumed agent responsible for not having performed the act in the manner he should have performed it, had he been

<sup>455</sup> *Spittle v. Lavender*, 6 E. C. L. 224; *Aetna Ins. Co. v. Sabine*, 6 McLean, 393, Fed. Cas. No. 97; *Bray v. Gunn*, 53 Ga. 144; *Clay v. Spratt*, 7 Bush (Ky.) 335; *Oliver v. Johnson*, 24 La. Ann. 460; *Ward v. Warfield*, 3 La. Ann. 471; *Foster v. Rockwell*, 104 Mass. 167; *Sheffield v. Ladue*, 16 Minn. 388 (Gil. 346), 10 Am. Rep. 145; *Green v. Clark*, 5 Denio (N. Y.) 497; *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 300; *Towle v. Stevenson*, 1 Johns. Cas. (N. Y.) 110; *Vianna v. Barclay*, 3 Cow. (N. Y.) 281; *Hazard v. Spears*, 4 Keyes (N. Y.) 469; *Woodward v. Suydam*, 11 Ohio, 360; *Berger's Appeal*, 96 Pa. 443; *Bank of St. Mary's v. Calder*, 3 Strob. Law (S. C.) 403; *Pickett v. Pearsons*, 17 Vt. 470.

The court in *Ward v. Warfield*, 3 La. Ann. 468, said: "The principle is well settled that the obligation of an agent whose authority is limited by instructions, is to adhere faithfully to those instructions. If he unnecessarily exceed his commission, or risks his principal's effects without authority, he renders himself responsible to the principal for the consequences of his act. If loss ensue, it furnishes no defense to him that he intended the benefit of his principal. But while this general doctrine may be considered as unquestionable, there are other principles which are equally well settled in the law of agency. Subsequent assent, as between principal and agent, is equivalent to a previous authority, and hence, where an agent has committed a breach of orders, and the principal, with full knowledge of all the consequences, adopts his acts, even for a moment, he will be bound by them, and the agent will be discharged. Nor is it necessary that such assent should be express. It may be inferred from the conduct of the principal."

authorized, because by the ratification he sanctions the act as done.<sup>456</sup> From the moment of ratification, the contract becomes the principal's, as between him and the agent. He is entitled to its benefits as well as subject to its burdens. But such ratification does not relieve the agent from liabilities to his principal thereunder, as for money received and retained by him.<sup>457</sup> Thus a suit against an agent for money unauthorizedly collected and converted, ratifies the unauthorized collection, but not its retention thereafter.<sup>458</sup> So the subsequent ratification by the principal of a note given by his agent in the principal's name without his authority does not make it the principal's note so as to release the agent from liability thereon.<sup>459</sup>

Although the principal's ratification of an unauthorized contract relieves the agent from liability thereon, we shall see in a subsequent section that such is not the rule in the case of torts committed by the agent.<sup>460</sup>

(b) **Construction of principal's acts as to agent.**—We have seen heretofore that as a general rule the principal's acts will be liberally construed in favor of a ratification,<sup>461</sup> but this rule will not always apply as strictly in favor of the agent as in favor of the third party and it will be found that such acts or circumstances as may amount to ratification as between the principal and a third party will not always amount to such as between the principal and agent, so as to release the latter from his liability or unauthorized acts.<sup>462</sup> While the rule is that, by a ratification of an unauthorized act, the principal absolves the agent from all responsibility for loss or damage growing out of the unauthorized transaction, yet mere passive inaction or silence

<sup>456</sup> *Menkens v. Watson*, 27 Mo. 163.

<sup>457</sup> *Strickland v. Hudson*, 55 Miss. 235.

<sup>458</sup> *Schanz v. Martin*, 37 Misc. (N. Y.) 492. Compare *Holland Coffee Co. v. Johnson*, 38 Misc. (N. Y.) 187.

<sup>459</sup> *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Palmer v. Stephens*, 1 Denio (N. Y.) 471.

<sup>460</sup> Post, § 150 (c).

<sup>461</sup> *Szymanski v. Plassan*, 20 La. Ann. 90, 96 Am. Dec. 382; *Flower v. Jones*, 7 Mart. N. S. (La.) 143. See ante, § 137.

<sup>462</sup> *Triggs v. Jones*, 46 Minn. 277.

after knowledge of the fact, which might amount, in favor of third parties, to an implied ratification of the unauthorized act, would not necessarily amount to ratification in favor of the agent, so as to absolve him from liability to his principal.<sup>463</sup> Thus, a mere effort on part of the principal, after knowledge of the unauthorized act of the agent to avoid loss thereby will not amount to a ratification, so as to relieve the agent from liability.<sup>464</sup> So where a principal transmits for payment a check which his agent has remitted to him contrary to instructions, it is not a ratification of the agent's unauthorized act so as to relieve him from liability to his principal therefor.<sup>465</sup>

(c) **Agent must inform principal.**—As has been seen, it is an essential element of ratification that the principal have a full knowledge of all the material facts, and the agent must act in good faith and be sure that all facts are correctly communicated. If the agent suppresses or makes fraudulent statements as to any of such facts, the principal's ratification under such circumstances will not relieve the agent from any loss or damage suffered by the principal by reason of such suppression or fraud,<sup>466</sup> although such facts may have been innocently concealed or inadvertently misrepresented.<sup>467</sup> If the agent fails or delays to notify his principal of the facts until an election either way would be of no benefit to the principal, he will lose all right to infer an implied ratification from the principal's silence.<sup>468</sup> Nor will a delinquent agent be relieved from liability if he communicates to the principal all the facts known to him at the time, and the principal ratifies the delinquency, if it afterwards turns out that the facts as communicated were not

<sup>463</sup> *Triggs v. Jones*, 46 Minn. 277.

<sup>464</sup> *Triggs v. Jones*, 46 Minn. 277. See ante, § 140 (h).

<sup>465</sup> *Walker v. Walker*, 5 Heisk. (Tenn.) 425.

<sup>466</sup> *Bank of Owensboro v. Western Bank*, 13 Bush (Ky.) 526, 26 Am. Rep. 211, 215; *Bell v. Cunningham*, 3 Pet. (U. S.) 69; *Dean v. Hipp* (Colo. App.) 66 Pac. 804.

<sup>467</sup> *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516, 524. Citing *Story*, Cont. § 160.

<sup>468</sup> *Amory v. Hamilton*, 17 Mass. 109; *Williams v. Merritt*, 23 Ill. 623.

the real facts of the case. In such a case the assumed condition is not that claimed to have been ratified.<sup>469</sup>

(d) **Agent's rights to reimbursement under ratification.**—The rule of ratification in toto is also applicable to such cases. If the principal ratifies a part of the agent's unauthorized act or contract he must ratify the whole, and thus release the agent from liability on all. Under this rule the agent would have a right to be reimbursed for any expenses incurred while performing the unauthorized acts, for by ratifying the unauthorized acts the principal also ratifies all expenses connected therewith and is liable therefor.<sup>470</sup>

**§ 150. Effect of ratification as between agent and third person.**

(a) **In general.**—In a previous section we discussed the effect of a subsequent ratification of unauthorized acts as between the agent and his principal, so here we will treat of the same as between the agent and the third party. We shall see in subsequent sections<sup>471</sup> that where an agent exceeds his authority or where he assumes to act as agent for another without any previous authority whatever, and for that reason is unable to create obligations against his assumed principal in favor of third persons, by his unauthorized acts or contracts, he will himself be responsible to such third persons for any loss occasioned by reason of such unauthorized acts. It will be seen that there is a distinction between the effect of ratification of unauthorized contracts, and of unauthorized torts, as between the agent and third persons. So that the discussion of this subject presents itself in a twofold division, viz.: (1) The effect, as between the agent and third persons, of the ratification of unauthorized contracts entered into by such agent in behalf of the principal; (2) the effect, as between the agent and third persons, of the ratification of unauthorized torts committed by the agent in behalf of the principal.

<sup>469</sup> *Bank of Owensboro v. Western Bank*, 13 Bush (Ky.) 526, 28 Am. Rep. 211, 215.

<sup>470</sup> *Frixione v. Tagliaferro*, 10 Moore, P. C. 175.

<sup>471</sup> Post, §§ 577-589; 593-611.

(b) **Of contracts.**—Where an agent without authority enters into a contract in behalf of an assumed or alleged principal, and the latter having a full knowledge of all the facts and circumstances in the case, ratifies the same, the agent is thereby put into the same position he would have occupied had the contract been previously authorized. By such ratification the agent is relieved from all responsibility to the third party, in reference to such contract, except in so far as he would have been responsible had it been previously authorized. Whereas before such ratification the principal was only a nominal one, and the agent may have been liable on the contract, by such ratification the party in whose name the contract was made becomes the real instead of the nominal principal, and the liability on the contract is transferred to the principal. The third party cannot object because he supposed he was contracting with the principal, and by means of such ratification he obtains what he was originally contracting for. By such ratification, then, the agent is released from liability to the third party on such contract, nor has he any rights therein.<sup>472</sup> If, however, the contract is such that the third party has a right to recede,<sup>473</sup> and he chooses to do so, the ratification would not have the effect, as above noted, but the agent would be liable to the third party, on his breach of warranty of authority, for any damage occasioned thereby.<sup>474</sup> Or if for any other reason ratification should not be made, the third party would still have the same rights against the agent as he had before an attempt at ratification.

(c) **Of torts.**—In the case of torts, however, committed by an agent without authority or by an assumed agent, a different rule prevails. As prior authority to commit a tort will not relieve an agent from liability thereon, so a subsequent ratification will not. Although by such ratification the principal makes himself liable to the third party for such torts, and releases the agent from liability to himself thereon, yet he does not thereby release the agent from liability to

<sup>472</sup> *Spittle v. Lavender*, 6 E. C. L. 224; *Bowen v. Morris*, 2 Taunt. 374; *Roby v. Cossitt*, 78 Ill. 638.

<sup>473</sup> *Ante*, § 112.

<sup>474</sup> *Post*, § 585.

the third party. After the ratification both the principal and agent are liable for the tort, and the third party may elect to bring his action either against the principal or against the agent or against both. So that the principal's ratification as in case of previous authorization, gives the third party another person against whom he may seek redress, and in no way releases the agent from liability for his wrongdoing.<sup>475</sup> The agent, however, may claim indemnity from the principal for any tort which has been authorized or ratified by the latter and which was not illegal.<sup>476</sup>

There is an exception to the general rule, however, in the case of public principals, for it is held that if the government ratifies an act, the character of the act is altered; the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but he has a remedy against the government only.<sup>477</sup>

<sup>475</sup> *Stephens v. Elwall*, 4 Maule & S. 259; *Richardson v. Kimball*, 28 Me. 463; *Josselyn v. McAllister*, 22 Mich. 300; *Wright v. Eaton*, 7 Wis. 595; *Burnap v. Marsh*, 13 Ill. 535; *Perminter v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177.

<sup>476</sup> *Post*, §§ 370, 371.

<sup>477</sup> *Buron v. Denman*, 2 Exch. 167.

## CHAPTER VII.

### TERMINATION OF THE RELATION OF PRINCIPAL AND AGENT.

§ 151. In general.

#### I. BY ACT OF BOTH PARTIES.

§ 152. By original agreement—In general.

153. By expiration of time.

154. By accomplishment of purpose.

155. By subsequent agreement.

#### II. BY ACT OF ONE OF THE PARTIES.

§ 156. In general.

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§ 157. General rule.

158. Where principal has power but not right to revoke.

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## II. BY ACT OF ONE OF THE PARTIES—Cont'd.

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182. By a change in the law.

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184. By a change in the condition of the parties—In general.

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192. By war.

## § 151. In general.

Generally speaking, the relation of principal and agent may be terminated in any one of three ways, namely: (1) By acts of both of the parties, and this may be either by (a) original agreement, as where by the terms of the contract creating the relation it is limited to continue for a definite time, or to accomplish some definite purpose, or until some contingency happens; or (b) by subsequent agreement entered into after the agency has commenced; (2) by act of one of the parties, as where it is revoked by the principal or renounced by the agent; and (3) by operation of law, as by destruction of the subject-matter of the agency, by death, insanity, or bankruptcy of one of the parties, or by marriage of the principal, if incompatible with the agency. The termination of an agent's authority, or in other words, the termination of the relation of agency, may always be referred to one of these three heads.

## I. BY ACT OF BOTH PARTIES.

## § 152. By original agreement—In general.

Of course, when a contract of agency is entered into, the parties thereto may expressly agree between themselves as to the terms or conditions upon which the agency may be

terminated. Where such is the case, the termination is to a great extent governed by such agreement, although the circumstances of some particular cases may make them an exception to this rule. If the principal and agent, in forming the contract of agency, expressly agree as to when or how the relation shall terminate, that agreement of course governs its termination, unless by reason of the peculiar circumstances of the case it shall cease sooner.

**§ 153. By expiration of time.**

(a) **When duration of agency is fixed.**—Where the instrument or manner of creating the agency expressly limits its duration for some specified time, or until the happening of some particular event, the expiration of that time or the happening of that event, will terminate the agency, without any further act whatever on the part of either the principal or agent. Thus, where one entered into a written agreement with another, by which the former was constituted the agent of the latter for the sale of certain machines, the following provision was made in regard to the duration of the agency: "Said B in consideration of the faithful performance, by the said A, of the obligation by him hereinafter assumed, agrees to furnish the said A such number of machines as the said A may be able to sell, as his agent, prior to October 1st, 1867." The agency continued only until 1st October, 1867, and then terminated by reason of the time, specified in the agreement, having expired.<sup>1</sup> So where one had been appointed deputy postmaster "for the term of six months" following a certain date, the agency was held to terminate at the end of that period, and his security was not liable on the bond thereafter, although the condition of the bond also contained the words "for and during all the time that he shall continue deputy postmaster of the said stage," etc.<sup>2</sup> The bond was only conditioned for his faithful performance of duty as deputy postmaster and as he could not be such after the expiration of the six months, without a re-appointment, the bond was invalid after that time, and the words

<sup>1</sup> Gundlach v. Fischer, 59 Ill. 172.

<sup>2</sup> Arlington v. Merricke, 2 Wms. Saund. 403.

"during all time" only referred to the six months recited in the appointment.

And again where the operative part of a power of attorney appointed X & Y to be the attorneys of the plaintiff without in terms limiting the duration of their power, but it was preceded by a recital that the plaintiff was going abroad, and was desirous of appointing attorneys to act for him during his absence, it was held that the recital controlled the generality of the operative part of the instrument, and limited the exercise of the powers of the attorneys to the period of the plaintiff's absence from this country,<sup>3</sup> or, in other words, limited the duration of the agency until the happening of a particular event, namely, his return from abroad; and immediately upon such return, the powers of attorney were thereby terminated by virtue of the terms of the agreement, without any further acts upon the part of plaintiff or the agents.

(b) **When duration of agency is indefinite.**—Where the terms agreed upon between the parties expressly stipulates for a definite time at which the relation shall cease, there is, of course, no doubt as to the duration of the agency; but cases arise in which the period during which the agency is to continue is not expressly stipulated, but may be implied, if from all the facts and circumstances surrounding the case, such seems to have been the intention of the parties. Thus, where an employment was made by letter stating that the wages would "be one hundred dollars per month," "and if you give me satisfaction at the end of the first year, I will increase your salary accordingly," it was held to be an employment for a year.<sup>4</sup> So where it was agreed between plaintiff and a company that the plaintiff should act as attorney and solicitor of the company from the 1st of January next at £100 per annum, this was a contract to continue the relation for at least a year.<sup>5</sup> Under such circumstances

<sup>3</sup> *Danby v. Coutts*, 29 Ch. Div. 500, 54 Law J. Ch. 577.

<sup>4</sup> *Emmens v. Elderton*, 13 C. B. 495; *Morton v. Cowell*, 65 Md. 359, 57 Am. Rep. 331. And see *Fawcett v. Cash*, 5 Barn. & Adol. 904; *Rex v. Inhabitants of Birdbrooke*, 4 Term R. 245; *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394.

<sup>5</sup> *Emmens v. Elderton*, 13 C. B. 495.

the agency will terminate at the end of such time, unless there are other circumstances in the case from which a continuance of the relation may be implied.

**§ 154. By accomplishment of purpose.**

If an agency is established for a particular purpose, and that purpose is accomplished, whether by the agent or otherwise, the agency is thereby terminated. If the agent accomplishes the purpose, he has performed his duty under his contract of agency. Or if the purpose has been accomplished by the principal or another, there remains nothing for the agent to do, and hence his relation under the original agreement ceases.<sup>6</sup> Thus, where the owner of a piece of land agreed with an agent to pay him a certain amount upon his finding a purchaser at a given price, the agency terminated as soon as the agent found the purchaser at the specified price, and he might thereafter undertake services for the purchaser in preparing papers of conveyance.<sup>7</sup> So where a party was employed to negotiate with an agent for the sale of land for the purchase of a certain tract for his principal, and, after an agreement upon the terms of sale, delivered to his principal a contract for a conveyance, and received from him the first payment, whereupon the principal paid the agent for his services, the agency was then terminated.<sup>8</sup>

Likewise an agency to borrow money terminates when the money is received by the borrower and all papers which the transaction calls for have been executed and delivered to the respective parties.<sup>9</sup> So where a man sells goods, acting as broker for another, the agency is terminated as soon as the sale is completed.<sup>10</sup> So where a broker is employed to procure insurance for his principal, such broker not being a

<sup>6</sup> *Walker v. Derby*, 5 Biss. 134, Fed. Cas. No. 17,068; *Moore v. Stone*, 40 Iowa, 259; *People v. Manistee County Sup'rs*, 40 Mich. 585; *Atlanta Sav. Bank v. Spencer*, 107 Ga. 629; *Bell v. Balls* [1897] 1 Ch. 663, 66 Law J. Ch. 397, 76 Law T. (N. S.) 254.

<sup>7</sup> *Short v. Millard*, 68 Ill. 292.

<sup>8</sup> *Moore v. Stone*, 40 Iowa, 259.

<sup>9</sup> *Atlanta Sav. Bank v. Spencer*, 107 Ga. 629.

<sup>10</sup> *Blackburn v. Scholes*, 2 Camp. 343.

general agent to place and manage insurance of the principal's property, he is then the principal's agent only for the purpose of procuring insurance, and as soon as he procures the policy, his authority is terminated.<sup>11</sup>

It sometimes happens that the purpose for which the agency was created has been accomplished by other means than that particular agency. In such a case as the purpose for which he was appointed has been perfected his authority is terminated. Thus, where a town treasurer had been authorized, by vote of its inhabitants, to borrow money for the adjustment of a state tax for the reimbursement of bounties to volunteers, and the tax was adjusted without the necessity of borrowing money, his authority to borrow money on that vote thereupon ceased.<sup>12</sup> And also where a landowner employs several different agents to act for him in the sale of the same tract of land, the sale of it by one agent will terminate the authority of the others.<sup>13</sup>

**§ 155. By subsequent agreement.**

Since the relation of principal and agent is founded on mutual consent, it may be terminated by an agreement entered into after the creation of the agency. Such agreement, however, must have all the essential elements of a valid contract. Thus, it must be for a valid consideration, but an abandonment by either party of his rights under the original agreement is a sufficient consideration for the subsequent agreement.<sup>14</sup> This mode of termination may take place although it amounts to rescission of the original contract, as where the agency was to continue for a definite time, which has not yet expired; or it may amount to merely a construction of the terms of the original contract, as where the terms of such contract are ambiguous as to when it shall terminate.

<sup>11</sup> *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 413, 53 Am. Rep. 199.

<sup>12</sup> *Benoit v. Conway*, 10 Allen (Mass.) 528.

<sup>13</sup> *Ahern v. Baker*, 34 Minn. 98.

<sup>14</sup> *Hammon, Cont.* 681; *Huffcut, Agency*, § 62. See *Conrey v. Brandegee*, 2 La. Ann. 132.

## II. BY ACT OF ONE OF THE PARTIES.

## § 156. In general.

Having considered the first method in which the relation of agency may be terminated, namely, by original agreement, or in other words by act of both of the parties, it now remains to be seen how such relation may be terminated by one of the parties acting alone. This may be done in one of two ways: either (1) by the revocation of the agent's authority by the principal, or (2) by the renunciation of his authority by the agent himself.

In reality, both of the first two methods of terminating an agent's authority are by act of parties. In the first, whilst the termination of the agency was by agreement express or implied, between the parties, it was at the same time only by the parties acting in concert, or in other words by bilateral acts, that the termination was effected. In the second method, the termination is also by act of parties as it is properly called; but here instead of the termination of the agency being effected by both of the parties, it is done by one of the parties acting alone. Either the relation may be terminated by the principal revoking the authority before conferred upon the agent; or by the agent renouncing the authority previously possessed by him.

*A. By Revocation.*

## § 157. General rule.

As the authority of an agent to act for his principal depends entirely upon the will of the latter, and as it is only for the principal's benefit and in his behalf that the agent should exercise such authority the agent should not be permitted to exercise it any longer than the principal so wills, in the absence of special circumstances giving the agent such a right. It will be seen hereafter that under certain circumstances the agent may continue to exercise his powers as such, although the principal may desire to terminate them. But in the absence of such circumstances or exceptions, it is a general rule of the law of agency that where the agency is for an indefinite time, the principal may revoke his agent's authority at any time before the transaction is completed,

and with or without good cause.<sup>15</sup> And in the absence of an express provision in the contract of agency requiring it, it is not necessary that the principal should give previous notice of his intention to revoke.<sup>16</sup>

Thus, the authority of a broker may be countermanded at any time before a memorandum of sale is written and signed by him, pursuant to the statute of frauds, although he has previously entered into a verbal agreement to sell the goods.<sup>17</sup> A client has a right to change his attorney at his own volition, whatever may be his motives, whether a mere

<sup>15</sup> *England*: Read v. Rann, 10 Barn. & C. 438, 21 E. C. L. 438; Farmer v. Robinson, 2 Camp. 339, note; Warwick v. Slade, 3 Camp. 127; Simpson v. Lamb, 84 E. C. L. 603.

*United States*: Hunt v. Rousmanier's Adm'rs, 8 Wheat. 174; Stier v. Imperial L. Ins. Co., 58 Fed. 843; Woodruff v. Dubuque & S. C. R. Co., 30 Fed. 91.

*Alabama*: Chambers v. Seay, 73 Ala. 372.

*California*: Brown v. Pforr, 38 Cal. 550.

*Georgia*: Phillips v. Howell, 60 Ga. 411; Howard College v. Pace, 15 Ga. 486.

*Louisiana*: Succession of Babin, 27 La. Ann. 114; Spear v. Gardner, 16 La. Ann. 383; Jacobs v. Warfield, 23 La. Ann. 395.

*Maryland*: Attrill v. Patterson, 58 Md. 226; Smith v. Dare, 89 Md. 47.

*Minnesota*: Simonton v. First Nat. Bank, 24 Minn. 216.

*Mississippi*: Jones v. Harris, 59 Miss. 214; Kolb v. Bennett Land Co., 74 Miss. 567.

*Missouri*: State v. Walker, 88 Mo. 279; Royal Remedy & Extract Co. v. Gregory Grocer Co., 90 Mo. App. 53.

*New Hampshire*: Wells v. Hatch, 43 N. H. 247.

*New Jersey*: Hartshorne v. Thomas, 43 N. J. Eq. 419.

*New York*: Allen v. Watson, 16 Johns. 205; Trust v. Repoor, 15 How. Pr. 570.

*North Carolina*: Brookshire v. Vancannon, 28 N. C. (6 Ired.) 231.

*Oregon*: Simpson v. Carson, 11 Or. 361.

*Pennsylvania*: Blackstone v. Buttermore, 53 Pa. 266; Kirk v. Hartman, 63 Pa. 97; Hartley's Appeal, 53 Pa. 212, 91 Am. Dec. 207; Coffin v. Landis, 46 Pa. 426; Peacock v. Cummings, 46 Pa. 434.

<sup>16</sup> Sheahan v. National S. S. Co., 87 Fed. 167, 30 C. C. A. 593; expressly required by contract of agency in Ballard v. Traveller's Ins. Co., 119 N. C. 187; Clover Condensed Milk Co. v. Cushman Bros. Co., 31 App. Div. 108, 52 N. Y. Supp. 769.

<sup>17</sup> Farmer v. Robinson, 2 Camp. 339, note. And see Warwick v. Slade, 3 Camp. 127. See post, § 750.

caprice or a substantial reason.<sup>18</sup> Where an authority is given to an agent to sell property of any kind, and the power is not coupled with an interest, as we shall presently see, or is not given for a valuable consideration, such authority may be revoked at any time before the completion of the sale;<sup>19</sup> and the same is true where an authority is given to appropriate funds for certain purposes,<sup>20</sup> as the payment of debts, etc. When the state employs one as agent, it has the same power of revocation as an individual. As where the state under an act of general assembly had appointed one, as agent of the state, to collect certain claims against the United States, his appointment was revoked by the repeal of the act.<sup>21</sup>

The doctrine of revocation may be summarized as follows: A principal may revoke his agent's authority at will, unless (a) its duration is fixed, but a mere declaration that the agency is irrevocable does not fix its duration; and even though the duration is fixed he may nevertheless revoke for the incompetency or misconduct of the agent, and although he wrongfully revokes it, it is effective as to third persons but leaves the principal liable to the agent; or unless (b) the agent's authority is coupled with an interest, or (c) has been given for valuable consideration or as security, or unless (d) the agency has been executed, but in case of a partial execution, the right to revoke as to the unexecuted part is the same as if there had been no execution.

<sup>18</sup> *Trust v. Repoor*, 15 How. Pr. (N. Y.) 570. See post, § 742.

<sup>19</sup> *Chambers v. Seay*, 73 Ala. 372; *Brown v. Pforr*, 38 Cal. 550; *Shisler's Estate*, 2 Pa. Dist. R. 588; *Stensgaard v. Smith*, 43 Minn. 11, 19 Am. St. Rep. 205; *Kolb v. Bennett Land Co.*, 74 Miss. 567; *Coffin v. Landis*, 46 Pa. 426; *Woods v. Hart*, 50 Neb. 497.

<sup>20</sup> *Taylor v. Lendey*, 9 East, 49; *Gibson v. Minet*, 9 Moore, 31; *Trustees of Howard College v. Pace*, 15 Ga. 486; *Phillips v. Howell*, 60 Ga. 411; *Swartz v. Earls*, 53 Ill. 237; *Solomon v. Nicholas*, 113 Ill. 351; *Lewis v. Sawyer*, 44 Me. 332; *Barker v. Prentiss*, 6 Mass. 433; *Simonton v. First Nat. Bank*, 24 Minn. 216; *Kelly v. Roberts*, 40 N. Y. 432; *Beers v. Spooner*, 9 Leigh (Va.) 153.

<sup>21</sup> *State v. Walker*, 88 Mo. 279.



**§ 158. Where principal has power but not right to revoke.**

It must be noticed, however, that there is a distinction between a principal's right and his power to revoke the agent's authority. Although he may have, in probably all cases, except in case of a power coupled with an interest, or a power given for a valuable consideration or as security, the power to revoke such authority, there are certain cases as shall be seen hereafter, in which he has not the legal right to do so, and the agent will have a right of action against him for any damages suffered by reason of a revocation in such cases. Thus where the principal has expressly agreed not to revoke the authority for a certain length of time, the principal may have the power to revoke the agency before the time is up, but he has not the right to do so without being liable to the agent for any injury sustained thereby.<sup>22</sup> Where a written contract creating a commercial agency is tacitly renewed from year to year, though the mere power to revoke exists the right to do so does not, so as to deprive the agent of his stipulated monthly compensation for the unexpired period of his term.<sup>23</sup> If there is an employment of an agent for a definite period of time express or implied, and he is discharged without cause before the expiration of that time, the principal is answerable as for a breach of the agreement and the agent may elect to treat the contract as rescinded and maintain an action for the value of the services rendered and money expended by him.<sup>24</sup>

Where the agency is one coupled with an interest in the subject-matter, it would seem that the principal has not only not the right to revoke the agency but he has not even the power to do so, at least not until such interest has been satisfied. Thus, where a person owing another a debt appoints the latter his agent to sell certain goods and pay for

<sup>22</sup> *Chambers v. Seay*, 73 Ala. 372; *Standard Oil Co. v. Gilbert*, 84 Ga. 714; *MacGregor v. Gardiner*, 14 Iowa, 326; *Richardson v. Eagle Mach. Works*, 78 Ind. 422, 41 Am. Rep. 584; *Lewis v. Atlas Mut. Life Ins. Co.*, 61 Mo. 534; *Green v. Cole*, 127 Mo. 587; *Howard v. Daly*, 61 N. Y. 362; *Blackstone v. Buttermore*, 53 Pa. 266.

<sup>23</sup> *Standard Oil Co. v. Gilbert*, 84 Ga. 714.

<sup>24</sup> *Glover v. Henderson*, 120 Mo. 367, 41 Am. St. Rep. 695.

the debt out of the proceeds, the latter has such an interest in the subject-matter that his agency cannot be revoked, at least not until such debt is paid. And the same would seem to be true in the case of an agency given for valid consideration or as security.

**§ 159. When principal has right to revoke.**

But where there is no express or implied agreement that the agent's authority shall not be revoked, the principal has not only the power but also the right to revoke his authority at any time.<sup>25</sup> Thus, where a life insurance company contracted to pay its agent certain commissions for procuring insurance and renewals, without specifying any term of duration, and the company went out of business and assigned the policies so procured to another company, it thereby terminated the agent's right to commissions on renewals.<sup>26</sup>

The instrument creating the agency may contain express terms permitting the agency to be terminated by either party on certain conditions. Such a termination in accordance with the terms of the contract is a termination of the relation by agreement.<sup>27</sup> Where in a contract of agency for a stipulated time there is an express proviso that the principal may revoke at any time if dissatisfied with the manner in which the employe performs his duties, the principal has the right to discharge on that ground only.<sup>28</sup> Where one as agent for another contracts to sell the lands of the latter, in consideration of one-half the net proceeds of the sales, and there is no stipulation in the contract as to the duration of the employment, the principal has a right to terminate it

<sup>25</sup> *Chambers v. Seay*, 73 Ala. 372; *Jacobs v. Warfield*, 23 La. Ann. 395; *Hotchkiss v. Gretna Ginnery & Compress Co.*, 36 La. Ann. 517; *Barrows v. Cushway*, 37 Mich. 481; *Adrian v. Ruthersford*, 57 Mich. 170; *Tyler v. Ames*, 6 Lans. (N. Y.) 280; *Kirk v. Hartman*, 63 Pa. 97; *Coffin v. Landis*, 46 Pa. 426; *North Carolina State Life Ins. Co. v. Williams*, 91 N. C. 69, 49 Am. Rep. 637.

<sup>26</sup> *North Carolina State Life Ins. Co. v. Williams*, 91 N. C. 69, 49 Am. Rep. 637.

<sup>27</sup> *Hammon*, Cont. 65.

<sup>28</sup> *Hotchkiss v. Gretna Ginnery & Compress Co.*, 36 La. Ann. 517; *Karsner v. Union Cent. Life Ins. Co.*, 12 Ohio Circ. R. 394.

at any time, and to discharge the agent from his service without notice.<sup>29</sup>

**§ 160. Where contract of agency is for a definite time.**

One of the exceptions to the above general rule is where the agency is for a definite time. Where the contract of agency is entered into for a certain specified time, it cannot be rightfully revoked before the expiration of that time, except for sufficient cause as shall be seen in the following sections. The inability of the principal to continue in business is no excuse for the breach of the contract of agency in such a case. And the fact that the principal did not in terms agree to continue the relation for the whole of that time will not authorize a discontinuance in the meantime on his part.<sup>30</sup> But where a person agreed to act as agent for an insurance company for five years, and to transact no business except for that company, for which he was to receive a fixed salary and also a commission on all business transacted, he was not entitled to recover prospective commissions for the remainder of the term of five years; the company having been voluntarily wound up before the expiration of that time.<sup>31</sup> As has been seen heretofore, it is often difficult to determine whether the contract of agency has been made for a definite time or not. It is not absolutely necessary that both parties should be bound for the same length of time. It may happen that one party is bound for a definite period whilst the other may terminate the relation at any time. Thus, where an agent agreed to transport all goods "presented to him," for one year, the agreement has been held binding only on the agent, and the principal might at any time revoke his authority by refusing to supply any goods for transportation.<sup>32</sup>

<sup>29</sup> *Coffin v. Landis*, 46 Pa. 426.

<sup>30</sup> *Lewis v. Atlas Mut. Life Ins. Co.*, 61 Mo. 534; *Black v. Woodrow*, 39 Md. 194; *Churchward v. Queen*, 6 Best & S. 807, L. R. 1 Q. B. 173.

<sup>31</sup> *Ex parte Maclure*, 5 Ch. App. 737.

<sup>32</sup> *Burton v. Great Northern R. Co.*, 9 Exch. 507; *Ex parte Maclure*, 5 Ch. App. 737; *Rhodes v. Forwood*, 1 App. Cas. 256, 15 Eng. Rep. 124; *Churchward v. Queen*, 6 Best & S. 807, L. R. 1 Q. B. 173.

Cases of this kind frequently arise out of the statute of frauds; but the cases are by no means agreed as to the construction of the statute in reference to such contracts. One class of cases holds that the party, to be charged, only need sign and be bound by the contract, for the writing is not the contract, but merely the evidence of it.<sup>33</sup> Under such rule where a written contract of agency is entered into for a year or more, if the contract is signed by the principal, though not by the agent, the principal would be bound thereby and could not revoke the agency; and if the principal should refuse to continue the agency before its expiration, the fact that the agent had not signed the contract would be no objection to his maintaining an action upon such contract. In another class of cases, however, it is held that if both are not bound by the contract neither is bound, and unless the party bringing the action is bound by the contract, the other is not bound for want of mutuality.<sup>34</sup> But the weight of authority seems to be against this rule. Under this rule unless the contract of agency was signed by both principal and agent, neither would be bound by it, and the principal could revoke the agency at any time notwithstanding the contract was for a definite time and had been signed by him, but not by the agent, and the latter could not maintain an action on such contract. Thus a contract of service for more than a year, signed only by the employer, is void for want of mutuality, and the other party cannot make it effective by written acceptance after the employer has refused to perform.<sup>35</sup>

**§ 161. When duration of agency is implied.**

The period for which an agency is to continue need not be expressly fixed by the terms of the contract, but it may be

<sup>33</sup> *Old Colony R. Corp. v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 394; *Williams v. Robinson*, 73 Me. 186; *Perkins v. Hadsell*, 50 Ill. 217; *Smith & Fleck's Appeal*, 69 Pa. 480; *Tripp v. Bishop*, 56 Pa. 428.

<sup>34</sup> *Krohn v. Bantz*, 68 Ind. 277; *Eppich v. Clifford*, 6 Colo. 493; *Sykes v. Dixon*, 36 E. C. L. 366, 9 Adol. & El. 693; *Lees v. Whitcomb*, 3 Car. & P. 289.

<sup>35</sup> *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708.

implied from such terms or from other circumstances. All that is necessary in any case is that the circumstances should show a clear intention of the parties to enter into a contract of agency for a definite time. The mere use of the word "salary," however, is not enough of itself to fix the time of employment at a definite period. There must be other facts or circumstances indicating that such was the intention of the parties.<sup>36</sup> A contract for service, "at a salary of \$2,500 per annum," is not a contract for a definite time. It is but a stipulation of the rates at which the employe is to be compensated for the services performed. He is not bound to serve for any definite time to entitle him to compensation,<sup>37</sup> nor will a promise to employ for a definite time be implied from the mere fact of employment.<sup>38</sup> But where one employed by the year is not discharged at the end of the year, but continues as before, with the knowledge and apparent sanction of the employer, it will be presumed that it was the intention of the parties that the contract should be a continuing contract by the year, subject to be terminated at the end of each year by the wish of one or both of the parties thereto.<sup>39</sup>

When two parties mutually agree for a fixed period, the one to employ the other as his sole agent in a certain business, at a certain place, the other that he will act in that business for no other principal at that place, there is no implied condition that the business itself shall continue to be carried on during the period named. And the fact that the employer sold the subject-matter of the employment does not make him liable to the agent, because there was no term

<sup>36</sup> *Palmer v. Marquette & Pac. Rolling Mill Co.*, 32 Mich. 274; *De Briar v. Minturn*, 1 Cal. 450; *Franklin Min. Co. v. Harris*, 24 Mich. 115.

<sup>37</sup> *Haney v. Caldwell*, 35 Ark. 156.

<sup>38</sup> *Jacobs v. Warfield*, 23 La. Ann. 395; *Kirk v. Hartman*, 63 Pa. 97.

<sup>39</sup> *Alba v. Moriarty*, 36 La. Ann. 680; *McCullough Iron Co. v. Carpenter*, 67 Md. 554; *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56; *Sines v. Superintendents of Poor for Wayne County*, 58 Mich. 503; *Tallon v. Grand Portage Copper Min. Co.*, 55 Mich. 147; *Weise v. Milwaukee County Sup'rs*, 51 Wis. 564.

in the agreement binding the employer to keep the same; and the agent was only employed to sell such goods as were sent to him.<sup>40</sup>

**§ 162. Where power declared to be "irrevocable" or "exclusive."**

Nor is the duration of an agency fixed by the fact that it is declared to be irrevocable, and the agent's authority may be revoked at any time before completion of the transaction, even though it is in express terms declared to be "irrevocable,"<sup>41</sup> or "exclusive."<sup>42</sup> And a provision in a contract of agency that the relation may be terminated on certain specified grounds does not imply that it can be terminated on those grounds only.<sup>43</sup> Thus, where a power of attorney authorized an agent to sell and dispose of the principal's patent right in all or any part of the United States and territories, and provided that the attorney was to account to the principal for one-half of the net proceeds derived from the sales, after deducting all necessary expenses therefrom, and declared the power to be irrevocable for two years, there being no transfer of any right in the patent, and no covenant or undertaking on the part of the attorney to make expenditures, the principal could revoke the power at any time leaving the attorney to his action for breach of the covenant not to revoke.<sup>44</sup> So although the principal has expressly stipulated that the power shall be irrevocable, still if the agent has no interest in its execution and there is no valid consideration for the execution of such power, it is a mere nudum pactum and may be revoked at any time at the will of the principal.<sup>45</sup>

<sup>40</sup> *Rhodes v. Forwood*, 1 App. Cas. 256, 15 Eng. R. 124.

<sup>41</sup> *Chambers v. Seay*, 73 Ala. 378; *Frink v. Roe*, 70 Cal. 296; *Walker v. Denison*, 86 Ill. 142; *MacGregor v. Gardner*, 14 Iowa, 326; *Blackstone v. Buttermore*, 53 Pa. 266.

<sup>42</sup> *Chambers v. Seay*, 73 Ala. 372; *Golden Gate Packing Co. v. Farmers' Union*, 55 Cal. 606; *Woods v. Hart*, 50 Neb. 497.

<sup>43</sup> *Stier v. Imperial L. Ins. Co.*, 58 Fed. 843; *Willcox & G. Sewing Mach. Co. v. Ewing*, 141 U. S. 627. Compare *Newcomb v. Imperial L. Ins. Co.*, 51 Fed. 725.

<sup>44</sup> *Walker v. Denison*, 86 Ill. 142.

<sup>45</sup> *Frink v. Roe*, 70 Cal. 297. And see *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459.

The mere fact that the power of attorney is thus declared to be irrevocable does not prohibit its revocation nor does it establish the fact that the person making the same yields all right or claim to the property authorized to be sold. Thus where a power of attorney read as follows: "Know all men by these presents, that I, James McGregor, Jr.," etc., "have nominated, constituted and appointed Alexander McGregor \* \* \* my true and lawful attorney, irrevocable for me and in my name," etc., it was held that this not being a power coupled with an interest or given for a valid consideration, conferred no greater authority upon the agent than an ordinary power of attorney, and could be revoked at any time by the principal.<sup>46</sup>

§ 163. Where agent becomes incompetent.

But even though there has been an express contract fixing the duration of the agency, or such duration is implied, it is an implied condition of such agency that the latter shall continue able and competent of performing the services for which he was employed. As shall be seen in a subsequent chapter, every agent upon entering into a contract of agency impliedly covenants that he possesses and will exercise such a degree of skill, knowledge and ability in the transaction, as is ordinarily possessed and exercised by reasonably prudent men in like employment under like circumstances.<sup>47</sup> If, therefore, at any time during the course of the agency, the agent becomes incapable or incompetent of exercising that degree of skill, care and diligence, the principal may rightfully revoke his authority, notwithstanding he had been employed for a definite time, and the principal will not be liable for a breach of contract.<sup>48</sup> In entering into the contract the principal employed or sought to employ one who possessed and would exercise such skill and care as was necessary for executing the power given, and if the agent did not possess or exercise the degree of skill and care required, then he had broken his implied covenant and the principal was

<sup>46</sup> MacGregor v. Gardner, 14 Iowa, 326.

<sup>47</sup> Post, § 392.

<sup>48</sup> Post, § 392 et seq.

no longer bound to retain him in his employ. Especially is this so when the agent had expressly covenanted that he possessed and would exercise the skill and diligence required in such cases. It would indeed be unjust to compel a principal to retain and suffer loss by an agent who was incompetent to execute the authority given him, and who had at least impliedly, if not expressly, covenanted that he was competent.

But if the principal knew, when he employed the agent, that he was incompetent, he could not terminate the agency for that reason, unless his inefficiency was much greater than the principal had any reason to suppose. One cannot complain that his business is improperly conducted if he knowingly authorizes an incompetent agent to conduct it.<sup>49</sup>

**§ 164. Where agent has been guilty of misconduct.**

Other duties also impliedly devolve upon one who has contracted to act as agent of another, and these are that he will regard and obey all reasonable and lawful instructions of his principal; that he will exercise the skill, care, and diligence necessary to the prudent discharge of his undertaking; that he will care for the principal's interests with the highest good faith; and that he will observe the laws and established principles of morality.<sup>50</sup> If, therefore, the agent violates or disregards these duties, the principal may discharge him and terminate the agency, although he was employed for a definite time.<sup>51</sup> An agent who is wanting in fidelity forfeits his right to his place, whatever may be the nature of his default, and whether it is or is not a source of injury to his principal. Thus, a principal may revoke his agent's authority where the latter engaged in a business derogatory to his principal's business.<sup>52</sup> If the acting man-

<sup>49</sup> Post, § 392 et seq.

<sup>50</sup> Post, § 404 et seq.

<sup>51</sup> *Callo v. Brouncker*, 4 Car. & P. 518; *Atkin v. Acton*, 4 Car. & P. 208; *Bixby v. Parsons*, 49 Conn. 483, 44 Am. Rep. 246; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Henderson v. Hydraulic Works*, 9 Phila. (Pa.) 100; *Dieringer v. Meyer*, 42 Wis. 311.

<sup>52</sup> *Horton v. McMurtry*, 5 Hurl. & N. 667; *Amor v. Fearon*, 9 Adol. & E. 548; *Ridgway v. Hungerford Market Co.*, 3 Adol. & E.



ager of a theater conducts himself in such an improper manner as to make it injurious to the interests of the theater to keep him, the lessee or proprietor may lawfully dismiss him.<sup>53</sup> And it has been held that a contract, by which an agent for several parties accepts an agency inconsistent with such employment and binds himself to a course of conduct inconsistent with the interests of some of the parties formerly represented, terminates, ipso facto, his former agency.<sup>54</sup> But a servant, whilst in his master's service, may solicit business from his customers for himself, when his service is at an end, and he sets up a business on his own account.<sup>55</sup>

So an agent's authority may be revoked where he wrongfully misappropriates the funds which come into his hands in the course of his agency;<sup>56</sup> or where he was to devote his whole time to his principal's business, but worked for another part of the time;<sup>57</sup> or where he was disobedient,<sup>58</sup> but a single act of disobedience by an agent, in absenting himself for a day, not involving any serious consequences and not unreasonable in itself, would not justify a termination of the agency.<sup>59</sup>

Or the principal may dismiss his agent where the latter by intoxication unfits himself for the full and proper performance of all his duties,<sup>60</sup> or where he is a gambler on the

171; *Gardner v. McCutcheon*, 4 Beav. 534; *Read v. Dunsmore*, 9 Car. & P. 588; *Adams' Exp. Co. v. Trego*, 35 Md. 47; *Jaffray v. King*, 34 Md. 217; *Singer v. McCormick*, 4 Watts & S. (Pa.) 265; *Case v. Jennings*, 17 Tex. 661; *Dieringer v. Meyer*, 42 Wis. 311.

<sup>53</sup> *Lacy v. Osbaldiston*, 8 Car. & P. 80.

<sup>54</sup> *Cotton v. Rand*, 93 Tex. 7.

<sup>55</sup> *Nichol v. Martyn*, 2 Esp. 732.

<sup>56</sup> *Henderson v. Hydraulic Works*, 9 Phila. (Pa.) 100; *Phoenix M. L. Ins. Co. v. Holloway*, 51 Conn. 311, 50 Am. Rep. 20; *Spotswood v. Barrow*, 5 Exch. 110; *Sumner v. Reichenker*, 9 Kan. 320. And see *Case v. Jennings*, 17 Tex. 661.

<sup>57</sup> *Orr v. Ward*, 73 Ill. 318.

<sup>58</sup> *Spotswood v. Barrow*, 5 Exch. 110; *Callo v. Brouncker*, 4 Car. & P. 518; *Newman v. Reagan*, 65 Ga. 512; *Ford v. Danks*, 16 La. Ann. 119.

<sup>59</sup> *Sharer v. Ingham*, 58 Mich. 649, 55 Am. Rep. 712. Compare *Ford v. Danks*, 16 La. Ann. 119.

<sup>60</sup> *McCormick v. Demary*, 10 Neb. 515; *Bass Furnace Co. v. Glasscock*, 82 Ala. 452, 60 Am. Rep. 748 (once held sufficient);

stock exchange.<sup>61</sup> Assaulting his employer's maid servant with intent to ravish her is a good cause for dismissing, without any notice, a clerk and traveler employed by the year.<sup>62</sup>

But mere angry expressions which neither support a plea of justification nor of rescission by mutual assent, or an isolated instance of neglect or insolence, will not be ground for dismissal; at all events not unless the insolence were such as to be incompatible with the continuance of the employment. Thus, the fact that some angry words were had between the principal and agent on a single occasion, and the agent had been somewhat insolent on that occasion, does not justify a dismissal.<sup>63</sup> Nor does the mere fact that the agent was in the habit of using morphine furnish sufficient ground for his discharge, unless it appear that the use of the morphine incapacitated him from giving proper attention to business.<sup>64</sup>

**§ 165. Power coupled with an interest—In general.**

Another important exception or limitation to the above general rule, as to the principal's right to revoke an agency at will, exists where the agent's authority is coupled with an interest. If an agent has an interest in the subject-matter of the agency, or as it is usually termed if he has a power coupled with an interest, his authority is deemed to be irrevocable, at least during the subsistence of such interest, whether it is expressly declared to be so or not, and the principal cannot revoke such authority, at least not until such interest has been satisfied.<sup>65</sup> Thus, where A, being in-

*Nolan v. Thompson*, 11 Daly (N. Y.) 314. If a foreman or "boss" in a tailor shop went on a spree, neglected his business and carried other employes with him, his employer might discharge him. *Physioc v. Shea*, 75 Ga. 466.

<sup>61</sup> *Pearce v. Foster*, 17 Q. B. Div. 536.

<sup>62</sup> *Atkin v. Acton*, 4 Car. & P. 208. Or where he seduced the principal's minor daughter. *Bixby v. Parsons*, 49 Conn. 483, 44 Am. Rep. 246.

<sup>63</sup> *Edwards v. Levy*, 2 Fost. & F. 94.

<sup>64</sup> *Jakowenko v. Des Moines Life Ass'n*, 21 Ohio Circ. R. 119.

<sup>65</sup> *Watson v. King*, 4 Camp. 274; *Gaussen v. Morton*, 10 Barn. & C. 731; *Chambers v. Seay*, 73 Ala. 372; *Hynson v. Noland*, 14 Ark. 710; *Frink v. Roe*, 70 Cal. 297; *Barr v. Schroeder*, 32 Cal. 609; *Brown v. Pforr*, 38 Cal. 550; *Posten v. Rassette*, 5 Cal. 467; *Bon-*

debted to B, in order to discharge the debt executed to B a power of attorney, authorizing him to sell certain lands belonging to him, A, it was a power coupled with an interest and could not be revoked.<sup>66</sup> So where a note is indorsed on the faith of an equitable pledge by the maker of moneys earned by him under a contract with the state, but not yet due, a power of attorney authorizing the indorser to collect such moneys when they become payable is not subject to revocation, being a power coupled with an interest.<sup>67</sup> Authority given by an officer, having charge of public moneys, to one of his securities, to act as agent in the receipt, control, and disbursement of the public moneys, for the protection of himself and securities, is in the nature of a power coupled with an interest and irrevocable so long as there remains any money of the office to be disbursed or accounted for, though the officer be removed from office.<sup>68</sup> A power of attorney made by a stockholder to vote and deal with his stock, or sell and exchange it, conferring an interest, and by its terms irrevocable, cannot be revoked by the maker in the absence of a showing of illegal purpose in granting the power, or that it is in violation of a statute or against public policy.<sup>69</sup>

But an agency or authority, coupled with an interest in the subject-matter thereof, may be revoked by the principal in pursuance of a stipulation or reservation to that effect in the instrument constituting the agency or authority.<sup>70</sup> Thus,

ney v. Smith, 17 Ill. 531; Walker v. Denison, 86 Ill. 142; Smith v. Dare, 89 Md. 47; Attrill v. Patterson, 58 Md. 226; Chapman v. Bates, 61 N. J. Eq. 658, 88 Am. St. Rep. 459; Durbrow v. Eppens, 65 N. J. Law, 10; Hutchins v. Hebbard, 34 N. Y. 24; Marfield v. Goodhue, 3 N. Y. (3 Comst.) 62; Marfield v. Douglass, 1 Sandf. (N. Y.) 360; Knapp v. Alvord, 10 Paige (N. Y.) 205, 40 Am. Dec. 241; Wheeler v. Knaggs, 8 Ohio, 169; Hartley's Appeal, 53 Pa. 212, 91 Am. Dec. 207; Smyth v. Craig, 3 Watts & S. (Pa.) 14; Montague v. McCarroll, 15 Utah, 318.

<sup>66</sup> Gausson v. Morton, 10 Barn. & C. 731.

<sup>67</sup> Hutchins v. Hebbard, 34 N. Y. 24.

<sup>68</sup> Hynson v. Noland, 14 Ark. 710.

<sup>69</sup> Chapman v. Bates, 61 N. J. Eq. 658, 88 Am. St. Rep. 459.

<sup>70</sup> Oregon & W. Mortg. Sav. Bank v. American Mortg. Co., 35

where a contract appointing an agent, contained the following provision: "Each party hereto may terminate this agreement by giving the other written notice to that effect, and the agent shall not be entitled to any commission upon premiums collected or received after the expiration of such notice," etc.; either party could terminate the agency at a moment's notice, and the principal, having so done without previous notice, was not liable in damages to the agent.<sup>71</sup>

— **What interest sufficient.** It is not every interest, however, that will be sufficient to make the power irrevocable. To have this effect it seems now to be well settled that the power given to the agent must be connected with an interest in the subject-matter of the agency itself. In other words, "The power and estate must be united and coexistent," and possibly of such a nature that the power would survive the principal in the event of the latter's death, so as to be capable of execution in the name of the agent; and both the power and interest must be derived from the same source.<sup>72</sup> Or as defined by Chief Justice Marshall it must be a power "engrafted on an estate in the thing itself."<sup>73</sup> Where the power is given to a person who derives, under the instrument creating the power, or otherwise, a present or future interest in the property, the subject on which the power is to act, it is then a power coupled with an interest.<sup>74</sup>

This doctrine has been well discussed as follows: "The words themselves would seem to import this meaning: 'A power coupled with an interest' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are

Fed. 22; *Doyle v. Phoenix Ins. Co.*, 25 Nova Scotia, 436; *Witherell v. Murphy*, 147 Mass. 417; *Adrian v. Rutherford*, 57 Mich. 170; *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459.

<sup>71</sup> *Doyle v. Phoenix Ins. Co.*, 25 Nova Scotia, 436.

<sup>72</sup> *Chambers v. Seay*, 73 Ala. 378; *Raleigh v. Atkinson*, 6 Mees. & W. 670; *Mansfield v. Mansfield*, 6 Conn. 559; *Nevitt v. Woodburn*, 82 Ill. App. 649; *Bonney v. Smith*, 17 Ill. 531; *Black v. Harsha*, 7 Kan. App. 794; *Hunt v. Rousmanier's Adm'r's*, 8 Wheat. (U. S.) 175, *Huffc. Cas.* 146. And see cases cited supra, note 65.

<sup>73</sup> *Hunt v. Rousmanier's Adm'r's*, 8 Wheat. (U. S.) 204, *Huffc. Cas.* 146.

<sup>74</sup> *McGriff v. Porter*, 5 Fla. 373.

to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it. But the substantial basis of the opinion of the court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such a case is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest, or estate, passes with the power, and vests in the person by whom the power is to be exercised, such a person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of a person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle. The idea may be in some degree illustrated by examples of cases in which the law is clear, and which are incompatible with any other exposition of the term, 'power coupled with an interest.' If the word 'interest' thus used, indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A. to sell for his own benefit, would be a power coupled with an interest; but a power to A. to sell for the benefit of B. would be a naked power, which could be executed only in the life of the person who gave it. Yet, for this distinction, no legal reason can be assigned. Nor is there any reason for it in justice; for a power to A. to sell for the benefit of B. may be as much a part of the contract on which B. advances his

money, as if the power had been made to himself. If this were the true exposition of the term, then a power to A. to sell for the use of B., inserted in a conveyance to A., of the thing to be sold, would not be a power coupled with an interest, and, consequently, could not be exercised after the death of the person making it; while a power to A. to sell and pay a debt to himself, though not accompanied with any conveyance which might vest the title in him, would enable him to make the conveyance and to pass a title not in him, even after the vivifying principle or the power had become extinct. But the law is not as the first case put would suppose. We know that a power to A. to sell for the benefit of B., engrafted on an estate conveyed to A., may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest although the person to whom it is given has no interest in its exercise. His title is coupled with an interest in the thing which enables him to execute it in his own name, and is therefore not dependent on the life of the person who created it."<sup>75</sup>

Thus, where a power is given to an agent to make a collection or sale, and out of the proceeds to pay himself for a debt due to him from the principal,<sup>76</sup> or to reimburse himself for advances made to the principal,<sup>77</sup> or where it is given to indemnify a surety,<sup>78</sup> it is a power coupled with an interest and cannot be revoked.

Wherever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made or liabilities incurred on account thereof; and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor makes advances, or incurs liabilities on account of the consignment, by which he acquires a spe-

<sup>75</sup> By Chief Justice Marshall in *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.) 174, Huffs. Cas. 146.

<sup>76</sup> *Watson v. King*, 4 Camp. 272; *Gaussen v. Morton*, 10 Barn. & C. 731; *Barr v. Schroeder*, 32 Cal. 609.

<sup>77</sup> *Posten v. Rassette*, 5 Cal. 467; *Marziou v. Ploche*, 8 Cal. 522.

<sup>78</sup> *Hynson v. Noland*, 14 Ark. 710.

cial property therein, the consignor has no authority by any subsequent orders to suspend or control this right of sale, except in respect to the surplus not necessary for the factor's reimbursement,<sup>79</sup> unless there is some agreement between the factor and consignor which gives the consignor right to suspend or control the factor's actions after such advances.<sup>80</sup>

— **What interest not sufficient.** But where the agent, to whom the power is given, has an interest only in the proceeds of the transaction, and not in the subject-matter itself, as where he is to receive out of the proceeds a certain amount as compensation for services rendered in the transaction, it is not a power coupled with an interest, and hence is not irrevocable.<sup>81</sup> Thus, where it was stipulated that the agent should receive a certain per cent of the proceeds of sale by way of compensation for his services in making the sale, it was not an authority coupled with an interest, and the agency could be revoked at any time before a sale was made under the power.<sup>82</sup> So where A gave B a power of attorney to prosecute a suit for the redemption and recovery of lands, accompanied with an agreement to give the latter one-half of what he might recover, and secured the performance of the agreement on his part, by a mortgage on the land sought to be recovered, but there was nothing in any of the writings

<sup>79</sup> *Marfield v. Douglass*, 1 Sandf. (N. Y.) 360; *Marfield v. Goodhue*, 3 N. Y. (3 Comst.) 62; *Brown v. McGran*, 14 Pet. (U. S.) 479; *Raleigh v. Atkinson*, 6 Mees. & W. 670. See c. 21.

<sup>80</sup> *Brown v. McGran*, 14 Pet. (U. S.) 479; *Marfield v. Goodhue*, 3 N. Y. (3 Comst.) 62; *Marfield v. Douglass*, 1 Sandf. (N. Y.) 360. See c. 21.

<sup>81</sup> *Chambers v. Seay*, 73 Ala. 372; *Stier v. Imperial Life Ins. Co.*, 58 Fed. 843; *Oregon & W. Mortg. Sav. Bank v. American Mortg. Co.*, 35 Fed. 22; *Hall v. Gambrill*, 92 Fed. 32; *Ballard v. Travellers' Ins. Co.*, 119 N. C. 187; *Wainwright v. Massenberg*, 129 N. C. 46; *Nevitt v. Woodburn*, 82 Ill. App. 649; *Andrews v. Travellers' Ins. Co.*, 24 Ky. L. R. 844, 70 S. W. 43.

<sup>82</sup> *Chambers v. Seay*, 73 Ala. 372; *Brown v. Pforr*, 38 Cal. 550; *Barr v. Schroeder*, 32 Cal. 609; *Frink v. Roe*, 70 Cal. 296; *Darrow v. St. George*, 8 Colo. 592; *Bonney v. Smith*, 17 Ill. 531; *Hamilton v. Frothingham*, 59 Mich. 253; *Simpson v. Carson*, 11 Or. 361; *Hartley's Appeal*, 53 Pa. 212, Huffc. Cas. 132; *Blackstone v. Buttermore*, 53 Pa. 266, Huffc. Cas. 133.

obligating the attorney to act, it was held that, by the mortgage, the power was not annexed to the estate, nor was the estate auxiliary to its exercise, that the power was not coupled with an interest in the lands and was revocable at any time before the attorney had recovered the lands or some portion thereof.<sup>83</sup> And this is also true where a power is given to collect a debt, the agent to have a certain per cent of the proceeds for his services.<sup>84</sup>

A power is simply collateral and without interest, or a naked power, where, to a mere stranger, authority is given to dispose of an interest, in which he had not before, nor has by the instrument creating the power, any estate whatsoever.<sup>85</sup>

**§ 166. Where power is given for a valuable consideration or as security.**

Still another exception to the general rule exists where authority has been conferred upon an agent for a valuable consideration or as security. If the authority has been conferred for a valuable consideration, independent of his right to compensation, such authority is deemed to be irrevocable; but the consideration must be independent of any compensation rendered for service.<sup>86</sup> "Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will, yet, if he bind himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it."<sup>87</sup> Where a principal, for a valuable con-

<sup>83</sup> *Gilbert v. Holmes*, 64 Ill. 548.

<sup>84</sup> *Hartley's Appeal*, 53 Pa. 212, *Huffc. Cas.* 132; *Flanagan v. Brown*, 70 Cal. 254; *Oregon & W. Mortg. Sav. Bank v. American Mortg. Co.*, 35 Fed. 22.

<sup>85</sup> *McGriff v. Porter*, 5 Fla. 373.

<sup>86</sup> *Bromley v. Holland*, 7 Ves. 28; *Smart v. Sandars*, 5 C. B. 917; *Evans v. Fearne*, 16 Ala. 689, 50 Am. Dec. 197; *Parke v. Frank*, 75 Cal. 364; *Brown v. Pforr*, 38 Cal. 550; *Frink v. Roe*, 70 Cal. 297; *Walker v. Denison*, 86 Ill. 142; *Attrill v. Patterson*, 58 Md. 226; *Creager v. Link*, 7 Md. 259; *Smith v. Dare*, 89 Md. 47; *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459; *Raymond v. Squire*, 11 Johns. (N. Y.) 47; *De Forest v. Bates*, 1 Edw. Ch. (N. Y.) 394; *Simpson v. Carson*, 11 Or. 361; *Montague v. McCarroll*, 15 Utah, 318.

<sup>87</sup> By Chief Justice Marshall in *Hunt v. Rousmanier's Adm'rs*,



sideration, agrees not to revoke an agency, for a reasonable time, and in view of the circumstances, and nature of the contract a reasonable time can be ascertained, he has no legal right to revoke it during such time.<sup>88</sup>

And this is also true, if the power is given as a security for the payment of money or the performance of some other lawful act, whether so expressed upon its face or not;<sup>89</sup> as where a letter of attorney was given to a bank for the purpose of securing the payment of a promissory note.<sup>90</sup> Usually, a power of attorney to confess judgment is not revocable by act of the party giving it.<sup>91</sup>

If, however, the consideration fails, the power may be revoked.<sup>92</sup> Thus, where a creditor executes a power of attorney to A. B., to receive the dividends on his debt for a bankrupt's use, the bankrupt undertaking to pay the debt in full, and for that purpose giving the creditor a bill of exchange, which, however, is never paid, the consideration for the power of attorney having failed, the power was revocable by the creditor, although it might have become irrevocable by the bankrupt performing his part of the contract, in consideration of which the power of attorney was given.<sup>93</sup> And so the mere fact that an agent has made ad-

8 Wheat. (U. S.) 174, Huffc. Cas. 146; Guthrie v. Wabash R. Co., 40 Ill. 109.

<sup>88</sup> Parke v. Frank, 75 Cal. 364.

<sup>89</sup> Walsh v. Whitcomb, 2 Esp. 565; Frink v. Roe, 70 Cal. 297; Hunt v. Rousmanier's Adm'rs, 8 Wheat. (U. S.) 175, Huffc. Cas. 146; Skinner v. Ft. Wayne, T. H. & S. W. R. Co., 58 Fed. 55; Evans v. Fearne, 16 Ala. 689, 50 Am. Dec. 197; Hutchins v. Hebbard, 34 N. Y. 27; Knapp v. Alvord, 10 Paige (N. Y.) 205, 40 Am. Dec. 241; Durbrow v. Eppens, 65 N. J. Law, 10.

<sup>90</sup> Evans v. Fearne, 16 Ala. 689, 50 Am. Dec. 197; Barr v. Schroeder, 32 Cal. 609; Walker v. Denison, 86 Ill. 142.

<sup>91</sup> Kindig v. March, 15 Ind. 248; Evans v. Fearne, 16 Ala. 689, 50 Am. Dec. 197; Eneu v. Clark, 2 Pa. 234, 44 Am. Dec. 191. A power of attorney to confess judgment in favor of a third person is revocable at the pleasure of the principal, unless it is supported by a consideration, or is held as security, or is necessary to effectuate a security. Odes v. Woodward, 2 Ld. Raym. 849.

<sup>92</sup> Ex parte Smither, 1 Deac. 413; Dunbar v. Foreman, 40 S. C. 500.

<sup>93</sup> Ex parte Smither, 1 Deac. 413.

vances for his principal upon the faith of his power does not prevent the latter from revoking the former's authority, if the power has not been conferred as security for such a debt and the agent was under no obligation to make them.<sup>94</sup>

**§ 167. Where agency has been wholly executed.**

Where the agency has been fully executed it cannot be revoked, and thereby affect acts or contracts that have been made in compliance with such authority.<sup>95</sup> A power of attorney to collect and distribute money is not revocable after its execution by collection of the money.<sup>96</sup> So a deed of assignment for the benefit of creditors cannot be revoked by the grantor after it has once taken effect; and no subsequent cancellation of it by him can affect the rights of his creditors.<sup>97</sup>

**§ 168. Where agency has been partly executed.**

Where an authority has been partly executed by the agent, the question may arise whether the principal may revoke the agent's authority either in whole or as to the part which remains unexecuted. As to this, the true principle seems to be that if the authority can be severed or revoked as to the part which is unexecuted, either as to the agent or as to third persons, the revocation will be good as to the part unexecuted but not as to the part already executed;<sup>98</sup> but if the authority be not thus severable and damage will happen to the agent on account of the execution of the authority pro tanto, the principal will not be allowed to revoke the unexecuted part, or at least not without fully indemnifying the agent.<sup>99</sup> Where a creditor has given an order to his debtor

<sup>94</sup> *Smith v. Dare*, 89 Md. 47.

<sup>95</sup> *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 18 Am. St. Rep. 843.

<sup>96</sup> *Watson v. Bagaley*, 12 Pa. 164, 51 Am. Dec. 595.

<sup>97</sup> *Scull v. Reeves*, 3 N. J. Eq. 131, 29 Am. Dec. 703.

<sup>98</sup> *Sanborn v. Rodgers*, 33 Fed. 851.

<sup>99</sup> *Story*, Ag. § 466.

The power of an attorney may be revoked at any time by the principal without notice, but if the agent, in the prosecution of the business of his principal, has fairly and in good faith, before

to pay the amount due him to a third person, and there is an acceptance of the order and a pledge by the person to whom that authority is given that he will pay the debt according to the authority, he (the creditor) has no right to revoke that order.<sup>100</sup> But where the third person does not know of or does not accept or assent to the arrangement and there is no new consideration for the contract between the debtor and creditor, it is not irrevocable by the creditor.<sup>101</sup> Until the third person accepts or assents to such agreement, there is no consideration to the creditor for his agreeing to release his debtor of his debt.<sup>102</sup> If the principal revoked the agency under such circumstances it would involve the agent in liability to the third person, and this the principal cannot do without indemnifying the agent. "The chief difficulty arises in those cases where the agent has incurred trouble and expense in the execution of the agency and has been prevented from effecting a sale by the interference of his principal, whether by revocation of his authority or otherwise. It is not just, it is true, for a principal to revoke an agent's authority without paying him for labor and expense reasonably incurred in the course of the agent's employment. Unless otherwise stipulated, the agent may, in a proper form of action, ordinarily claim reimbursement for the value of these."<sup>103</sup>

**§ 169. How revocation may be made.**

(a) **In general.**—In general, the revocation of an agent's authority may be effected by as many different means as by which it may be conferred. It may be by an express act of the principal or it may be implied from the facts and circumstances of the case. It may be by a mere private and verbal declaration to the agent, or by a simple writing not

notice of revocation of his powers, entered into any engagements or come under any liabilities, the principal will be bound to indemnify him. *United States v. Jarvis*, 2 Ware (Dav. 274) 278, Fed. Cas. No. 15,468.

<sup>100</sup> *Hodgson v. Anderson*, 3 Barn. & C. 842, 10 E. C. L. 379.

<sup>101</sup> *Kelly v. Roberts*, 40 N. Y. 432.

<sup>102</sup> *Hammon*, Cont. 672, 856.

<sup>103</sup> *Chambers v. Seay*, 73 Ala. 372. See post, § 370.

under seal, or by a writing under seal, or by a public publication or announcement. What will be a sufficient revocation in any particular case, of course, depends upon the facts and circumstances of that case. But certain it is that a revocation is not effected by the mere fact that the principal desires it. There must be an expression of such desire, the form or manner of expression depending upon the particular case. In some cases it may be required to be by an instrument under seal. In other cases it may be by parol; and in still others it may be implied from the facts of the case. From this it follows, as we shall presently see, that notice of revocation must be given to the different parties, in order that the revocation may be effectual as against them.

(b) **Where authority is under seal.**—It is a rule of the common law that a contract under seal can be discharged only in the same form as that in which it was made. Thus, a contract under seal can be discharged only by another instrument of equal solemnity. But this doctrine is not applicable to powers of attorney. And although such a power is conferred by an instrument under seal, it may nevertheless be terminated by a parol revocation,<sup>104</sup> unless a sealed revocation is required by an express statutory provision; and especially is this so when the seal on the instrument conferring the power was superfluous, the nature of the agency not requiring such solemnity to its creation.<sup>105</sup>

(c) **Where authority is in writing not under seal.**—A fortiori an authority conferred by a writing not under seal may be dissolved by parol.<sup>106</sup> Where, under an agreement by a creditor to accept from his debtor, in payment of the debt, property at an appraised value, appraisers are appointed, their authority may be revoked as in the case of a submission to arbitration, and such revocation may be made orally,

<sup>104</sup> *Brookshire v. Brookshire*, 30 N. C. (8 Ired.) 74, 47 Am. Dec. 341, *Huffc. Cas.* 130, *Wamb. Cas.* 953; *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198; *Pickler v. State*, 18 Ind. 266.

<sup>105</sup> *Brookshire v. Brookshire*, 30 N. C. (8 Ired.) 74, 47 Am. Dec. 341, *Huffc. Cas.* 130, *Wamb. Cas.* 953.

<sup>106</sup> *Legal v. Miller*, 2 Ves. Sr. 299; *Coles v. Trecothick*, 9 Ves. 250; *Price v. Dyer*, 17 Ves. 356.

though the appointment was in writing but not under seal.<sup>107</sup> The demand by the principal for the return of a written power under which an attorney in fact was acting, and its surrender without any further instructions, is a revocation of the power.<sup>108</sup>

**§ 170. Revocation by implication.**

(a) **In general.**—Not only may an agent's authority be revoked by an instrument or by parol, but a revocation may be implied from the circumstances of the case, and these circumstances may be much varied. All that is necessary in such a case is the presence of such circumstances as show an intention on the part of the principal to terminate the agent's authority.

Thus an agent's authority is revoked by the subsequent appointment of himself and another jointly to execute the same authority for which he had been previously appointed.<sup>109</sup> Especially would this be so if the power given to the former agent was an exclusive or special one, and the second appointment is incompatible or inconsistent with the prior one.<sup>110</sup> So where the complainant in a suit executed a release empowering defendants to dismiss the suit, their authority to dismiss the suit was revoked by the subsequent execution of a power of attorney to another, before dismissal, empowering him to continue and prosecute the same to termination.<sup>111</sup> If, however, the first appointment is not an exclusive one, and a second appointment is not inconsistent with the first, the fact that the principal appoints another agent to perform the same duties does not of itself revoke the first appointment,<sup>112</sup> although, as we shall see elsewhere, a performance of such duties by either will be a revocation of the powers of both. There may be two or more persons

<sup>107</sup> *Rochester v. Whitehouse*, 15 N. H. 468.

<sup>108</sup> *Kelly v. Brennan*, 55 N. J. Eq. 423.

<sup>109</sup> *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198.

<sup>110</sup> *Rapier v. Louisiana Equitable L. Ins. Co.*, 57 Ala. 100; *Clark v. Mullenix*, 11 Ind. 532; *Johnson v. Youngs*, 82 Wis. 107.

<sup>111</sup> *Aiken v. Taylor* (Tenn.) 62 S. W. 200.

<sup>112</sup> *Cushman v. Glover*, 11 Ill. 600, 52 Am. Dec. 461; *Hatch v. Codding*, 95 U. S. 48, 56.

appointed to exercise the same power as agents for a principal. If there is nothing in the agency to render an authority in one person inconsistent with a like authority in another, both may well be authorized, and the acts of either or both, within the scope of the agency, will be valid and binding on the principal. Thus, if an agent is appointed to collect money, the mere fact that another agent is also appointed to collect the same money will not amount to a revocation.<sup>113</sup> Nor is a power of attorney, executed by the widow and heirs of the decedent empowering an agent to complete a contract made by the decedent revoked by a grant of administration to the widow two days thereafter.<sup>114</sup> Nor will a written appointment of a special agent be necessarily superseded by a subsequent verbal appointment to manage the principal's general business.<sup>115</sup>

So a revocation will be implied where the principal makes a demand for property sent to the agent;<sup>116</sup> or by paying the agent for services rendered in a certain transaction.<sup>117</sup> But bringing an action on a book account is not per se a revocation of an authority previously given by the plaintiff to the defendant to pay to a third person certain items in the plaintiff's account.<sup>118</sup>

(b) **By disposing of the subject-matter.**—Where a principal confers upon an agent authority to do a certain thing, but before the agent executes that authority, the principal either by himself or through another disposes of the subject-matter of the agency, a revocation of the power will necessarily be implied.<sup>119</sup> Some of the courts seem to hold that this is

<sup>113</sup> *Davol v. Quimby*, 11 Allen (Mass.) 208.

<sup>114</sup> *Jones' Adm'r v. Commercial Bank*, 78 Ky. 413.

<sup>115</sup> *Smith v. Lane*, 101 Ind. 449.

<sup>116</sup> *Potter v. Merchants' Bank*, 28 N. Y. 641, 86 Am. Dec. 273; *Comley v. Dazian*, 114 N. Y. 161.

<sup>117</sup> *Reed v. Latham*, 40 Conn. 452.

<sup>118</sup> *Walker v. Barrington*, 28 Vt. 781.

<sup>119</sup> *Gilbert v. Holmes*, 64 Ill. 548; *Bissell v. Terry*, 69 Ill. 184; *Walker v. Denison*, 86 Ill. 142; *Ahern v. Baker*, 34 Minn. 98; *Torre v. Thiele*, 25 La. Ann. 418; *Elliot v. Barrett*, 144 Mass. 256; *Kolb v. Bennett Land Co.*, 74 Miss. 567.

a revocation by operation of law.<sup>120</sup> But it is believed that this is more properly a revocation by implication, for as we shall see hereafter<sup>121</sup> in order that a revocation by operation of law, by change in subject-matter, may be effected, the contract must have been made in contemplation of the continued existence of the subject-matter, or circumstances as they were when the contract was entered into, and this condition should be changed without fault of the principal. Thus, a power of attorney to convey land is revoked by a conveyance of the land by the principal to the agent as trustee and guardian of his son, and a subsequent conveyance of the land under the power of attorney is void.<sup>122</sup> So where a landowner employs several different agents to act for him in the sale of the same tract of land, a sale by one of them will operate as a revocation of the authority of the others.<sup>123</sup>

When a debtor delivers to a third person money to pay to his creditor, the relation between the debtor and third person is that of principal and agent, until the creditor assents to the transaction; and, until such assent, the debtor may revoke the intended appropriation. Any disposition by the debtor, such as an assignment for the benefit of creditors, inconsistent with the appropriation first intended, will be a revocation.<sup>124</sup> So where a principal agrees to ship to his agent for sale the entire output of his canning operations during a certain season, and subsequently makes an assignment for the benefit of creditors, the agent cannot enforce specific performance against the assignee, where it appears that the agent's authority was not coupled with an interest.<sup>125</sup> So the assignment of a judgment revokes the au-

<sup>120</sup> *Gilbert v. Holmes*, 64 Ill. 548; *Blissell v. Terry*, 69 Ill. 184; *Walker v. Denison*, 86 Ill. 142.

<sup>121</sup> *Post*, § 183.

<sup>122</sup> *Chenault v. Quisenberry* (Ky.) 57 S. W. 234.

<sup>123</sup> *Ahern v. Baker*, 34 Minn. 98.

<sup>124</sup> *Simonton v. First Nat. Bank*, 24 Minn. 216; *Dole v. Bodman*, 3 Metc. (Mass.) 139; *Kelly v. Roberts*, 40 N. Y. 432; *Wilson v. Harris*, 21 Mont. 374; *Scott v. Porcher*, 3 Mer. 652; *Wallwyn v. Coutts*, 3 Mer. 707.

<sup>125</sup> *Elwell v. Coon* (N. J. Eq.) 46 Atl. 580.

thority of the plaintiff's attorney to receive the money on the execution, or to control the judgment.<sup>126</sup>

(c) **By dissolution of partnership.**—Where a partnership appoints an agent to act for it in firm affairs, a dissolution of the partnership thereby revokes the authority of such agent;<sup>127</sup> and the same is true in the case of a dissolution of a corporation.<sup>128</sup> Thus, where a partnership, to expire at a certain time, appointed an agent or attorney to "buy and sell goods, sign notes, and perform all acts concerning the business," the expiration of the time dissolved the partnership and thus revoked the agency.<sup>129</sup> And where a commercial partnership is dissolved, the power of its former members to act as agents of the firm and bind each other by note is revoked, unless there is an express agreement between the former partners authorizing one or more to act as agent for the others or they individually ratify his acts, in settling up the firm accounts, and binding the others by note.<sup>130</sup>

But a mere change in the name of the firm does not operate to revoke or annul an agency conferred upon it, when the firm under the new name is composed of the same members as those under the old one.<sup>131</sup>

(d) **By severance of joint principals.**—Where two or more joint principals appoint an agent to take charge of their joint interests, a severance of their joint relation thereafter revokes the agent's authority.<sup>132</sup>

### § 171. Revocation of subagency.

If a subagent is one who has been appointed by the primary agent, without any authority from the principal, a revoca-

<sup>126</sup> *Trumbull v. Nicholson*, 27 Ill. 149; *Wilson v. Harris*, 21 Mont. 374.

<sup>127</sup> *Schlater v. Winpenny*, 75 Pa. 321; *Whitworth v. Ballard*, 56 Ind. 279; *Meyer v. Atkins*, 29 La. Ann. 586; *Vaccaro v. Toof*, 9 Heisk. (Tenn.) 194.

<sup>128</sup> *People v. Globe M. L. Ins. Co.*, 91 N. Y. 174; *Montross v. Roger Williams Ins. Co.*, 49 Mich. 477.

<sup>129</sup> *Schlater v. Winpenny*, 75 Pa. 321.

<sup>130</sup> *Meyer v. Atkins*, 29 La. Ann. 586.

<sup>131</sup> *Billingsley v. Dawson*, 27 Iowa, 210. And see *Rice v. Isham*, 4 Abb. Dec. (N. Y.) 37.

<sup>132</sup> *Rowe v. Rand*, 111 Ind. 206, *Huffc. Cas.* 126.



tion of the powers of the primary agent operates also as a revocation of the subagent's powers.<sup>133</sup> If, however, the subagent has been appointed by the authority of the principal, and derives his authority from the principal, he is an agent of the principal, and his authority will not be affected by a revocation of the authority of the primary agent.<sup>134</sup> But there may be cases in which the subagent's powers are such that they are dependent upon the continuance of the primary agent's powers, and a revocation of the latter would necessarily include a revocation of the former, although the subagent had been appointed by the principal's authority. For instance, if the subagent's authority is merely to act as an assistant to the primary agent, he could hardly act in that capacity after the primary agent's authority had been revoked.

### § 172. Revocation of public agency.

Where an agent has been appointed by an act of the general assembly, his authority can be revoked only by a repeal of such act.<sup>135</sup> And where the state does not itself appoint an agent, but passes a law requiring certain principals to appoint agents for certain purposes, as long as such law is in force, the authority of such an agent cannot be revoked by the principal, unless upon the appointment of another to take his place. These laws are usually passed in reference to foreign insurance companies doing business within the state, requiring them to appoint an agent within the state, upon whom service of process might be made, in proceedings concerning such insurance company.<sup>136</sup> Thus, a foreign insurance company doing business in New Orleans, through an agent, cannot revoke such agent's authority on the eve of the institution of a suit for a loss, of which it has been notified, so as to frustrate a claim in Louisiana upon a contract with it.<sup>137</sup>

<sup>133</sup> *Lehigh Coal & Nav. Co. v. Mohr*, 83 Pa. 228, 24 Am. Rep. 161; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296.

<sup>134</sup> *Smith v. White*, 5 Dana (Ky.) 383.

<sup>135</sup> *State v. Walker*, 88 Mo. 279; *Dudley v. Greene*, 35 Me. 14.

<sup>136</sup> *Michael v. Mutual Ins. Co. of Nashville*, 10 La. Ann. 737; *Gibson v. Manufacturers' F. & M. Ins. Co.*, 144 Mass. 81.

<sup>137</sup> *Michael v. Mutual Ins. Co. of Nashville*, 10 La. Ann. 737.

### § 173. Notice of revocation.

(a) **In general.**—Although the principal may revoke his agent's authority in the different ways described in preceding sections, yet in order to make that revocation effectual and binding on the different parties concerned, it is necessary, in general, that the principal should give notice thereof to all persons who may be affected by such agency. Such notice must be given to the agent, and in some cases to subagents; to third persons who have had dealings with the agent as such, and are apt to deal with him again; and to persons who knowing of such agency are apt to deal with him, although they have not previously done so. And this notice, as we shall presently see, is required to be given in a certain manner, according to the persons whom it is desired the notice shall affect, and according to the character of the original authority.

(b) **Notice to third persons—When necessary.**—Whenever a general agency has been established for any purpose, all persons who have dealt with such agent, or who have known of the agency and are apt to deal with him, have a right to presume that such authority will continue until it is shown to have been terminated in one way or another;<sup>138</sup> and they also have a right to anticipate that if the principal revokes such authority they will be given due notice thereof. It is a general rule of law, therefore, upon which there seems to be no conflict of authorities, that all acts of a general agent within the scope of his authority, as respects third persons, will be binding on the principal, even though done after revocation, unless notice of such revocation has been given to those persons who have had dealings with and who are apt to have other dealings with the agent, upon the strength of his former authority.<sup>139</sup> Thus, where an

<sup>138</sup> *McNeilly v. Continental L. Ins. Co.*, 66 N. Y. 23; *Southern L. Ins. Co. v. McCain*, 96 U. S. 84; *Andrews v. Clark*, 72 Md. 396; *Anthony v. Phillips*, 17 R. I. 188.

<sup>139</sup> *England*: *Anon. v. Harrison*, 12 Mod. 346, Wamb. Cas. 953; *Salte v. Field*, 5 Term R. 211.

*United States*: *Southern L. Ins. Co. v. McCain*, 96 U. S. 84; *Hatch v. Coddington*, 95 U. S. 48; *Lanusse v. Barker*, 3 Wheat. 101, 142; *Johnson v. Christian*, 128 U. S. 374.

agency, constituted by writing, is revoked, but the written authority is left in the hands of the agent, and he subsequently exhibits it to a third person, who deals with him as agent, on the faith of it, without any notice of the revocation, the act of the agent, within the scope of the authority,

*Alabama:* Gunter v. Stuart, 87 Ala. 196.

*California:* Quinn v. Dresbach, 75 Cal. 159, 7 Am. St. Rep. 138; Van Dusen v. Star Quartz Min. Co., 36 Cal. 571, 95 Am. Dec. 209.

*Connecticut:* Fellows v. Hartford & N. Y. Steamboat Co., 38 Conn. 197.

*Illinois:* Meyer v. Hehner, 96 Ill. 400; Diversy v. Kellogg, 44 Ill. 114, 92 Am. Dec. 154.

*Indiana:* Howe Mach. Co. v. Simler, 59 Ind. 307; Foellinger v. Leh, 110 Ind. 238; Ulrich v. McCormick, 66 Ind. 243.

*Iowa:* Baudouine v. Grimes, 64 Iowa, 370.

*Kentucky:* Hancock v. Byrne, 5 Dana, 513.

*Louisiana:* Harris v. Cuddy, 21 La. Ann. 388; Caldwell v. Neil Bros., 21 La. Ann. 342, 99 Am. Dec. 738; Girard v. Hirsch, 6 La. Ann. 651.

*Maine:* Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 56 Am. St. Rep. 436.

*Maryland:* Baltimore v. Eschbach, 18 Md. 276; Bernard v. Torrance, 5 Gill & J. 383; Andrews v. Clark, 72 Md. 396.

*Massachusetts:* Wright v. Herrick, 128 Mass. 240; Packer v. Hinckley Locomotive Works, 122 Mass. 484; Rice v. Barnard, 127 Mass. 241.

*Mississippi:* Planters' Bank v. Cameron, 3 Smedes & M. 609.

*Missouri:* Lamothe v. St. Louis Marine R. & Dock Co., 17 Mo. 204.

*New Hampshire:* Beard v. Kirk, 11 N. H. 397.

*New Jersey:* Capen v. Pacific Mut. Ins. Co., 25 N. J. Law, 67, 64 Am. Dec. 412.

*New York:* McNelly v. Continental L. Ins. Co., 66 N. Y. 23; Claflin v. Lenheim, 66 N. Y. 301, 305; Barkley v. Rensselaer & S. R. Co., 71 N. Y. 205; Munn v. Commission Co., 15 Johns. 44, 8 Am. Dec. 219; Gelpcke v. Quintell, 74 N. Y. 599.

*North Carolina:* Braswell v. American L. Ins. Co., 75 N. C. 8.

*Pennsylvania:* Morgan v. Stell, 5 Bin. 305.

*Rhode Island:* Anthony v. Phillips, 17 R. I. 188.

*South Carolina:* Montgomery v. Eveleigh, 1 McCord Eq. 267.

*Texas:* Aetna L. Ins. Co. v. Hanna, 81 Tex. 487, 492.

*Vermont:* Tier v. Lampson, 35 Vt. 179, 82 Am. Dec. 634; Bradish v. Belknap, 41 Vt. 172.

*Virginia:* Smith v. Watson, 82 Va. 712.

will bind the principal.<sup>140</sup> So where a father has permitted a minor son to buy goods on his credit, a party knowing of that fact and without notice of any change in the relation or of circumstances sufficient to put him on inquiry may recover against the father for goods sold to the son, although the son has left the father.<sup>141</sup>

The above rule also applies when the husband is acting as agent for his wife,<sup>142</sup> and vice versa.<sup>143</sup> Thus, where a tradesman who has previously furnished goods to a wife, and has been paid by the husband, has neither actual nor imputed knowledge of the wife's separation from the husband, and who after the separation furnishes goods to the wife, he may maintain an action therefor against the husband. In such a case, the wife's agency continues until a knowledge of the separation and notice by the husband not to sell to the wife on his credit is brought home to the tradesman.<sup>144</sup>

The doctrine, however, that a discharged agent may, under some circumstances, bind his former principal to the extent of the authority with which he had been apparently clothed, has no application beyond the claim of authority made by the agent. Accordingly, where an agent of the plaintiff after his discharge, which was unknown to the defendant, represented that he had authority to draw upon his principal, but not that he had authority to procure an accommodation indorser, the principal was not bound to indemnify the defendant for indorsing the discharged agent's draft, which the principal refused to pay, notwithstanding the principal had honored several other drafts drawn by the agent before his discharge and indorsed by the defendant.<sup>145</sup>

The underlying principle that makes a principal liable to

<sup>140</sup> *Beard v. Kirk*, 11 N. H. 397.

<sup>141</sup> *Murphy v. Ottenheimer*, 84 Ill. 39, 25 Am. Rep. 424. And see ante, § 77.

<sup>142</sup> *Maxcy Mfg. Co. v. Burnham*, 89 Me. 538, 56 Am. St. Rep. 436.

<sup>143</sup> *Anthony v. Phillips*, 17 R. I. 188; *Debenham v. Mellon*, 5 Q. B. Div. 394.

<sup>144</sup> *Anthony v. Phillips*, 17 R. I. 188. See ante, § 85.

<sup>145</sup> *Baudouine v. Grimes*, 64 Iowa, 370; *Groneweg v. Kusworm*, 75 Iowa, 237.

a third person for the acts of the agent done within the scope of his authority although after revocation, but before notice thereof has been brought home to third persons who had formerly dealt with him, is that, if one of two innocent purchasers must suffer, the loss must be borne by him whose acts contributed to bring about the state of things which caused the loss.<sup>146</sup>

— **When not necessary.** Where, however, the agent has been appointed for some special act only, or in other words where he is a special agent, third persons have no right to presume that his authority will continue beyond the doing of that act. As soon as he has performed the particular act authorized, his authority thereby ceases, and parties knowing of his agency have knowledge of this fact. In case of special agencies, then, it is the rule that notice of revocation of authority after the performance of the special act, need not be given to third persons.<sup>147</sup> But where the revocation is made before the special agency has been completed, notice thereof should be given to third persons who have had dealings with such agent, or who know of the agency, the same as in general agencies.

(c) **Notice to agent.**—Not only must notice of revocation be given to third persons, but it must also be given to the agent himself. Notice of revocation to a third party without notice to the agent, leaves the power in force. And such revocation of an agency becomes operative as to the agent only from the time it is actually made known to him,<sup>148</sup> if by a letter, from the time the letter is received, and not from the time it was mailed.<sup>149</sup> And where it is expressly

<sup>146</sup> *Caldwell v. Nell Bros.*, 21 La. Ann. 342, 99 Am. Dec. 738; *Story*, Ag. § 856; *Walker v. Cassaway*, 4 La. Ann. 19, 50 Am. Dec. 551; *Maple v. Kussart*, 53 Pa. 349, 91 Am. Dec. 214; *Stout v. Benoit*, 39 Mo. 277, 90 Am. Dec. 466; *Rulz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618.

<sup>147</sup> *Watts v. Kavanagh*, 35 Vt. 34; *Strachan v. Muxlow*, 24 Wis. 21.

<sup>148</sup> *Robertson v. Cloud*, 47 Miss. 208; *Williams v. Birbeck*, Hoff. Ch. (N. Y.) 359; *Welle's Case*, 7 Ct. Cl. (U. S.) 535; *Salte v. Field*, 5 Term R. 211.

<sup>149</sup> *Robertson v. Cloud*, 47 Miss. 208. Nor can an agent's author-

provided that the agent's authority could be revoked by a request in writing by the principal, it is the duty of the principal himself, or by a specially authorized attorney to notify the agent of the revocation of his authority.<sup>150</sup>

But after revocation of an agent's authority has been brought home to him, the principal is not bound, as between himself and the agent, to notify the latter of his dissent from acts done thereafter by such agent in pursuance of the original authority.<sup>151</sup>

(d) **Notice to subagent.**—Whether or not notice of the revocation of the agent's authority should be given to a subagent depends upon whether the subagent is the agent of the initial agent or of the principal. If the agent has appointed him upon his own responsibility and without any authority, express or implied, from the principal, such subagent is the agent of the initial agent and no notice of revocation of such agent's authority need be given to him; if, however, he is appointed upon the authority, express or implied, of the principal, he is the agent of such principal, and notice of the revocation of authority should be given to him as to other agents.<sup>152</sup>

(e) **How notice of revocation should be given.**—It is impossible to lay down any definite rule as to how notice of revocation should be given in any particular case. What might be sufficient notice in one case may not be in another. The sufficiency of such notice must be determined from the facts and circumstances of each particular case; and must always be sufficient to make the knowledge of the revocation co-extensive with the knowledge of the authority. It has been seen in a preceding section that in order that a revocation may be effective as against the agent, notice thereof must be actually given to him. In reference to third persons, this question properly comes under two heads, (1) as to persons who have previously dealt with the agent, and

ity be revoked by a letter which he never received. *Sayre v. Willson*, 86 Ala. 151.

<sup>150</sup> *Tingley v. Parshall*, 11 Neb. 443.

<sup>151</sup> *Kelly v. Phelps*, 57 Wis. 425.

<sup>152</sup> *Story*, Ag. § 469. See *North Chicago Rolling Mill Co. v. Hyland*, 94 Ind. 448.

(2) as to persons who have not, although they may have known of the agency. As to persons who have been previously in the habit of dealing with such agent, it is requisite that actual notice should be brought home to them, or at least such knowledge of revocation must be given to them as would put a reasonably prudent man upon inquiry.<sup>153</sup> "It is not necessary that personal information should be brought home to the party. If, with the exercise of ordinary caution, he would have been led to a knowledge of the revocation, it will be sufficient."<sup>154</sup> The case of such an agency is analogous to that of a partnership, and the notice of revocation of the agency is governed by the same rules as notice of dissolution of a partnership.<sup>155</sup> Thus, notice by a principal to such third persons of the contents of a written agreement with the agent terminating the agency is sufficient notice of the termination of the agency.<sup>156</sup> It is not necessary that such notice should be given to the third persons by the principal himself. If they acquire it from the agent, or from any other source it will be effective as to them, and it is immaterial that it did not come from the principal.<sup>157</sup> It will be seen hereafter that if the revocation is one that is required to be recorded and is recorded, it will be effective although the third person does not have actual notice thereof.<sup>158</sup>

As to third persons, however, who have never dealt with the agent, although having knowledge of the agency, such actual notice is not required, and a general notice by publication will be deemed sufficient, whether seen by them or not.

(f) When revocation should be recorded.—It is expressly

<sup>153</sup> *Clafin v. Lenheim*, 66 N. Y. 301, 305; *Braswell v. American Life Ins. Co.*, 75 N. C. 8; *Williams v. Birbeck*, Hoff. Ch. (N. Y.) 359; *Tier v. Lampson*, 35 Vt. 179, 82 Am. Dec. 634; *Fellows v. Hartford & New York Steamboat Co.*, 38 Conn. 197.

<sup>154</sup> *Williams v. Birbeck*, Hoff. Ch. (N. Y.) 359.

<sup>155</sup> *Clafin v. Lenheim*, 66 N. Y. 301, 305.

<sup>156</sup> *Van Dusen v. Star Quartz Min. Co.*, 36 Cal. 571, 95 Am. Dec. 209; *Vall v. Judson*, 4 E. D. Smith (N. Y.) 165.

<sup>157</sup> *Vall v. Judson*, 4 E. D. Smith (N. Y.) 165, 168.

<sup>158</sup> See *infra* (f).

provided by statute in some states that when a power of attorney, or other evidence of agency is recorded, a revocation of such agency should also be recorded. Where such provisions prevail, a deposit for record or recording of a revocation of a power of attorney in the proper office operates, under such statutes, as a notice to all parties dealing with the agent; and the revocation becomes absolute without actual notice to third persons or to the agent.<sup>159</sup> Thus, the statute of Nevada provides that: "No such power or other instrument, certified and recorded in the manner prescribed in the preceding section, shall be deemed to be revoked by any act of the party by whom it was executed, until the instrument containing such revocation shall be deposited for record in the same office in which the instrument containing the power is recorded."<sup>160</sup> So a recorded power of attorney to convey land is not revoked by an unrecorded conveyance of the land by the principal so as to defeat titles subsequently acquired in good faith from the attorney.<sup>161</sup> And where the record of a deed is notice to creditors and subsequent purchasers for value only, such a record would not notify a subagent for the sale of land of the termination of the original agent's authority by the conveyance.<sup>162</sup> But

<sup>159</sup> *Arnold v. Stevenson*, 2 Nev. 234. See *Williams v. Birbeck*, Hoff. Ch. (N. Y.) 359.

<sup>160</sup> Gen. St. Nev. § 2597. To same effect, see Mo. Rev. St. 1899, § 931; Comp. Laws Mich. 1897, § 8998; How. St. Mich. § 5692. For other statutes, see Ark. Dig. St. § 720; Cal. Civ. Code 1899, § 1216; Comp. Laws Dak. 1887, § 3295; Idaho Rev. St. 1887, § 3003; Ind. Gen. Laws 1883, c. 78, § 1; Iowa Code 1873, § 1969; Kan. Gen. St. 1899, § 1176; Md. Rev. Code 1878, art. 44, § 29; Minn. St. 1894, § 4188; Miss. Ann. Code 1892, § 196; Mont. Code 1895, div. II, § 1643; Neb. Gen. St. 1887, c. 61, § 19; N. M. Comp. Laws 1884, § 2766; N. Y. Rev. St. (7th Ed.) p. 2222, § 40; 2 Hill's Ann. Law, Or. 1892, § 3036; Tenn. Code 1896, § 3697(3); Utah Rev. St. 1898, § 1978; Wis. St. 1898, § 2246; Wyo. Rev. St. 1899, § 2756; Brightly Purd. Dig., Atty. in Fact, 3, "All such powers shall be accounted, deemed and taken to be in force, until the attorney or agent shall have notice of a countermand, recordation or death of the constituent."

<sup>161</sup> *Gratz v. Land & River Imp. Co.*, 82 Fed. 381.

<sup>162</sup> *Loehde v. Halsey*, 88 Ill. App. 452.



under the Texas statute, providing that the record of a deed shall be notice to all persons of its existence, the record of a deed by the owner of a tract of land is notice to his agent, and to all persons dealing with him, of the revocation of the agent's authority to sell the land.<sup>163</sup>

But if the revocation is one that is not required to be recorded, then the mere fact that it is recorded will not constitute notice thereof, as it is a rule of law that no one is chargeable with constructive notice of an instrument from its being recorded, unless the law makes it necessary to record it.<sup>164</sup>

**(g) Sufficiency of notice.**—In order that notice of revocation, when given, may be effective, it is necessary that it should be unambiguous, unequivocal, and certain. The notice should clearly show on its face an intention, on the part of the principal, to revoke the agent's authority.<sup>165</sup> Thus, notice by a principal to the person with whom the agent has done business for the principal, that he will not be allowed to do a particular thing in the future, is revocation of his authority to do it.<sup>166</sup> So the appointment of a second agent is sufficient notice of the revocation of the first, if the agencies are incompatible.<sup>167</sup> But it is not necessary that any particular form of words be used, if the intention to revoke clearly appears. The words "I am very sorry to have to ask you to resign your position," in a letter from an employer to his employe, are properly construed as a peremptory discharge.<sup>168</sup> But a revocation will not be shown from resolutions of a corporation, appointing an agent to perform acts, which another was also appointed to perform, if the two

<sup>163</sup> *Donnan v. Adams*, 30 Tex. Civ. App. 615; *Sayles' Civ. St. Tex.* art. 4652.

<sup>164</sup> *Williams v. Birbeck*, Hoff. Ch. (N. Y.) 359.

<sup>165</sup> *Claffin v. Lenheim*, 66 N. Y. 301; *Hatch v. Coddington*, 95 U. S. 48, 56; *Lanusse v. Barker*, 3 Wheat. (U. S.) 101, 143.

<sup>166</sup> *Friederick v. Perkinson*, 43 N. Y. St. Rep. 161; *Kirby v. Corn- ing*, 54 Wis. 599.

<sup>167</sup> *Clark v. Mullenix*, 11 Ind. 532; *Johnson v. Youngs*, 82 Wis. 107. See ante, § 170(a).

<sup>168</sup> *Jones v. Graham & M. Transp. Co.*, 51 Mich. 539.

appointments are not inconsistent;<sup>169</sup> nor from letters alone, in which no avowal of an intention to revoke is contained.<sup>170</sup> As was said in this latter case: "Nothing could be more inconsistent with that candor and good faith which ought to mark the transactions of mercantile men, than to favor the revocation of an explicit contract on the construction of the correspondence nowhere avowing that object. It was in the defendant's power to have revoked his assumption, contained in the letter of the 9th, at any time prior to its execution, but it was incumbent on him to have done so avowedly, and in language that could not be charged with equivocation."<sup>171</sup>

— **How determined.** Where the facts of the case are undisputed, it is a question of law for the court to determine whether or not the stated facts constitute sufficient notice of revocation.<sup>172</sup> But where the circumstances are controverted, or where notice is sought to be inferred as a fact, from circumstances, it is a question of fact for the jury; they must determine, as a question of fact, whether the party claiming against the principal had notice of the revocation.<sup>173</sup>

#### *B. By Renunciation.*

#### § 174. General rule.

It has been seen that the relation of principal and agent is based on mutual assent, express or implied, and as the principal can revoke the agency at any time, subject to certain exceptions, so the agent may in general renounce it

<sup>169</sup> *Hatch v. Coddington*, 95 U. S. 48, 56. See ante, § 170(a).

<sup>170</sup> *Lanusse v. Barker*, 3 Wheat. (U. S.) 101, 143.

<sup>171</sup> By *Johnson, J.*, in *Lanusse v. Barker*, 3 Wheat. (U. S.) 101, 143.

<sup>172</sup> *Claffin v. Lenheim*, 66 N. Y. 301, 305; *American Linen Thread Co. v. Wortendyke*, 24 N. Y. 550; *Clark v. Mullenix*, 11 Ind. 532; *Johnson v. Youngs*, 82 Wis. 107; *Howe v. Thayer*, 17 Pick. (Mass.) 91.

<sup>173</sup> *Claffin v. Lenheim*, 66 N. Y. 301, 305; *McNeilly v. Continental L. Ins. Co.*, 66 N. Y. 23; *Perrine v. Jermyn*, 163 Pa. 497; *Deford & Co. v. Reynolds*, 36 Pa. 325. See *Packer v. Hinckley Locomotive Works*, 122 Mass. 484.

at will. Just so far as the principal has power to revoke the agency, to the same extent has the agent power to renounce it. But, as has been seen in the case of revocation, he may have the power to renounce the relation, but his right to do so may be limited by his agreements. And again the renunciation may be given either in express terms, or it may be implied from the circumstances in the case. It may be stated as a general rule, then, that an agent may renounce his authority at any time upon giving reasonable notice thereof;<sup>174</sup> but, as we shall presently see, he does not always have the right to so renounce it, and may incur liabilities by doing so.

**§ 175. Where agency is of indefinite duration.**

Where the authority given to an agent is not given for any definite length of time, the agent usually has not only the power but also the right to renounce it at any time, upon giving reasonable notice, without incurring any liability by reason thereof.<sup>175</sup> Thus, where one was acting as agent of sewing-machines, to be sold on commission, and without his fault, a consignment of machines were destroyed by fire, after he had given reasonable notice to the principals to take them back, it was held that he was not liable for the loss, the contract not making him agent of the principals for any definite time, nor transferring the title to the machines.<sup>176</sup>

**§ 176. Where agency is of definite duration.**

Where, however, it is expressly or impliedly agreed that the relation shall continue for a definite period, or the authority is given for a valuable consideration, the agent may not renounce his authority, without good cause, before the expiration of that period, or before the performance of his contract, and if he does so it will be a breach of his contract and will make him liable to his principal for any

<sup>174</sup> *Barrows v. Cushway*, 37 Mich. 481; *Hitchcock v. Kelley*, 18 Ohio Cir. Ct. R. 808, and see cases cited hereafter.

<sup>175</sup> *Barrows v. Cushway*, 37 Mich. 481; *United States v. Jarvis*, 2 Ware (Dav. 274) 278, Fed. Cas. No. 15,468; without notice, *Coffin v. Landis*, 46 Pa. 426, 433.

<sup>176</sup> *Barrows v. Cushway*, 37 Mich. 481.

loss sustained thereby.<sup>177</sup> These principles having their foundation in natural equity, apply as well between the government and an individual as when both parties are private persons. No one can change his will to the injury of another, where mutual rights and obligations exist between the parties.<sup>178</sup>

**§ 177. Exception—Where renunciation is justified.**

There is an exception to this rule, however, where the principal by his own conduct, as by a breach of the contract of agency, justifies the agent in renouncing the agency, and a renunciation under such circumstances reserves to the agent all his rights.<sup>179</sup> Thus, where the principal, failing to furnish a store for the agent's office as he had promised, and refusing to pay for one furnished by the agent, and this bringing on unpleasant remarks by the principal, the agent was justified in renouncing the agency.<sup>180</sup> But where an agent was employed by the principal to obtain a cargo for a ship, and after part of the services had been performed the principal failed, the agent could not terminate his agency, put an end to the services partly performed, and become the employe of a third person to the contract between him and his principal.<sup>181</sup>

**§ 178. Where agent becomes ill.**

It seems that the illness of the principal would have no effect on the agency, unless perhaps it reached a stage of insanity. But if the agent becomes so ill that he is incapacitated from performing his duties, it will justify him in terminating the agency,<sup>182</sup> and it would seem that such

<sup>177</sup> *United States v. Jarvis*, 2 Ware (Dav. 274) 278, Fed. Cas. No. 15,468; *Coffin v. Landis*, 46 Pa. 426, 434; *Cannon Coal Co. v. Taggart*, 1 Colo. App. 60; *White v. Smith*, 6 Lans. (N. Y.) 5.

<sup>178</sup> *United States v. Jarvis*, 2 Ware (Dav. 274) 278, Fed. Cas. No. 15,468.

<sup>179</sup> *Conrey v. Brandegee*, 2 La. Ann. 132; *Duffield v. Michaels*, 97 Fed. 825. See post, § 179.

<sup>180</sup> *Conrey v. Brandegee*, 2 La. Ann. 132.

<sup>181</sup> *Means v. Ross*, 106 La. 175.

<sup>182</sup> *Spalding v. Rosa*, 71 N. Y. 40; *Robinson v. Davison*, L. R. 6 Exch. 269.

circumstances would also justify the principal in revoking the agency. But the illness alone does not terminate the agency, and any acts that the agent should perform, within the scope of his authority, before renunciation or notice of termination of the relation, would be binding on the principal.

**§ 179. Renunciation by implication from agent's abandonment.**

Where an agent by his words or conduct shows a clear intention to abandon his undertaking, it will amount to an implied renunciation of his agency, and the principal may rightly treat it as so renounced and employ another in his place.<sup>183</sup> Thus, where an agent wrote to his principal: "I have determined to sell out and give up the business; if you want it, come or send on, and I will give you the figures which I will take; this is final," the principal was justified, after making a fair and reasonable proposition to settle, which was not accepted, in treating the agent's action as an abandonment, and in at once appointing another agent.<sup>184</sup> So a refusal, by an agent, to deliver to the principal, goods purchased with funds furnished by the principal except upon a condition the principal was not bound to accept, has the same effect as an absolute refusal, and entitles the principal to treat it as an entire repudiation by the agent of his agreement, and to demand and recover from the agent the funds placed in his hands.<sup>185</sup>

Where the agent has agreed to devote his whole time, attention, and skill to his work for a definite period, and, without fault on his part, was arrested and kept in jail for a fortnight, during the busiest season, the principal may treat the agency as terminated and hire another person in his place, even though he offers his services after his release, which are refused.<sup>186</sup> But where an agent for the care and sale of

<sup>183</sup> *Stoddart v. Key*, 62 How. Pr. (N. Y.) 137; *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93; *Safford v. Kinsley*, 40 Vt. 506; *Case v. Jennings*, 17 Tex. 661.

<sup>184</sup> *Stoddart v. Key*, 62 How. Pr. (N. Y.) 137.

<sup>185</sup> *Safford v. Kinsley*, 40 Vt. 506.

<sup>186</sup> *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93. Compare

property wrote to the owners complaining that they had been acting with other agents, and that he would not so act any longer, but continued to act thereafter, receiving propositions from the owners as to price and terms of sale, the contract of agency was not terminated by such letter.<sup>187</sup>

— **Where abandonment is justified.** An agent, however, may be justified in abandoning his agency, if he is required to do an illegal or immoral act, or if the principal on his part breaks the contract of agency.<sup>188</sup>

**§ 180. Notice of renunciation.**

(a) **As between principal and agent.**—As between an agent and his principal, the agent should give notice of his renunciation to his principal, and it becomes operative only from the time the principal receives actual notice thereof.

(b) **As between principal and third party.**—As between the principal and third parties, in order to protect himself from liability for subsequent acts of the agent, notice of the renunciation must be given by the principal to third parties in the same manner and of the same character as when he himself revokes such authority.<sup>189</sup> Thus, where an agent, appointed by a foreign corporation to receive service of process in his state, tendered his resignation, which was accepted, but no notice or knowledge thereof was received by the plaintiff, a service of process on the agent after his resignation but before notice to the plaintiff was binding on the corporation.<sup>190</sup>

*Hughes v. Wamsutta Mills*, 11 Allen (Mass.) 201, where it was held that an arrest, conviction, and imprisonment for crime, will exonerate a workman from the duty of giving to his employers two weeks' notice before leaving their service, under a contract by the terms of which he has agreed to give such notice, or not claim any wages due.

<sup>187</sup> *Stringfellow v. Elsea* (Tex. Civ. App.) 45 S. W. 418.

<sup>188</sup> *Duffield v. Michaels*, 97 Fed. 825. See ante, § 177.

<sup>189</sup> *Capen v. Pacific Mut. Ins. Co.*, 25 N. J. Law, 67, 64 Am. Dec. 412. See ante, § 173.

<sup>190</sup> *Capen v. Pacific Mut. Ins. Co.*, 25 N. J. Law, 67, 64 Am. Dec. 412.

## III. BY OPERATION OF LAW.

## § 181. In general.

It has been seen, heretofore, how an agency may be terminated by the intentional acts, express or implied, of the parties to the relation. But there may be cases in which the contracts of agency are discharged by law; and perhaps contrary to the real intention of the parties. This is what is known as termination by operation of law; and occurs in those cases where by reason of changes in the condition of affairs, either of the parties or affecting the subject-matter, it is inconsistent, impossible, or contrary to public policy for the relation to continue. Whereupon the law steps in and terminates or dissolves the contract that cannot be performed whether such is the intention of the parties or not. These changes and conditions that cause a termination of the relation by operation of law may be divided into three general heads, so far as concerns contracts in which personal service is to be performed: (1) A change in the law itself, (2) a change in the subject-matter of the contract, (3) a change in the conditions of the parties to the contract.

## § 182. By a change in the law.

If one enters into a contract of agency to perform certain acts, and the law is afterwards changed so as to make the performance of such acts illegal, this operates as a termination of the agency, as to the future performance of such acts. This is but an application of the principle of contracts, that one is discharged from the performance of a contract when by a change in the law, performance becomes impossible or illegal.<sup>191</sup> It has been seen heretofore that an agency cannot be created for an illegal purpose, or for the performance of illegal acts;<sup>192</sup> for the same reason, as there given, an agency cannot exist for the performance of such though such acts were legal, and capable of being performed by an agent when the agency was first created.

<sup>191</sup> See Hammon, Cont. 829.

<sup>192</sup> See ante, § 38.

**§ 183. By a change in the subject-matter or circumstances.**

Where a contract of agency is entered into in contemplation of the continued existence of the subject-matter or circumstances as they were when the contract was made, a change permanently affecting the condition of such subject-matter or circumstances may operate to terminate the agency, although contrary to the real intention of the parties.<sup>193</sup> Although a party to an absolute executory contract is not excused by inability to execute it, caused by unforeseen accident or misfortune, but must perform or pay damages unless he has protected himself by a stipulation in the contract, there may be in the nature of the contract an implied condition by which he will be relieved from such unqualified obligation, and, when in such case, without his fault, performance is rendered impossible, it may be excused. Such an implication arises when it inherently appears to have been known to the parties to the contract, and contemplated by them when it was made, that its fulfillment would depend upon the continuance or existence, at the time for performance, of certain things or conditions essential to its existence.<sup>194</sup> Any change in conditions must take place without any voluntary act on the part of the principal or his agent, as where the property is destroyed by fire,<sup>195</sup> for if such change or disposition of the subject-matter is caused by the voluntary act of either one of the parties, it effects a termination by implication from the acts of the parties, as has been seen in a previous section.<sup>196</sup>

Whether or not the prevalence of a contagious disease at the place where an agent is to perform his services will operate as a termination of the agency and excuse the agent from performing his contract is not definitely settled. It has been held that where such disease renders it unsafe and unreasonable for men of ordinary care and prudence to re-

<sup>193</sup> *Turner v. Goldsmith* [1891] 1 Q. B. 544, *Huffc. Cas.* 137; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Stewart v. Stone*, 127 N. Y. 500; *People v. Bartlett*, 3 Hill (N. Y.) 570.

<sup>194</sup> *Stewart v. Stone*, 127 N. Y. 500.

<sup>195</sup> *Stewart v. Stone*, 127 N. Y. 500.

<sup>196</sup> See ante, § 170.



main there, it is a sufficient cause for not performing the agency.<sup>197</sup>

**§ 184. By a change in the condition of the parties—In general.**

So a termination of agency by operation of law may be affected by a change in the condition of one of the parties to the relation. If the condition of one of the parties becomes such that it is impossible for the contract of agency to be further performed, the law steps in and terminates the relation. This condition of affairs may be brought about (1) by the death of one of the parties; (2) by the insanity of one of the parties; (3) by the illness of one of the parties; (4) by bankruptcy of one of the parties; (5) by war; or (6) by marriage of one of the parties. These different conditions and their effects will be fully treated in the following sections.

**§ 185. By death of the principal.**

(a) **In general.**—As we shall see presently, an agency which is coupled with an interest in the subject-matter is not terminated or revoked by the death of the principal; and even when an agency is not coupled with an interest, the act of the agent after the principal's death may be binding on the latter's heirs and personal representatives, if the act is done in ignorance of such death. Except in these cases the general rule is that an agency is terminated or revoked, ipso facto, by the death of the principal, and that acts or contracts done or made by the agent on behalf of the principal after his death are not binding on the principal's heirs or representatives;<sup>198</sup> and this is true although

<sup>197</sup> *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77. Compare *Dewey v. Alpena School Dist.*, 43 Mich. 480, 38 Am. Rep. 206.

<sup>198</sup> *England*: *Palmer v. Reiffenstein*, 1 Man. & G. 94; *Smout v. Ilbery*, 10 Mees. & W. 1; *Campanari v. Woodburn*, 15 C. B. 400.

*United States*: *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 174; *Boone's Ex'r v. Clarke*, 3 Cranch, C. C. 389, Fed. Cas. No. 1,641; *Long v. Thayer*, 150 U. S. 520; *Pacific Bank v. Hannah*, 90 Fed. 72; *McDonald v. Hannah*, 51 Fed. 73, 75; *McClaskey v. Barr*, 50 Fed. 712.

the power is such that it could not have been revoked by the principal during his lifetime,<sup>109</sup> as where it was given for

*Alabama:* Scruggs v. Driver's Ex'rs, 31 Ala. 274; Saltmarsh v. Smith, 32 Ala. 404.

*Arizona:* Tuttle v. Green, 48 Pac. 1009.

*California:* Ferris v. Irving, 28 Cal. 645; Travers v. Crane, 15 Cal. 12; Judson v. Love, 35 Cal. 463; Krumdick v. White, 92 Cal. 143; *Id.*, 107 Cal. 37.

*Florida:* McGriff v. Porter, 5 Fla. 373.

*Georgia:* Wellborn v. Weaver, 17 Ga. 267, 63 Am. Dec. 235; Jones v. Beall, 19 Ga. 171.

*Illinois:* Garber v. Myers, 32 Ill. App. 175; Risley v. Fellows, 10 Ill. 531; Turnan v. Temke, 84 Ill. 286.

*Indiana:* Harness v. State, 57 Ind. 1.

*Iowa:* Dorr v. Dorr, 59 Iowa, 81; Furenes v. Elde, 109 Iowa, 511, 77 Am. St. Rep. 545.

*Kentucky:* Clark's Ex'rs v. Parrish's Ex'rs, 1 Bibb, 547; Campbell's Representatives v. Kincaid, 3 T. B. Mon. 68.

*Maine:* Harper v. Little, 2 Greenl. 14, 11 Am. Dec. 25; Staples v. Bradbury, 8 Greenl. 181, 23 Am. Dec. 494.

*Massachusetts:* Lincoln v. Emerson, 108 Mass. 87; Marlett v. Jackman, 3 Allen, 287; Gleason v. Dodd, 4 Metc. 333; Farnum v. Boutelle, 13 Metc. 159; Brown v. Cushman, 173 Mass. 368.

*Mississippi:* Clayton v. Merrett, 52 Miss. 353.

*New Hampshire:* Gale v. Tappan, 12 N. H. 145, 37 Am. Dec. 194; Wilson v. Edmonds, 24 N. H. 517.

*New Jersey:* Durbrow v. Eppens, 65 N. J. Law, 10.

*New York:* Farmers' Loan & Trust Co. v. Wilson, 139 N. Y. 284, 36 Am. St. Rep. 696; Smith's Ex'rs v. Wyckoff, 3 Sandf. Ch. 77; Putnam v. Van Buren, 7 How. Pr. 31.

*North Carolina:* Doe d. Smith v. Smith, 46 N. C. (1 Jones Law) 135, 59 Am. Dec. 581; Duckworth v. Orr, 126 N. C. 674; Wainwright v. Massenburg, 129 N. C. 46.

*Ohio:* McDonald v. Black, 20 Ohio, 185, 55 Am. Dec. 448, 453; Easton's Adm'x v. Ellis, 1 Handy, 70; Johnson v. Johnson's Adm'rs, Wright, 594; Lessee of Wallace v. Saunders, 7 Ohio, 173.

*Pennsylvania:* Appeal of Given, 16 Atl. 75; *In re Kern's Estate*, 176 Pa. 373.

*Tennessee:* Jenkins v. Atkins, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648.

*Texas:* Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 274; Primm v. Stewart, 7 Tex. 178.

*Vermont:* Gifford v. Thomas' Estate, 62 Vt. 34; Michigan State Bank v. Leavenworth's Estate, 28 Vt. 209; Davis' Adm'r v. Windsor

a valuable consideration, or as security. It is also true, although the agent may have been employed for a definite time, and no recovery can be had against the principal's estate upon the contract of agency.<sup>200</sup>

If, however, the agency has been wholly executed before the death of the principal, such death cannot terminate the authority so as to affect rights that have been acquired under such agency. Or if it has been partly executed, before the death of the principal, such death will not terminate the unexecuted part as to the other contracting party;<sup>201</sup> unless the agency was a severable one and the part already executed could be separated from the unexecuted part without affecting the other party's rights.

Thus, except where the power is coupled with an interest, the principal's death terminates an agent's power to collect a debt;<sup>202</sup> or to make a sale of personal property;<sup>203</sup> or to make a sale and conveyance of real property;<sup>204</sup> and deeds

*Sav. Bank*, 46 Vt. 728; *Michigan Ins. Co. v. Leavenworth's Estate*, 30 Vt. 11.

*Virginia*: *Huston's Adm'r v. Cantril*, 11 Leigh, 136; *Triplett v. Woodworth's Adm'r*, 98 Va. 187.

Compare *Kelly v. Bowerman*, 113 Mich. 446.

<sup>199</sup> *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.) 174, 201, *Huffc. Cas.* 146; *McGriff v. Porter*, 5 Fla. 373.

<sup>200</sup> *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578; *Friend v. Young* [1897] 2 Ch. Div. 421, 66 Law J. Ch. 737; *Tasker v. Shepherd*, 6 Hurl. & N. 575; *Burnet v. Hope*, 9 Ont. Rep. 10. But see *Fereira v. Sayres*, 5 Watts & S. (Pa.) 210, 40 Am. Dec. 496, where a contrary doctrine is held upon the death of one of the partners, who were principals.

<sup>201</sup> *Garrett v. Trabue*, 82 Ala. 227.

<sup>202</sup> *Gale v. Tappan*, 12 N. H. 145, 37 Am. Dec. 194; *Long v. Thayer*, 150 U. S. 520. And see cases cited *supra*.

<sup>203</sup> *McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448; *Scruggs v. Driver's Ex'rs*, 31 Ala. 274; *Campanari v. Woodburn*, 15 C. B. 400; *Brown v. Cushman*, 173 Mass. 368. See cases cited *supra*.

<sup>204</sup> *Ex parte Welch*, 2 N. B. Eq. 129; *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.) 201, *Huffc. Cas.* 146; *Pacific Bank v. Hannah*, 90 Fed. 72; *McClaskey v. Barr*, 50 Fed. 712; *Saltmarsh v. Smith*, 32 Ala. 404; *Travers v. Crane*, 15 Cal. 12; *Ferris v. Irving*, 28 Cal. 645; *Coney v. Sanders*, 28 Ga. 511; *Lewis v. Kerr*, 17 Iowa, 73; *Harper*

made thereafter by the agent are null and void. So one claiming under a power of attorney to recover land whereby he is to have one-half of what he recovers has not an interest coupled with the power which prevents death from terminating the agency.<sup>205</sup>

Where a party litigant dies after verdict, or at any time pending action, the authority of his attorney to act for him is thereby determined, and he can neither give nor receive a motion for a new trial, or appeal, or conduct any other proceeding by virtue of his original authority.<sup>206</sup> The attorney of the ancestor does not become the attorney of the heirs, without a new appointment;<sup>207</sup> and when an attorney revives a suit, after the death of his principal, and acts for the representatives, his claim is on his engagement with them, and not as attorney for the deceased.<sup>208</sup> But where such suit is revived in the name of the heirs, the counsel employed by the deceased principal will be presumed, in the absence of evidence to the contrary, to be continued as counsel in the cause.<sup>209</sup>

The general rule that a power of attorney, though irrevocable by the principal during his life, is extinguished by his death, is not affected by the circumstance that testamentary powers are executed after the death of the testator. The power in such case is necessarily to be executed after the death of the person who makes it and cannot exist dur-

v. Little, 2 Greenl. (Me.) 14, 11 Am. Dec. 25; Clayton v. Merrett, 52 Miss. 353; Easton's Adm'r v. Ellis, 1 Handy (Ohio) 70; Primm v. Stewart, 7 Tex. 178; Huston's Adm'r v. Cantrill, 11 Leigh (Va.) 136.

<sup>205</sup> Wainwright v. Massenburg, 129 N. C. 46.

<sup>206</sup> Judson v. Love, 35 Cal. 463; Adams v. Nellis, 59 How. Pr. (N. Y.) 385; Pool v. Pool, 58 Law J. Prob. 67.

<sup>207</sup> Putnam v. Van Buren, 7 How. Pr. (N. Y.) 31; Turnan v. Temke, 84 Ill. 286; Risley v. Fellows, 10 Ill. 531; Gleason v. Dodd, 4 Metc. (Mass.) 333. And see post, § 743.

<sup>208</sup> Campbell's Representatives v. Kincaid, 3 T. B. Mon. (Ky.) 68; Clark's Ex'rs v. Parrish's Ex'rs, 1 Bibb (Ky.) 547; Adams v. Nellis, 59 How. Pr. (N. Y.) 385. And see post, § 743.

<sup>209</sup> Wilson v. Smith, 22 Grat. (Va.) 494. See post, § 743.

ing his life. It is the intention of the parties that it shall be executed after his death.<sup>210</sup>

(b) **Reason for the rule.**—The general rule is based upon the theory that a person acting through an agent acts by himself—*qui facit per alium, facit per se*—and since it is impossible for him to act for himself after his death, it is likewise impossible for an agent to act for him.<sup>211</sup> As has been said: "It seems founded on the presumption that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed; and on the manner in which he must execute his authority, as stated in *Combes' Case*, 9 Co. 766. In that case it was resolved, that 'when anyone has authority as attorney to do any act, he ought to do it in his name who gave the authority.'"<sup>212</sup> Now as an agent can only do that which the principal might do, it is evident that he cannot do that which the principal, by reason of his death, cannot do.

(c) **Where power is coupled with an interest.**—There is an exception to the above general rule, however, where the agent has a power coupled with an interest in the subject-matter of the agency, as has been seen heretofore in the case of a revocation by the principal. When the authority of a person to act as agent for another is coupled with an interest in the subject-matter of the agency, it is not revoked or terminated by the principal's death, and an execution of the authority after the principal's death is good, and binds the principal's heirs and personal representatives.<sup>213</sup> The reason for this

<sup>210</sup> *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.) 206, *Huffc. Cas.* 150; *McGriff v. Porter*, 5 Fla. 373, 381.

<sup>211</sup> *Ish v. Crane*, 8 Ohio St. 520; *Weber v. Bridgman*, 113 N. Y. 600.

<sup>212</sup> By Marshall, C. J., in *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.) 174, *Huffc. Cas.* 146.

<sup>213</sup> *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.) 174, *Huffc. Cas.* 146; *Norton v. Whitehead*, 84 Cal. 263, 18 Am. St. Rep. 172; *Travers v. Crane*, 15 Cal. 12; *Gilbert v. Holmes*, 64 Ill. 548; *Merry v. Lynch*, 68 Me. 94; *Kelly v. Bowerman*, 113 Mich. 446; *Durbrow v. Eppens*, 65 N. J. 10; *Bergen v. Bennett*, 1 *Caines Cas.* (N. Y.) 1, 2 Am. Dec. 281; *Knapp v. Alvord*, 10 *Palge* (N. Y.) 205, 40 Am. Dec. 241; *Hess v. Rau*, 95 N. Y. 359; *Farmers' Loan & Trust Co. v. Wilson*, 139 N. Y. 284, 36 Am. St. Rep. 696; *Grapel v. Hodges*, 112 N.

exception is this: "The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. \* \* \* But if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such a person acts in his own name. The estate being in him passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it exists no longer, and the rule ceases with the reason on which it is founded."<sup>214</sup>

Where, however, such a power is expressly conditioned to be performed in the principal's lifetime, it will be terminated by the principal's death.<sup>215</sup> Thus, where a bond executed by a son to his father for the maintenance of the latter, in consideration of a conveyance of the father's farm to his son, conditioned to account for and deliver to the father on demand, the cattle on the farm, or other cattle as good, imports no power to sell the cattle and substitute others, or if it does, the power must be executed in the father's lifetime, and ceases at his death.<sup>216</sup>

Y. 419; *Houghtaling v. Marvin*, 7 Barb. (N. Y.) 412; *Stevens v. Sessa*, 50 App. Div. (N. Y.) 547; *Wilson v. Stewart*, 5 Pa. Law J. 450; *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 274; *Carleton v. Hausler*, 20 Tex. Civ. App. 275. But the doctrine in England seems to be contra. As was said by Ld. Ellenborough: "A power coupled with an interest cannot be revoked by the person granting it; but it is necessarily revoked by his death. How can a valid act be done in the name of a dead man." *Watson v. King*, 4 Camp. 272; *Wallace v. Cook*, 5 Esp. 117. So it was held in a late Canadian case, that a power of attorney from a mortgagor authorizing the attorney to relieve any surplus realized from a foreclosure sale of the mortgaged premises, to be applied on any debt due him from the mortgagor, is revoked by the mortgagor's death before the sale. *Ex parte Welch*, 2 N. B. Eq. 129.

<sup>214</sup> By Marshall, C. J., in *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.) 174, 204, *Huffc. Cas.* 148.

<sup>215</sup> *Staples v. Bradbury*, 8 Greenl. (Me.) 181, 23 Am. Dec. 494.

<sup>216</sup> *Staples v. Bradbury*, 8 Greenl. (Me.) 181, 23 Am. Dec. 494.

— **What is a sufficient interest.** The same question arises here as arose in a previous section,<sup>217</sup> in reference to a revocation of the agent's authority by the principal, as to what is a sufficient interest to make the power with which it is coupled irrevocable by the death of the principal. As this question was fully discussed there, nothing further will be said here, except to state generally that it must be an interest in the subject-matter of the agency itself and which may be executed in the name of the agent; and not merely an interest in the proceeds of the power. Thus, a power of sale contained in a mortgage deed, on default of payment, is a power coupled with an interest, and is not terminated by the death of the mortgagor;<sup>218</sup> unless there is a statute in the particular state, giving a mortgage the effect of mere security for a debt, passing no estate or title to the mortgagee, in which case the power of sale would be revoked by the mortgagor's death.<sup>219</sup> Nor does the death of the principal terminate the agent's power to sell for the purpose of paying certain notes indorsed by the agent and others for the principal,<sup>220</sup> or to collect to pay advances made by the agent.<sup>221</sup> So where negotiable paper is indorsed to an agent for collection, he may sue thereon in his own name; and as the indorsement for such purposes passes the legal title in trust the authority to collect is not revoked by the death of the principal.<sup>222</sup>

(d) **Where principal's death is unknown.**—Whether an act of an agent after his principal's death is binding when both of the parties were ignorant of the death is a question upon

<sup>217</sup> Ante, § 165.

<sup>218</sup> *Bergen v. Bennett*, 1 *Caines Cas.* (N. Y.) 1, 2 *Am. Dec.* 281; *Wilson v. Troup*, 2 *Cow.* (N. Y.) 195, 14 *Am. Dec.* 458; *Conners v. Holland*, 113 *Mass.* 50; *Varnum v. Meserve*, 8 *Allen (Mass.)* 158; *Harvey v. Smith*, 179 *Mass.* 592; *Hudgins v. Morrow*, 47 *Ark.* 515; *Berry v. Skinner*, 30 *Md.* 567; *Beatie v. Butler*, 21 *Mo.* 313. But see *Ex parte Welch*, 2 *N. B. Eq.* 129.

<sup>219</sup> *Wilkins v. McGehee*, 86 *Ga.* 764; *Johnson v. Johnson*, 27 *S. C.* 309, 13 *Am. St. Rep.* 636. Compare *Reilly v. Phillips*, 4 *S. D.* 604.

<sup>220</sup> *Knapp v. Alvord*, 10 *Palge* (N. Y.) 205, 40 *Am. Dec.* 241; *Merry v. Lynch*, 68 *Me.* 94.

<sup>221</sup> *Norton v. Whitehead*, 84 *Cal.* 263, 18 *Am. St. Rep.* 172.

<sup>222</sup> *Boyd v. Corbitt*, 37 *Mich.* 52; *Moore v. Hall*, 48 *Mich.* 143; *Deweese v. Muff*, 57 *Neb.* 17.

which there has been some conflict of opinion. On some points, however, the law is clear. All of the authorities agree that an act done by an agent after the death of his principal is not binding, but a mere nullity, although both parties may have been ignorant of the principal's death, if the act was one which could only be done in the name of the principal, such as the execution of a conveyance of land or other instrument under seal.<sup>223</sup> The distinction as to notice between revocation and termination by death of the principal has been stated thus: "In the case of a revocation, the power continues good against the principal, till notice is given to the agent (and to third persons); but the instant the principal dies the estate belongs to his heirs, or devisees, or creditors; and their rights cannot be divested or impaired by any act performed by the attorney after the death has happened; the attorney then being a stranger to them, and having no control over their property."<sup>224</sup>

Some courts hold that if the act is of such a character that it need not be done in the principal's name, it will be binding if done after his death, though the parties were ignorant thereof.<sup>225</sup> But the preponderance of authority holds that as to mere acts in pais of an agent of a deceased principal, the agent's authority, if not coupled with an interest, is instantly terminated by the death of the principal, whether the parties have notice of the death or not.<sup>226</sup> Thus,

<sup>223</sup> *Galt v. Galloway*, 4 Pet. (U. S.) 331; *Travers v. Crane*, 15 Cal. 12; *Ferris v. Irving*, 28 Cal. 645; *Coney v. Sanders*, 28 Ga. 511; *Home Nat. Bank v. Waterman*, 134 Ill. 461; *Lewis v. Kerr*, 17 Iowa, 73; *Harper v. Little*, 2 Me. 14, 11 Am. Dec. 25; *Weber v. Bridgman*, 113 N. Y. 600; *Doe d. Smith v. Smith*, 46 N. C. (1 Jones) 135, 59 Am. Dec. 581; *Watson v. King*, 4 Camp. 272; *Wallace v. Cook*, 5 Esp. 117.

<sup>224</sup> *Harper v. Little*, 2 Me. 14, 11 Am. Dec. 27.

<sup>225</sup> *Cassiday v. McKenzie*, 4 Watts & S. (Pa.) 282, 39 Am. Dec. 76; *Garrett v. Trabue*, 82 Ala. 227; *Dick v. Page*, 17 Mo. 234, 57 Am. Dec. 267; *Ish v. Crane*, 8 Ohio St. 520; *Id.*, 13 Ohio St. 574; *Deweese v. Muff*, 57 Neb. 17, 42 L. R. A. 789.

<sup>226</sup> *Campanari v. Woodburn*, 15 C. B. 400; *Smout v. Ilbery*, 10 Mees. & W. 1; *Blades v. Free*, 9 Barn. & C. 167; *Houstoun v. Robertson*, 6 Taunt. 448; *Farrow v. Wilson*, L. R. 4 C. P. 744; *Bank of Washington v. Peirson*, 2 Cranch, C. C. 685, Fed. Cas. No. 953;



the power of an agent to collect and receive rents falling due to his principal, ceases upon the death of the latter, unless the agency is coupled with an interest, and payment made thereafter does not bind the estate of the principal, although made in ignorance of such death.<sup>227</sup>

It has been said that by the civil law, and the law of those countries which have adopted the civil law, the acts of an agent done bona fide after the death of his principal, and before notice of his death, are valid and binding on his representatives. Thus, Pothier says: "Although the commission terminates by the death of the person giving it, and there appears a repugnancy in supposing me to contract by the ministry of another, who after my death contracts in my name; yet if he contracts in my name after my death, but before it could be known at the place where the contract is made, such contract shall oblige my successor as if I had actually contracted by the ministry of this agent."<sup>228</sup> But this equitable principle does not prevail in the English law, and the death of the principal is an instantaneous and absolute revocation of the authority of the agent, unless the power be coupled with an interest."<sup>229</sup>

— **Statutory provisions.** In view of the fact that this common-law rule was seen to work great hardships in many cases, the legislatures in some states have passed statutes making valid acts of the agent after his principal's death and in ignorance thereof, even though they are such acts as

*Galt v. Galloway*, 4 Pet. (U. S.) 331; *Long v. Thayer*, 150 U. S. 522; *Rapp's Estate v. Phoenix Ins. Co.*, 113 Ill. 390, 55 Am. Rep. 427; *Royal Ins. Co. v. Davies*, 40 Iowa, 469, 20 Am. Rep. 581; *Lewis v. Kerr*, 17 Iowa, 73; *Green v. Young*, 8 Me. 14, 22 Am. Dec. 218; *Clayton v. Merrett*, 52 Miss. 353; *Farmers' Loan & Trust Co. v. Wilson*, 139 N. Y. 284; *Jenkins v. Atkins*, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648; *Rigs v. Cage*, 2 Humph. (Tenn.) 350, 37 Am. Dec. 559; *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 274; *Michigan Ins. Co. v. Leavenworth's Estate*, 30 Vt. 11; *Davis v. Windsor Sav. Bank*, 46 Vt. 728; *Michigan State Bank v. Leavenworth's Estate*, 28 Vt. 209.

<sup>227</sup> *Farmers' Loan & Trust Co. v. Wilson*, 139 N. Y. 284.

<sup>228</sup> Pothier, Obl. [81].

<sup>229</sup> *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 279.

must be executed in the principal's name.<sup>230</sup> Thus, it is provided under the Maryland statute that: "All payments of money, transfers of property, or other dealings made or had, to or with, any person acting under a power of attorney, or other agency, duly executed or created, by any person within this state, which would be binding on the party giving such power of attorney, or agency, if the same was in full force and unrevoked at the time of such payment, transfer or other dealings, shall be equally binding and obligatory upon the representatives or other assignees of such party, although at the time aforesaid said party may be dead, or may have assigned his interest in such money, property, or dealing; provided, that the person paying, transferring, or having such dealings with the person acting under such power of attorney, or agency, had not at the time notice of the death of the party giving such power or creating such agency."<sup>231</sup>

So in Georgia the fifth section of the act of 1875 declares that sales of lands, made under powers, shall be good, if made before the agent "has notice of a countermand, revocation, or death of the constituent."<sup>232</sup> The court, however, in that state gave it as its opinion that that section applied only to powers created in other states than Georgia, and as the power in question had been created in Georgia it was held to be revoked by the death of the principal.<sup>233</sup>

In Louisiana, the statute provides that, "if the attorney, being ignorant of the death or of the cessation of the rights of his principal, should continue under his power of attorney, the transactions done by him, during this state of ignorance, are considered as valid."<sup>234</sup>

**(e) By death of partner or joint principal.**—Where authority is given to an agent by a partnership, the death of one of the partners will thereby terminate the agent's authority,

<sup>230</sup> See Cal. Civ. Code, § 2356; Dak. Civ. Code, §§ 1150, 1151; Md. Rev. Code 1878, p. 388, art. 44, § 31; Voorhees' Rev. Civ. Code La. 1875, arts. 3032, 3033; S. C. Gen. St. 1882, § 1302; 2 Kent, Comm. 646.

<sup>231</sup> Md. Rev. Code 1878, p. 388, § 31.

<sup>232</sup> Coney v. Sanders, 28 Ga. 511.

<sup>233</sup> Coney v. Sanders, 28 Ga. 511.

<sup>234</sup> Voorhees' Rev. Civ. Code La. 1875, art. 3032.

unless it is a power coupled with an interest,<sup>235</sup> and it is held to be immaterial whether the dissolution was known or not.<sup>236</sup> But it has been held that authority of an agent to draw out and apply the money of such firm to the uses thereof, continues in a qualified form after the death of one of the members of such firm; as where an agent of a firm, authorized to draw its moneys from the bank and apply the same to the uses of the firm, continues to do so after the death of one of the members without knowledge on his part or on the part of the bank, of such death, he acts within the scope of his authority, and his acts bind the firm.<sup>237</sup> And again it has been held that, if the agent has been expressly employed for a definite time, the death of one of the partners does not terminate the agency, so as to defeat the agent's claim for compensation for the full time.<sup>238</sup>

The same applies when two principals jointly appoint an agent to take charge of some matter in which they are jointly interested, and a severance of such interests afterwards occurs by the death of one of the joint principals.<sup>239</sup> Where, however, the principals are joint and several and the power given to the agent is both joint and several, the death of one of the principals does not terminate his authority.<sup>240</sup>

**(f) Effect of principal's death on subagent.**—For the same reason that the principal's death terminates the agent's authority, it also terminates the subagent's authority, whether such subagent has been appointed by the principal's authority or not. If he has been appointed by the authority of the principal, the latter's death terminates his authority, for what the principal cannot do neither can the agent. And if he derives his authority directly from the primary agent,

<sup>235</sup> *McNaughton v. Moore*, 2 N. C. (1 Hayw.) 189; *Easton's Adm'x v. Ellis*, 1 Handy (Ohio) 70; *Friend v. Young* [1897] 2 Ch. 421, 66 Law J. Ch. 737; *Tasker v. Shepherd*, 6 Hurl. & N. 575.

<sup>236</sup> *Easton's Adm'x v. Ellis*, 1 Handy (Ohio) 70.

<sup>237</sup> *Bank of New York v. Vanderhorst*, 32 N. Y. 553.

<sup>238</sup> *Fereira v. Sayres*, 5 Watts & S. (Pa.) 210, 40 Am. Dec. 496. But see *Friend v. Young* [1897] 2 Ch. 421, 66 Law J. Ch. 737; *Tasker v. Shepherd*, 6 Hurl. & N. 575; *Burnet v. Hope*, 9 Ont. 10.

<sup>239</sup> *Rowe v. Rand*, 111 Ind. 206, Huffc. Cas. 126.

<sup>240</sup> *Milson v. Stewart*, 5 Clark (Pa.) 450.

as the principal's death terminates the latter's authority, it also terminates the subagent's.

§ 186. By death of the agent.

(a) **In general.**—As has been seen heretofore, the relation of principal and agent presupposes the existence of two parties—a principal and an agent. If for any reason the agent ceases to exist, or, as we shall see presently, becomes incapable of performing his duties, the relation forthwith ceases, subject to an exception which we shall see hereafter. It is a general rule of law, then, subject to one exception, that the death of an agent terminates the agency; and especially is this so where his duties were such as to require the exercise of personal skill, judgment and discretion. The principal having selected him by reason of his peculiar ability to transact the particular business, would perhaps not consent that such duties should devolve upon the agent's personal representatives, of whom he knew nothing and who perhaps did not possess the required skill, judgment, and discretion.<sup>241</sup> And this is true, although the contract of agency was for a definite time, which had not expired at the time of the agent's death.<sup>242</sup> Thus, upon the death of an agent, money due for goods sold by the agent for his principal, shall be paid to the principal and not to the administrators of such agent.<sup>243</sup> If, however, the agent has the money in his possession at the time of his death, it shall be looked upon as the agent's estate, and must first answer the debts of a superior creditor, etc., for in that regard money has no earmarks, and equity cannot follow that in behalf of the principal.<sup>244</sup> But if the agent, before his death, had invested the money in other goods,

<sup>241</sup> *Merrick's Estate*, 8 Watts & S. (Pa.) 402; *Adriance v. Rutherford*, 57 Mich. 170; *Shiff v. Lessep's Succession*, 22 La. Ann. 185; *Gage v. Allison*, 1 Brev. (S. C.) 495, 2 Am. Dec. 682; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296; *Mills v. Union Cent. L. Ins. Co.*, 77 Miss. 327, 78 Am. St. Rep. 522.

<sup>242</sup> *Mills v. Union Cent. L. Ins. Co.*, 77 Miss. 327, 78 Am. St. Rep. 522.

<sup>243</sup> *Merrick's Estate*, 8 Watts & S. (Pa.) 402; *Whitecomb v. Jacob*, 1 Salk. 160; *Burdett v. Willett*, 2 Vern. 638.

<sup>244</sup> *Whitecomb v. Jacob*, 1 Salk. 160.

or had the original goods in his possession at the time of his death, these goods shall be taken as part of the principal's estate, and not the agent's,<sup>245</sup> and the agent's executor cannot lawfully dispose of the goods, although he may retain them for the agent's lien.<sup>246</sup>

(b) **Where agent's power is coupled with an interest.**—The same exception obtains here as in the case of a principal's death, and if an agent has acquired not only a power but also connected with it an interest in the subject-matter of the agency, his death will not terminate the power, but it may be exercised after his death by his personal representatives and assigns.<sup>247</sup> Thus, where a trust deed, or a mortgage, executed to secure the payment of a sum of money, confers upon the grantee, his administrator and assigns, the power to sell the premises, upon nonpayment of the debt, the power is irrevocable, and does not cease with the death of the grantee;<sup>248</sup> and if this is not by virtue of the instrument itself, it may be by statute.<sup>249</sup>

(c) **Death of a joint agent.**—We shall see hereafter<sup>250</sup> that when authority is conferred upon two or more agents, in the absence of evidence to the contrary, it is usually understood to be a joint agency and the power must be exercised by all of them acting together. Where such is the case the death of one of the joint agents necessarily terminates the authority of the others, for as they could only execute their powers by acting jointly, the death of one makes this impossible and operates to terminate the agency,<sup>251</sup> unless there is a subsequent recognition by the principal of the survivor as agent.<sup>252</sup> But this is in effect a new appointment. Thus,

<sup>245</sup> *Whitecomb v. Jacob*, 1 Salk. 160; *Adriance v. Rutherford*, 57 Mich. 170.

<sup>246</sup> *Gage v. Allison*, 1 Brev. (S. C.) 495, 2 Am. Dec. 682.

<sup>247</sup> *Lewis v. Wells*, 50 Ala. 198; *Merrin v. Lewis*, 90 Ill. 505; *Collins v. Hopkins*, 7 Iowa, 463; *Harnickell v. Orndorff*, 35 Md. 341.

<sup>248</sup> *Collins v. Hopkins*, 7 Iowa, 463; and see cases cited above.

<sup>249</sup> *Lewis v. Wells*, 50 Ala. 198.

<sup>250</sup> Post, § 291.

<sup>251</sup> *Hartford F. Ins. Co. v. Wilcox*, 57 Ill. 180; *Rowe v. Rand*, 111 Ind. 206, *Huffc. Cas.* 126; *Johnson v. Wilcox*, 25 Ind. 182; *Martine v. International L. Ins. Soc.*, 53 N. Y. 339, 13 Am. Rep. 529.

<sup>252</sup> *Hartford F. Ins. Co. v. Wilcox*, 57 Ill. 180.

where A. delivered a note to B. & C. for collection, taking their receipt therefor, B. having died, the agency was thereby terminated, and B.'s estate could not be charged for C.'s subsequent misconduct.<sup>253</sup> So where a firm is employed as agents, their authority is determined by the death of one partner,<sup>254</sup> for whilst the firm may act by one of its members alone, yet it is the act of the firm, and upon his death the firm is dissolved and they cannot then act jointly.

Where, however, the agency is joint and several, the same rule would apply as in the case of joint principals and the death of one agent would not terminate the agency.<sup>255</sup>

(d) **Effect of agent's death on subagents.**—Where the authority of the subagent comes directly from the principal, or in other words where there is a privity of contract between the principal and subagent, although the appointment is made by the primary agent, the subagent's authority is held not to be terminated by the death of the primary agent.<sup>256</sup> Where, however, the subagent derives his authority directly from the agent, there is no privity of contract between the principal and subagent, and the agent's death terminates the subagent's authority;<sup>257</sup> although the primary agent may have been expressly authorized to appoint such subagent.<sup>258</sup>

## § 187. By insanity of the principal.

(a) **General rule.**—As we have seen elsewhere, a principal cannot authorize another to do that which he cannot do himself, or in other words what the principal cannot do himself, an agent cannot do for him. There is, as it were, a constant stream of authority flowing from the principal to the agent throughout the performance of anything for the principal. If, then, for any reason, the principal becomes incapable of

<sup>253</sup> *Johnson v. Wilcox*, 25 Ind. 182.

<sup>254</sup> *Martine v. International L. Ins. Soc.*, 53 N. Y. 339, 13 Am. Rep. 529.

<sup>255</sup> See ante, § 185(e).

<sup>256</sup> *Smith v. White*, 5 Dana (Ky.) 376.

<sup>257</sup> *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296.

<sup>258</sup> *Watt v. Watt*, 2 Barb. Ch. (N. Y.) 371; *Perles v. Ayclina*, 3 Watts & S. (Pa.) 64; *Lehigh Coal & Nav. Co. v. Mohr*, 83 Pa. 288, 24 Am. Rep. 161.

himself doing the particular thing authorized, this stream of authority must likewise cease. The fountainhead being destroyed, the stream must necessarily cease to flow.

It is a general rule of law, therefore, subject to certain exceptions, as we shall see presently, that if a principal becomes insane, to such an extent that he is incapable of exercising his own will, after he has appointed an agent to act for him, such insanity thereby terminates or suspends the agency by operation of law.<sup>259</sup> But although the agent's power ceases during the principal's insanity, yet, if on his recovery he manifests no will to terminate the agent's power, it may be considered as merely suspended, and acts done by the agent during the suspension will be inferred to be assented to, if he does not dissent from them, when they come to his knowledge.<sup>260</sup>

Thus, where a wife who had been the general agent of her husband for years past, on the day of his death when he was entirely senseless and no hopes of his recovery were entertained, turned over to another in settlement of a debt owing by the husband a note which the husband held against such other, it was held that the agency of the wife was revoked by the situation and the transaction invalid.<sup>261</sup> As was said in this case: "It would be postposterous, where the

<sup>259</sup> *Drew v. Nunn*, 4 Q. B. Div. 661, *Huffc. Cas.* 24, *Wamb. Cas.* 967; *Bunce v. Gallagher*, 5 *Blatchf.* 481, *Fed. Cas. No.* 2,133; *Davis v. Lane*, 10 N. H. 156; *Matthiessen & W. Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536; *Hill's Ex'rs v. Day*, 34 N. J. Eq. 150; *Berry v. Skinner*, 30 Md. 567; *Motley v. Head*, 43 Vt. 633; *Blake v. Garwood*, 42 N. J. Eq. 276.

<sup>260</sup> *Davis v. Lane*, 10 N. H. 156; *Hill's Ex'rs v. Day*, 34 N. J. Eq. 150; *Drew v. Nunn*, 4 Q. B. Div. 661, *Huffc. Cas.* 24, *Wamb. Cas.* 967.

<sup>261</sup> *Davis v. Lane*, 10 N. H. 156. As further said by the court in this case: "An authority to do an act for and in the name of another pre-supposes a power in the individual to do the act himself, if present. The act to be done is not the act of the agent, but the act of the principal; and the agent can do no act in the name of the principal which the principal might not himself do, if he were personally present. The principal is present by his representative, and the making or execution of the contract or acknowledgment of a deed, is his act or acknowledgment."

power is in its nature revocable, to hold that the principal was, in contemplation of law, present, making a contract or acknowledging a deed, when he was in fact lying insensible on his deathbed, and this fact well known to those who undertook to act with him and for him. The act done by the agent, under a revocable power, implies the existence of volition on the part of the principal. He makes the contract; he does the act. It is done through the more active instrumentality of another, but the latter represents his principal and uses his name. Further, upon the constitution of an agent or attorney to act for another, where the authority is not coupled with an interest and not irrevocable, there exists at all times a right of supervision in the principal, and the power to terminate the authority of the agent at the pleasure of the principal. The law secures to the principal the right of judging how long he will be represented by the agent and suffer him to act in his name. So long as, having the power, he does not exercise the will to revoke, the authority continues. When, then, an act of Providence deprives the principal of the power to exercise any judgment or will on the subject, the authority of the agent to act should thereby be suspended for the time being; otherwise the right of the agent would be continued beyond the period when all evidence that the principal chose to continue the authority had ceased; for after the principal was deprived of the power to exercise any will upon the subject, there could be no assent, or acquiescence, or evidence of any kind to show that he consented that the agency should continue to exist. And, moreover, a confirmed insanity would render wholly irrevocable an authority, which, by the original nature of its constitution, it was to be in the power of the principal at any time to revoke."

**(b) Where power is coupled with an interest.**—Where, however, an agent has a power coupled with an interest in the subject-matter of the agency, the after-occurring insanity of the principal will not terminate it.<sup>262</sup> Thus, the lunacy of

<sup>262</sup> *Berry v. Skinner*, 30 Md. 567; *Davis v. Lane*, 10 N. H. 156; *Hill's Ex'rs v. Day*, 34 N. J. Eq. 150; *Matthiessen & W. Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536.



a mortgagor does not in any manner affect or interfere with the mortgagee's right to execute the power of sale, and foreclose the right of redemption, in the mode and manner stipulated by the parties.<sup>263</sup> It has been said that it is a quære as to whether or not this rule applies to the case of a power which is given as part of a security or for a valuable consideration;<sup>264</sup> but as these are in effect powers coupled with an interest, no reason appears why it should not apply to them as well as to other powers coupled with an interest.

(c) **Where insanity is unknown.**—There seems to be another exception to the general rule, where, in the absence of a formal adjudication of insanity, the third person is ignorant of the principal's insanity. Where the principal has not been judicially declared insane, persons who deal with the agent in ignorance of the principal's insanity will be protected, on the ground that between two equally innocent parties he who has made the loss possible must bear it. Whilst the principal and third party may both be innocent, the principal by conferring the authority on the agent has made the loss possible and must bear it.<sup>265</sup> Thus, where a purchase of real estate from an insane person is made, and a conveyance is obtained in perfect good faith, before an inquisition and finding of lunacy, for a fair and reasonable consideration, without knowledge of the insanity, and no advantage is taken by the purchaser, the conveyance cannot be avoided by the insane person, or by one representing him, if the consideration has not been returned to the purchaser, and no offer has been made to return the same.<sup>266</sup> If, however, the principal has been judicially declared insane, the decree or order of the court or commission will be notice to

<sup>263</sup> *Berry v. Skinner*, 30 Md. 567.

<sup>264</sup> *Davis v. Lane*, 10 N. H. 156.

<sup>265</sup> *Gribben v. Maxwell*, 34 Kan. 8; *Young v. Stevens*, 48 N. H. 133; *Davis v. Lane*, 10 N. H. 156; *Mutual L. Ins. Co. v. Hunt*, 79 N. Y. 541; *Hill's Ex'rs v. Day*, 34 N. J. Eq. 150; *Matthiessen & W. Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536; *Drew v. Nunn*, 4 Q. B. Div. 661, *Huffc. Cas.* 24, *Wamb. Cas.* 967.

<sup>266</sup> *Gribben v. Maxwell*, 34 Kan. 8; *Young v. Stevens*, 48 N. H. 133; *Mutual L. Ins. Co. v. Hunt*, 79 N. Y. 541.

all of such insanity, and a third party cannot plead his ignorance as a protection to himself for acting with the agent.

(d) **What insanity is sufficient.**—As has been stated before, the insanity should be such as renders the principal incapable of exercising his own will. Whether or not it is necessary that the insanity be established by an inquisition is not fully settled. It has been held that a power of attorney executed by one, whose sanity was in question, is not terminated until the lunacy has been established by an inquisition.<sup>267</sup> But the weight of authority seems to hold, that if the insanity is such as to affect the principal's exercise of his will, it will effect a termination or suspension of the agent's authority, although there has been no inquisition.<sup>268</sup> An inquisition *de lunatico inquirendo* simply makes a *prima facie* case. Where there is no reason to suspect fraud, the test in cases where mental incapacity is charged is: Did the person whose act is challenged possess sufficient mind to understand, in a reasonable manner, the nature and effect of the act he was doing or the business he was transacting?<sup>269</sup> And even where one was sent to an insane asylum under a special guardian for treatment for an uncontrollable appetite for liquor, it was held that the agency of the wife appointed before his going there does not thereby terminate, it not appearing that the insanity was of that character which disqualified a person from entering into a valid contract.<sup>270</sup>

§ 188. By insanity of the agent.

(a) **General rule.**—The insanity of the agent also constitutes a natural termination of the agency, for it cannot be presumed that the principal intends one to act for him and to bind him when that one is incompetent to understand or to transact the business for which he was employed. Especial-

<sup>267</sup> *Wallis v. Manhattan Co.*, 2 Hall (N. Y.) 495; 2 Kent, Comm. 645.

<sup>268</sup> *Matthiessen & W. Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536; *Bunce v. Gallagher*, 5 Blatchf. 481, Fed. Cas. No. 2,133; *Drew v. Nunn*, 4 Q. B. Div. 661, Huffc. Cas. 24, Wamb. Cas. 967.

<sup>269</sup> *Hill's Ex'rs v. Day*, 34 N. J. Eq. 150.

<sup>270</sup> *Motley v. Head*, 43 Vt. 633.

ly is this true where the agent is one selected for his mental abilities, as where performance of his duties requires the exercise of skill, judgment, and discretion. Where, therefore, during continuance of the agency, the agent becomes insane to such an extent as to incapacitate him from the further execution of his authority, it will be terminated or suspended during such insanity, unless he has an interest in the subject-matter of the agency. Mere partial derangement, however, or monomania will not terminate or suspend his authority, unless it happens to be on the particular subject of the agency, or otherwise unfits him for transacting the business of his agency.<sup>271</sup>

(b) **Where insanity is unknown.**—Where the agent's insanity is of such a nature as not to be readily apparent, and a third person was ignorant thereof, and has dealt with him in good faith, taking no advantage of his mental incapacity, and the contract has been so far executed that the parties cannot be placed in statu quo, the agent's insanity will have no effect on such executed transactions. Where, however, the agent has been judicially declared insane, it is sufficient notice to third persons and any dealings had with him thereafter will be at their own risk.

(c) **Insanity of a joint agent.**—In case of the insanity of one of two or more joint agents, the same rule applies as in case of the death of one of the joint agents. If the agency is a joint one, all the agents must act jointly in executing it, and where one of them becomes insane to the extent of incapacitating him from joining in the execution of the agency, it would necessarily be thereby terminated.<sup>272</sup> Where, however, the agency was joint and several, the insanity of one does not prevent the others from executing it.

(d) **As to subagents.**—Whether or not the insanity of an agent terminating his authority, also terminates the authority of a subagent, depends upon whether the latter is the agent of the primary agent or of the principal. If he is appointed by the agent with or without the authority of the

<sup>271</sup> See Story, Agency, § 487; Mechem, Agency, § 259.

<sup>272</sup> Rowe v. Rand, 111 Ind. 206, 210, Huffc. Cas. 127; Salisbury v. Brisbane, 61 N. Y. 617.

principal, and derives his authority wholly from the primary agent, then the latter's insanity also terminates such subagent's authority. But if the subagent derives his authority directly from the principal although appointed by the agent, he is the agent of the principal and the primary agent's insanity would not affect his authority. Of course if the subagent, in the latter case, himself becomes insane, the same rules would apply to him as to the original agent.

**§ 189. By bankruptcy of the principal.**

(a) **General rule.**—Where the principal enters into bankruptcy, either voluntarily or involuntarily, the agent's authority is thereby terminated, by operation of law, as to all rights of property of which the principal was divested by reason of his bankruptcy.<sup>273</sup> The reason for this rule is that by the bankruptcy the principal is divested of any control over his property, and cannot in any manner dispose of it, or transfer a good title thereto. And since the agent has no higher power or authority over the property than the principal himself has, and cannot do what the principal cannot do, and as the principal cannot dispose of or give a title to the property, neither can the agent do so. Thus, if a bankrupt previous to his bankruptcy has given a power of attorney to another, to receive sums of money due to him, in consideration of engagements entered into by such person on account of the bankrupt, money received under such power after the bankruptcy, may be recovered by the assignees.<sup>274</sup> But a factor may, after his principal has become bankrupt, enforce his lien, for sums for which he has become surety, against his principal's property, and thus collect for goods of the principal sold by him.<sup>275</sup> Or where the agent has funds of the principal paid into his hands, he may, after bankruptcy of the principal, apply the proceeds in satisfaction of the debt due to him from the principal.<sup>276</sup>

<sup>273</sup> *Parker v. Smith*, 16 East, 382; *Ex parte Snowball*, 7 Ch. App. 534; *Minett v. Forrester*, 4 Taunt. 541; *In re Daniels*, 6 Biss. 405, Fed. Cas. No. 3,566; *Ogden v. Gillingham*, Baldw. 38, Fed. Cas. No. 10,456.

<sup>274</sup> *Hovill v. Lethwaite*, 5 Esp. 158.

<sup>275</sup> *Drinkwater v. Goodwin*, Cowp. 251.

<sup>276</sup> *Alley v. Hotson*, 4 Camp. 325.

But the bankruptcy of the principal does not prevent the agent from performing a mere formal act, which the bankrupt himself might have been compelled to execute notwithstanding his bankruptcy.<sup>277</sup>

**(b) Mere insolvency does not terminate agent's authority.**—The agent's authority, however, will not be terminated by operation of law upon the mere insolvency of the principal, or from the mere fact that he is unable to meet his obligations when due. To have that effect the principal must have been legally declared a bankrupt, whether voluntarily or involuntarily. Until such is the case, the principal does not lose control of his property, and may delegate to another to do with it anything that he himself may do.

**(c) Where power is coupled with an interest.**—But where the agent's power is coupled with an interest in the subject-matter of the agency, the same exception exists here as we have seen before, and the bankruptcy of the principal will not operate to terminate the agent's authority.<sup>278</sup> Thus, a power of sale in the mortgagee contained in a mortgage is not terminated by the bankruptcy of the mortgagor.<sup>279</sup>

**(d) Where bankruptcy is unknown.**—Although the adjudication of the court is held to relate back to the time of the act of bankruptcy, yet if third persons, subsequent to such act, but in ignorance thereof, and prior to the adjudication of the court, deal in good faith with the agent, they will be protected.<sup>280</sup> "We are of the opinion," said Lord Justice Mellish, "that though, no doubt, as a general rule, a power of attorney must be treated as revoked by an act of bankruptcy committed by the giver of the power as against the trustee under a subsequent bankruptcy, still if after the act of bankruptcy, but before adjudication, property is conveyed under the power to a bona fide purchaser who has no notice of the act of bankruptcy, the purchaser may hold the property as against the trustee."<sup>281</sup> And so if the agent receives

<sup>277</sup> *Dixon v. Ewart*, 3 Mer. 322.

<sup>278</sup> *Hall v. Bliss*, 118 Mass. 554; *Alley v. Hotson*, 4 Camp. 325.

<sup>279</sup> *Hall v. Bliss*, 118 Mass. 554.

<sup>280</sup> *Ex parte Snowball*, 7 Ch. App. 548.

<sup>281</sup> *Ex parte Snowball*, 7 Ch. App. 548.

money after an act of bankruptcy by the principal, but before the date of the receiving order, without notice of the act of bankruptcy, the money may be set off by the agent as against the trustee in bankruptcy.<sup>282</sup>

**§ 190. By bankruptcy of the agent.**

When one appoints another to act as his agent, it is generally presumed, especially in cases where the handling of funds or property is necessary, that he appoints a certain one because he believes the latter responsible for any loss or damage sustained by his misconduct or neglect of duty. For this reason it is a general rule of law that an agent's authority is usually terminated by the bankruptcy of such agent.<sup>283</sup> Of course, there may be circumstances in particular cases, that would permit the agent to exercise his authority notwithstanding his bankruptcy and notwithstanding his duties involved responsibility, as where it was expressly agreed that the agent should be relieved from all responsibility, or where the principal, knowing of his bankruptcy, permits him to continue in his capacity of agent.

If, however, the act to be performed by the agent is merely a formal one, and not such a one as involves much responsibility, his bankruptcy would not terminate his authority to do such acts.<sup>284</sup>

**§ 191. By marriage.**

Although, as a general rule, marriage of the principal does not terminate the relation of principal and agent, yet if the continuance of such relation would impair rights growing out of the marriage relation, the marriage of the principal would have this effect. Thus, where a single man gave a power of attorney to sell his land, and before such sale could be effected he married, as the wife thereby acquired certain interests in the land which could not be impaired without

<sup>282</sup> *Elliott v. Turguand*, 7 App. Cas. 79. And see *Ogden v. Gillingham*, Baldw. 38, Fed. Cas. No. 10,456.

<sup>283</sup> *Hudson v. Granger*, 5 Barn. & Ald. 27; *Scott v. Surman*, Willes, 400; *Audendried v. Betteley*, 8 Allen (Mass.) 302.

<sup>284</sup> *Hudson v. Granger*, 5 Barn. & Ald. 27; *Robson v. Kemp*, 4 Esp. 233.

her consent, the marriage operated to terminate the agent's power of attorney.<sup>285</sup>

At common law the marriage of a feme sole gave to her husband the control over all of her property, and thus the authority of any agent she may have appointed was thereby terminated;<sup>286</sup> and the same is true now where the execution of the agency would affect any property interests or rights acquired by the husband by reason of such marriage.<sup>287</sup> A submission of any matter to arbitration by a woman is terminated by her marriage before award is made.<sup>288</sup> Where, however, the agent has a power coupled with an interest, it would not be terminated by the subsequent marriage of the feme sole.<sup>289</sup> Thus, if a feme sole gives a warrant of attorney to confess judgment on her bond, and afterwards marries, judgment may be entered against husband and wife.<sup>290</sup> The modern statutes in some states have given to a married woman the right to hold and control property as if she were unmarried, and of course in such cases, her agent's authority would not be terminated by her subsequent marriage.<sup>291</sup>

### § 192. By war.

(a) **General rule.**—There has been some controversy since the Civil War as to what effect war has upon agencies; and the authorities conflict somewhat on this subject. It seems however, to be the general rule in America, although there are cases to the contrary, that war between the state or country of the principal and that of the agent, terminates ipso facto any agency that contemplates commercial intercourse

<sup>285</sup> *Henderson v. Ford*, 46 Tex. 627. But see *Joseph v. Fisher*, 122 Ind. 399.

<sup>286</sup> *McCan v. O'Ferrall*, 8 Clark & F. 30; *Charnley v. Winstanley*, 5 East, 266; *Anonymous*, 1 Salk. 399.

<sup>287</sup> *Judson v. Sierra*, 22 Tex. 365; *Wambole v. Foote*, 2 Dak. 1; *Linton v. Minneapolis & N. Elevator Co.*, 2 N. D. 232.

<sup>288</sup> *McCan v. O'Ferrall*, 8 Clark & F. 30; *Sutton v. Tyrrell*, 10 Vt. 91.

<sup>289</sup> *Wambole v. Foote*, 2 Dak. 1.

<sup>290</sup> *Eneu v. Clark*, 2 Pa. 234, 44 Am. Dec. 191. Contra, *Anonymous*, 1 Salk. 399.

<sup>291</sup> *Reynolds v. Rowley*, 2 La. Ann. 890; *Edgecomb v. Buckhout*, 146 N. Y. 332; *Joseph v. Fisher*, 122 Ind. 399.

or communication between them through the hostile lines, and makes unlawful any further commercial intercourse between them in the prosecution of the agency.<sup>292</sup> Thus, in a case growing out of the late Civil War, it was said: "If the power of attorney was given prior to the war, it was revoked by the war, as the principal was a citizen of Massachusetts, and the agent a resident or citizen of Georgia, and no act of revocation or renunciation by the parties was necessary. Whenever the parties became alien enemies, by the laws of war, the agency was at an end. It ceased by operation of law."<sup>293</sup>

Contracts between alien enemies have frequently been held to be void; consequently as they cannot contract themselves, it would be impossible for them to appoint an agent to contract for them or to even continue in employment one previously appointed to transact business between them.<sup>294</sup>

(b) **Reason for the rule.**—This rule is based upon the principle that during a state of war between different states or countries, trading or commercial intercourse between those states or countries, directly or indirectly, which may in any way tend to aid the enemy, whether by transmission of goods or money, or orders for the delivery of either, is prohibited except so far as may be allowed by the sovereign authority.<sup>295</sup> "The law of nations, as judicially de-

<sup>292</sup> *New York Life Ins. Co. v. Davis*, 95 U. S. 425, Wamb. Cas. 962; *United States v. Lapene*, 17 Wall. (U. S.) 601; *Ward v. Smith*, 7 Wall. (U. S.) 447; *Hanger v. Abbott*, 6 Wall. (U. S.) 532; *The William Bagaley*, 5 Wall. (U. S.) 377; *Howell v. Gordon*, 40 Ga. 302; *Kershaw v. Kelsey*, 100 Mass. 561, 1 Am. Rep. 142; *Conley v. Burson*, 1 Heisk. (Tenn.) 145; *Maloney v. Stephens*, 11 Heisk. (Tenn.) 738; *Small's Adm'r v. Lumpkin's Ex'r*, 28 Grat. (Va.) 832; *Hale v. Wall*, 22 Grat. (Va.) 430; *Billgerry v. Branch & Sons*, 19 Grat. (Va.) 393, 100 Am. Dec. 679.

<sup>293</sup> *By Brown, C. J., in Howell v. Gordon*, 40 Ga. 308.

<sup>294</sup> *Fretz v. Stover*, 22 Wall. (U. S.) 198; *United States v. Grossmayer*, 9 Wall. (U. S.) 72; *Hanger v. Abbott*, 6 Wall. (U. S.) 532; *The William Bagaley*, 5 Wall. (U. S.) 377; *Conley v. Burson*, 1 Heisk. (Tenn.) 145; *Blackwell v. Willard*, 65 N. C. 555, 6 Am. Rep. 749.

<sup>295</sup> *Kershaw v. Kelsey*, 100 Mass. 561, 1 Am. Rep. 142; *United States v. Grossmayer*, 9 Wall. (U. S.) 72; *Montgomery v. United*



clared, prohibits all intercourse between citizens of the two belligerents, which is inconsistent with the state of war between their countries; and this includes every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy."<sup>296</sup>

(c) **Exceptions to general rule.**—But the mere fact of the breaking out of a war does not necessarily and as a matter of law revoke every agency. Whether it is revoked or not depends upon the circumstances surrounding the case and the nature and character of the agency.<sup>297</sup> As may be seen from the reason for the general rule in the preceding section, such rule was specially made to terminate such agencies as required for their existence an intercourse or communication between the principal and agent, and a transmission of goods or funds through the hostile lines. If then these circumstances are not present in any given case, the rule would seem to no longer apply.

Thus, recognized exceptions to the general rule are: That if the agent has property of the principal in his possession or control, good faith and fidelity to his trust will require him to keep it safely during the war and to restore it at its close; and that debts may be paid by the debtor to the agent of an alien enemy, where the agent resides in the same state or country with the debtor, provided there is no intention of transmitting such property or funds to the principal during the continuance of the war.<sup>298</sup> And in some of the cases it

States, 15 Wall. (U. S.) 395; *Jecker v. Montgomery*, 13 How. (U. S.) 498; *Id.*, 18 How. (U. S.) 110; *Small's Adm'r v. Lumpkin's Ex'r*, 28 Grat. (Va.) 832; *Potts v. Bell*, 8 Term R. 561.

<sup>296</sup> By Gray, J., in *Kershaw v. Kelsey*, 100 Mass. 561, 1 Am. Rep. 142, 152.

<sup>297</sup> *Williams v. Paine*, 169 U. S. 55.

<sup>298</sup> *New York Life Ins. Co. v. Davis*, 95 U. S. 425, Wamb. Cas. 964; *Conn v. Penn*, 1 Pet. C. C. 496, Fed. Cas. No. 3,104; *Denniston v. Imbrie*, 3 Wash. C. C. 396, Fed. Cas. No. 3,802; *United States v.*

is held that it is no objection that the agent may possibly remit the money to his principal.<sup>299</sup> It has been held necessary, however, that such agency should have been established before the war began. As has been said: "We are not disposed to deny the doctrine, that a resident in the territory of one of the belligerents, may have, in time of war, an agent residing in the territory of the other, to whom the debtor could pay his debt in money, or deliver to him property in discharge of it; but in such a case the agency must have been created before the war began, for there is no power to appoint an agent for the purpose after the hostilities have actually commenced, and to this effect are all the authorities."<sup>300</sup> If the principal were permitted to appoint such agent after the war began, it would be holding intercourse between hostile countries which is prohibited by the rules of war.

But the agent cannot thus receive the payment of debts during the continuance of the war without the mutual assent, express or implied, of the principal and agent.<sup>301</sup> In order

Grossmayer, 9 Wall. (U. S.) 72; Ward v. Smith, 7 Wall. (U. S.) 447; Bartow County Com'rs v. Newell, 64 Ga. 699; Buford v. Speed, 11 Bush (Ky.) 338; Monsseaux v. Urquhart, 19 La. Ann. 482; Shelby v. Offutt, 51 Miss. 128; Murrell v. Jones, 40 Miss. 565; Buchanan v. Curry, 19 Johns. (N. Y.) 141; Sands v. New York Life Ins. Co., 50 N. Y. 626, 10 Am. Rep. 535; Clarke v. Morey, 10 Johns. (N. Y.) 73; Jones v. Harris, 10 Helsk. (Tenn.) 98; Darling v. Lewis, 11 Helsk. (Tenn.) 125; Maloney v. Stephens, 11 Helsk. (Tenn.) 738; Hale v. Wall, 22 Grat. (Va.) 424; Manhattan Life Ins. Co. v. Warwick, 20 Grat. (Va.) 614, 3 Am. Rep. 218; Mutual Ben. Life Ins. Co. v. Atwood, 24 Grat. (Va.) 497, 18 Am. Rep. 652; New York Life Ins. Co. v. Hendren, 24 Grat. (Va.) 536; King v. Hanson, 4 Call (Va.) 259.

<sup>299</sup> Kershaw v. Kelsey, 100 Mass. 561, 1 Am. Rep. 142; Conn v. Penn, 1 Pet. C. C. 496, Fed. Cas. No. 3,104; Denniston v. Imbrie, 3 Wash. C. C. 396, Fed. Cas. No. 3,802; Ward v. Smith, 7 Wall. (U. S.) 447; Buchanan v. Curry, 19 Johns. (N. Y.) 137.

<sup>300</sup> By Davis, J., in United States v. Grossmayer, 9 Wall. (U. S.) 75. And see Small's Adm'r v. Lumpkin's Ex'r, 28 Grat. (Va.) 832, and cases cited in preceding notes.

<sup>301</sup> New York Life Ins. Co. v. Davis, 95 U. S. 425, Wamb. Cas. 962; Ward v. Smith, 7 Wall. (U. S.) 447; Williams v. Paine, 169 U. S. 55.

that such an agency may subsist "during the war, it must have the assent of all the parties thereto—the principal and the agent. As war suspends all intercourse between them, preventing any instructions, supervision, or knowledge of what takes place, on the one part, and any report or application for advice on the other, this relation necessarily ceases on the breaking out of hostilities, \* \* \* unless continued by the mutual assent of the parties. It is not compulsory; nor can it be made so, on either side, to subserve the ends of third parties. If the agent continues to act as such, and his so acting is subsequently ratified by the principal, or if the principal's assent is evinced by any other circumstances, then third parties may safely pay money, for the use of the principal, into the agent's hands, but not otherwise. It is not enough that there was an agency prior to the war. It would be contrary to reason that a man, without his consent, should continue to be bound by the acts of one whose relations to him have undergone such a fundamental alteration as that produced by a war between the two countries to which they respectively belong; with whom he can have no correspondence, to whom he can communicate no instructions, and over whom he can exercise no control. It would be equally unreasonable that the agent should be compelled to continue in the service of one whom the law of nations declares to be his public enemy."<sup>302</sup> "What particular circumstances will be sufficient to show the consent of one person that another shall act as his agent to receive payment of debts in an enemy's country during war may sometimes be difficult to determine. \* \* \* Perhaps it may be assumed that an agent ante bellum, who continues to act as such during the war, in the receipt of money or property on behalf of his principal, where it is to the manifest interest of the latter that he should do so, as in the collection of rents and other debts, the assent of the principal will be presumed, unless the contrary be shown; but that where it is against his interest, or would impose upon him some new obligation or burden, his assent will not be

<sup>302</sup> By Bradley, J., in *New York Life Ins. Co. v. Davis*, 95 U. S. 425, Wamb. Cas. 964.

presumed, but must be proved, either by his subsequent ratification or in some other manner. In some way, however, it must appear that the alleged agent assumed to act as such, and that the alleged principal consented to his so acting."<sup>303</sup> So it would seem that any other agency in the enemy's country that may be carried on without communication or intercourse between the hostile countries does not cease with the beginning of the war but may be continued notwithstanding it.<sup>304</sup> A sale of real estate made under a power contained in a deed of trust executed before the late Civil War is valid, notwithstanding the grantors in the deed, which was made to secure payment of promissory notes, were citizens and residents of one of the states declared to be in insurrection at the time of the sale and it was made while the war was flagrant.<sup>305</sup>

<sup>303</sup> By Bradley, J., in *New York Life Ins. Co. v. Davis*, 95 U. S. 425, Wamb. Cas. 965.

<sup>304</sup> *Stoddart's Case*, 6 Ct. Cl. 340; *Queyrrouze's Case*, 7 Ct. Cl. 402; *Jacob Mayer's Case*, 3 Ct. Cl. 249; *University v. Finch*, 18 Wall. (U. S.) 106; *United States v. Quigley*, 103 U. S. 595; *Mitchell v. Nodaway County*, 80 Mo. 257; *McCormick & Bro. v. Arnspliger*, 38 Tex. 569; *Wilkinson v. Williams*, 35 Tex. 181; *Newton's Ex'r v. Bushong*, 22 Grat. (Va.) 628; *Small's Adm'r v. Lumpkin's Ex'r*, 28 Grat. (Va.) 832.

<sup>305</sup> *University v. Finch*, 18 Wall. (U. S.) 106; *Mitchell v. Nodaway County*, 80 Mo. 257.

## BOOK II.

### NATURE, CONSTRUCTION, EXECUTION, AND DELEGATION OF AGENT'S AUTHORITY.

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#### CHAPTER VIII.

##### NATURE AND EXTENT OF AGENT'S AUTHORITY.

###### § 193. Scope of chapter.

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###### § 194. Express authority.

###### 195. Implied authority.

###### II. EXTENT OF AUTHORITY.

###### § 196. In general.

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###### 209. Elements of apparent scope of authority.

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###### § 193. Scope of chapter.

In the preceding chapters we have treated of the establishment and of the termination of the relation of principal and agent, but so far have said little or nothing as to the purpose for which such relation is established. In early times when the commercial transactions between individuals were few and easily conducted by each for himself, there was

no need for the services of an intervening party or agent. But as commerce developed the difficulties of conducting the same likewise increased, it oftentimes occurring that a man had transactions pending at the same time in different sections of the country, and also that one often had dealings in a line of business of which he had little knowledge. Then it was that there arose the system or relation of agency, the principal employing another to do for him that which he did not wish to do or which it was inconvenient for him to do in person, or which the agent was better able to do than he was. But in order that one may thus act as agent for another, in particular transactions or dealings, it is necessary that he should have authority from the person for whom he is acting. The purpose, then, of establishing the relation of principal and agent is to confer upon the agent such authority as it is necessary for him to have in order to carry on the business intrusted to him. For the purpose of conducting the business, according to his authority, the agent acts as if he were the principal himself; and what he does in the course of his employment and within his authority is of the same effect as if done by the principal in person. It will readily be seen that many questions may arise as to this conferring of authority upon the agent, not only as between the principal and his agent, but also especially between the principal or agent and third parties. Questions may arise as to when such authority takes effect or how long it continues, which have been considered heretofore; or where the authority has been given, there may be some question as to its nature and extent, and it is this latter phase of the subject that is to be considered in this chapter. In doing this it may be necessary, by reason of the close connection of the subjects, to repeat somewhat the principles heretofore discussed and to tread a little on the ground that will be gone over more fully in subsequent chapters. Such repetitions, however, will be avoided as much as possible.

#### I. NATURE OF AUTHORITY.

The authorities or powers of an agent are, as to their nature, either express or implied, according to whether such authority is conferred upon him in express terms and

with express limitations or whether it is implied from the principal's acts or conduct.

**§ 194. Express authority.**

As the creation of the relation of principal and agent is in fact the conferring of authority upon the agent, so express authority may be conferred upon the agent in the same manner in which the relation may be expressly created.<sup>1</sup> Where the authority is expressly given, its limitations or extent will be determined by the instrument or language by which it is given and such limitations will be binding upon all parties who have notice thereof.<sup>2</sup> If the authority is given in writing or if the third party knows that the agent is acting under an express power, all parties so dealing with the agent are bound to take notice of the extent and limits of that authority. They "are to be regarded as dealing with the power before them; and they must at their peril observe that the act done by the agent is legally identical with the act authorized by the power."<sup>3</sup> Especially is this true where the authority is such as is required by law to be given by a writing under seal or by a written instrument, although the third parties have no actual notice of the limitations fixed by the instrument.<sup>4</sup> Nor can a usage or cus-

<sup>1</sup> Ante, § 2.

<sup>2</sup> *Rust v. Eaton*, 24 Fed. 830; *Siebold v. Davis*, 67 Iowa, 561; *Wood Mowing & Reaping Mach. Co. v. Crow*, 70 Iowa, 340; *Bohart v. Oberne*, 36 Kan. 284; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Hurley v. Watson*, 68 Mich. 531; *Berry v. Haldeman*, 111 Mich. 667; *Brown v. Johnson*, 12 Smedes & M. (Miss.) 398, 51 Am. Dec. 118; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Half v. O'Connor*, 14 Tex. Civ. App. 191; *Stainback v. Read*, 11 Grat. (Va.) 281, 62 Am. Dec. 648.

<sup>3</sup> *Stainback v. Read*, 11 Grat. (Va.) 281, 62 Am. Dec. 650; *Silliman v. Fredericksburg, O. & C. R. Co.*, 27 Grat. (Va.) 120; *Whiteside v. United States*, 93 U. S. 247; *The Floyd Acceptances*, 7 Wall. (U. S.) 666; *Craycraft v. Selvage*, 10 Bush (Ky.) 696; *Snow v. Warner*, 10 Metc. (Mass.) 132, 43 Am. Dec. 417; *Dozier v. Freeman*, 47 Miss. 647; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262.

<sup>4</sup> *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Peabody v. Hoard*, 46 Ill. 242; *National Iron Armor Co. v. Bruner*, 19 N. J. Eq. 331; *Weise's Appeal*, 72 Pa. 351.

tom be shown to enlarge such powers or to construe it in a manner inconsistent with the written terms, although evidence of usage may be introduced for the purpose of interpreting the powers actually given, or to annex usual terms and conditions which are not inconsistent with the written terms between the parties.<sup>5</sup> Of these matters more will be seen in the following sections.

### § 195. Implied authority.

Likewise as the relation of principal and agent may be created by implication, so the agent's authority may be implied from the principal's words, silence, or other conduct. But this implication cannot arise arbitrarily at the will of the third party or by presumption; it can arise from facts only, and must be such implication as will arise in similar cases under similar circumstances. Authority is a creature of intention, and will be implied in those cases only where the facts are such as to show that the principal intended the agent to have such authority.<sup>6</sup> The fact that in a particular instance a person was authorized by the owner of property to negotiate a sale of it to one person on particular terms, the actual transfer to be made by the owner personally, is not sufficient to prove authority in such person to sell and transfer the same property at a prior time and on different terms to another and different person.<sup>7</sup> So the fact that an agent has, in some instances, been authorized to write his principal's name to powers authorizing a sale or transfer of securities, does not warrant the inference that such authority was given as to certificates of stock belonging to an estate, but having no connection with such other securities.<sup>8</sup>

<sup>5</sup> *Robinson v. Mollet*, L. R. 7 H. L. 802, Wamb. Cas. 908; *Brown v. Byrne*, 3 El. & Bl. 703, 715; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

<sup>6</sup> *National Bank of the Republic v. Old Town Bank*, 112 Fed. 726; *Graves v. Horton*, 38 Minn. 66; *Baines v. Ewing*, L. R. 1 Exch. 320, 4 Hurl. & C. 511, Wamb. Cas. 334; *Cooley v. Willard*, 34 Ill. 68, 85 Am. Dec. 296; *Bickford v. Menier*, 107 N. Y. 490; *Mann v. Dublin Cotton-Oil Co.*, 92 Tex. 377.

<sup>7</sup> *Graves v. Horton*, 38 Minn. 66.

<sup>8</sup> *Pennsylvania Co. for Ins. v. Franklin F. Ins. Co.*, 181 Pa. 40.



## II. EXTENT OF AUTHORITY.

## § 196. In general.

In respect to the extent of authority conferred upon an agent, agencies are usually divided into two classes, viz.: general agencies and special agencies. A third class, universal agencies, has also been said to exist, as we shall see in the next section.

As a general rule, an agent may bind his principal by all acts done or contracts made within the apparent scope of his authority. This, as we shall see presently, includes not only the agent's express and incidental powers, but also all powers that are annexed by custom or usage to those actually conferred, and also all powers that the principal, by his conduct, has induced third persons to believe the agent possessed. "A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act, which he expressly authorizes him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance."<sup>9</sup> This is but an application of the well known doctrine, that he who acts through another, acts himself—*qui facit per alium, facit per se*; and in the general application of this rule it makes no difference whether the agent is a general or special one so long as he acts within his express or incidental powers. "Beyond that, he is liable for the acts of the agent within the appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing,"<sup>10</sup> although there be

<sup>9</sup> *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655; *Edmunds v. Bushell*, L. R. 1 Q. B. 97, Wamb. Cas. 331; *Hagerman v. Bates*, 24 Colo. 71; *Napier v. Poe*, 12 Ga. 170; *Goodrich v. Hanson*, 33 Ill. 499; *Taylor v. Taylor*, 20 Ill. 650; *Barbee v. Aultman, Miller & Co.*, 102 Iowa, 278; *Destrehan v. Louisiana Cypress Lumber Co.*, 45 La. Ann. 920, 40 Am. St. Rep. 265; *Broadway Sav. Bank v. Vorster*, 30 La. Ann. 587; *Caswell v. Cross*, 120 Mass. 545; *White Lake Lumber Co. v. Stone*, 19 Neb. 402; *Webster v. Clark*, 30 N. H. 245; *Parker v. Saratoga County Sup'rs*, 106 N. Y. 392; *Knell v. United States & B. Steamship Co.*, 33 N. Y. Super. Ct. 423; *Meyer v. Harnden's Exp. Co.*, 24 How. Pr. (N. Y.) 290; *Darst v. Slevins*, 2 Disn. (Ohio) 473.

<sup>10</sup> *England*: *Smith v. McGuire*, 3 Hurl. & N. 554; *Brocklesby v.*

unknown private instructions. The agent, however, may only act within the appearance of authority which the prin-

Temperance Permanent Bldg. Soc. [1893] 3 Ch. 130; Chapleo v. Brunswick Ben. Bldg. Soc., 50 Law J. Q. B. 372.

*United States:* Butler v. Maples, 9 Wall. 766; Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank, 97 Fed. 181; Foster v. Cleveland, C., C. & St. L. R. Co., 56 Fed. 434; Schimmelpennich v. Bayard, 1 Pet. 264.

*Alabama:* Wheeler v. McGuire, 86 Ala. 398; Golding v. Merchant, 43 Ala. 705; A. G. Rhodes Furniture Co. v. Weeden, 108 Ala. 252.

*Arkansas:* Little Rock & F. S. R. Co. v. Wiggins, 65 Ark. 385; Jacobson v. Poindexter, 42 Ark. 97.

*California:* Heald v. Hendy, 89 Cal. 632; Davidson v. Dallas, 8 Cal. 227.

*Colorado:* Hagerman v. Bates, 24 Colo. 71; Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co., 11 Colo. 223, 7 Am. St. Rep. 226.

*Delaware:* Lattomus v. Farmers' M. F. Ins. Co., 3 Houst. 404; Watertown Steam Engine Co. v. Davis, 5 Houst. 210.

*Georgia:* Louisville & N. R. Co. v. Tift, 100 Ga. 86; Florida Midland & G. R. Co. v. Varnedoe, 81 Ga. 175; Blaisdell v. Bohr, 77 Ga. 381; Georgia Military Academy v. Estill, 77 Ga. 409.

*Illinois:* Union Stock Yard & Translt Co. v. Mallory, etc., Co., 157 Ill. 554, 48 Am. St. Rep. 341; Union M. L. Ins. Co. v. White, 106 Ill. 67; Noble v. Nugent, 89 Ill. 522; Thurber v. Anderson, 88 Ill. 167.

*Indiana:* Cincinnati, I., St. L. & C. R. Co. v. Davis, 126 Ind. 99; Over v. Schiffling, 102 Ind. 191; Pursley v. Morrison, 7 Ind. 356, 63 Am. Dec. 424; Lake Shore & M. S. R. Co. v. Foster, 104 Ind. 293, 54 Am. Rep. 319.

*Iowa:* Whiting v. Western Stage Co., 20 Iowa, 554; Richmond v. Greeley, 38 Iowa, 666.

*Kansas:* Leu v. Mayer, 52 Kan. 419.

*Kentucky:* Blood v. Herring, 22 Ky. L. R. 1725, 61 S. W. 273; Columbia Land & Min. Co. v. Tinsley, 22 Ky. L. R. 1082, 60 S. W. 10; Com. v. Hawkins, 83 Ky. 246.

*Louisiana:* Caldwell v. Neil Bros., 21 La. Ann. 342, 99 Am. Dec. 738.

*Maine:* Johnson v. Wingate, 29 Me. 404.

*Massachusetts:* McNeil v. Boston Chamber of Commerce, 154 Mass. 277.

*Michigan:* Shipman v. Byles, 65 Mich. 690; Verdine v. Olney, 77 Mich. 310; Austrian v. Springer, 94 Mich. 343, 34 Am. St. Rep. 350; Baker v. Barnett Produce Co., 113 Mich. 533.

*Minnesota:* Mason v. Taylor, 38 Minn. 32; Tice v. Russell, 43 Minn. 66.

cial himself causes, and not that caused by the agent alone.<sup>11</sup>  
 "For the acts of the agent within his express authority,

*Mississippi:* Potter v. Springfield Mill. Co., 75 Miss. 532; Planters' Compress & Warehouse Co. v. Ireys (Miss.) 16 So. 386; Brown v. Johnson, 12 Smedes & M. (Miss.) 398, 51 Am. Dec. 118; McCoy v. McKowen, 26 Miss. 487, 59 Am. Dec. 264.

*Missouri:* Johnson v. Hurley, 115 Mo. 513; Nicholson v. Golden, 27 Mo. App. 132; Buckle v. Probasco, 58 Mo. App. 49; Harrison v. Kansas City, C. & S. R. Co., 50 Mo. App. 332.

*Nebraska:* Holt v. Schneider, 57 Neb. 523; Lorton v. Russell, 27 Neb. 372; Plano Mfg. Co. v. Nordstrom, 63 Neb. 123; Webster v. Wray, 17 Neb. 579; Oberne v. Burke, 30 Neb. 581.

*New Hampshire:* Hatch v. Taylor, 10 N. H. 538; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

*New Jersey:* Law v. Stokes, 32 N. J. Law, 249, 90 Am. Dec. 655.

*New York:* Walsh v. Hartford F. Ins. Co., 73 N. Y. 5; Munn v. Commission Co., 15 Johns. 44, 8 Am. Dec. 219; Fifth Ave. Bank v. Forty-Second St. & G. St. Ferry R. Co., 137 N. Y. 231, 33 Am. St. Rep. 712; Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612, 51 Am. St. Rep. 721; Westfield Bank v. Cornen, 37 N. Y. 320, 93 Am. Dec. 573; Commercial Bank of Buffalo v. Kortright, 22 Wend. 348, 34 Am. Dec. 317; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341.

*Oregon:* Hardwick v. State Ins. Co., 23 Or. 290.

*Pennsylvania:* Hubbard v. Tenbrook, 124 Pa. 291, 10 Am. St. Rep. 585; Ellenberger v. Protective M. F. Ins. Co., 89 Pa. 464; Baltimore & P. Steamboat Co. v. Brown, 54 Pa. 77.

*South Dakota:* Aldrich v. Witmarth, 3 S. D. 523.

*Tennessee:* Murphy v. Southern L. Ins. Co., 3 Baxt. 449, 27 Am. Rep. 761.

*Texas:* Galveston, H. & S. A. R. Co. v. House, 4 Tex. Civ. App. 263.

*Utah:* Garner v. A. Fisher Brew. Co., 6 Utah, 332; Smith v. Droubay, 20 Utah, 443.

*Vermont:* Cushman v. Somers, 62 Vt. 132, 22 Am. St. Rep. 92; Winchell v. National Exp. Co., 64 Vt. 15; Griggs v. Selden, 58 Vt. 561; Kingsley v. Fitts, 51 Vt. 414.

*Virginia:* Gore v. Buzzard's Adm'rs, 4 Leigh, 231; Mann v. King, 6 Munf. 428.

*Washington:* Graton & K. Mfg. Co. v. Redelsheimer, 28 Wash. 370.

*West Virginia:* Rohrbough v. United States Exp. Co., 50 W. Va. 148, 88 Am. St. Rep. 849.

*Wisconsin:* Hoyer v. Ludington, 100 Wis. 441; Cannon v. Henry, 78 Wis. 167, 23 Am. St. Rep. 399; Kountz v. Gates, 78 Wis. 415.

<sup>11</sup> Edwards v. Dooley, 120 N. Y. 540; Leu v. Mayer, 52 Kan. 419;

the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent, within the scope of the authority he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible; because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. In whichever way the liability of the principal is established it must flow from the act of the principal. And when established, it cannot on the one hand be qualified by the secret instructions of the principal, nor on the other hand be enlarged by the unauthorized representations of the agent."<sup>12</sup>

The rule that the principal is bound by the acts of his agent within the apparent scope of his authority is applicable only when there have been previous transactions of a similar character, in which the agent exceeded his authority, and which have been ratified by the principal without question, and without knowledge on the part of a third party of a limitation of the agent's authority, and an excess in the particular case, whereby such party is led to believe that the agent has all the powers assumed.<sup>13</sup> Thus, if one relies upon an ostensible agency to sustain an unauthorized pledge, he must give evidence of similar transactions in which the acts of the alleged agent were authorized or ratified.<sup>14</sup>

It is essential, also, that the third party should have relied upon the appearance of authority as held out by the principal, otherwise the latter will not be bound by the unauthorized acts.<sup>15</sup> The principal could not be held responsible

*Figueira v. Lerner*, 52 App. Div. (N. Y.) 216; *Brown v. Franklin M. F. Ins. Co.*, 165 Mass. 565, 52 Am. St. Rep. 534; *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655. And see other cases *supra*.

<sup>12</sup> By Depue, J., in *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655; *Brown v. Franklin M. F. Ins. Co.*, 165 Mass. 565, 52 Am. St. Rep. 534.

<sup>13</sup> *Kane v. Barstow*, 42 Kan. 465, 16 Am. St. Rep. 490; *Banks v. Everest*, 35 Kan. 687.

<sup>14</sup> *Robinson v. Nevada Bank*, 81 Cal. 106.

<sup>15</sup> *Tallmadge v. Lounsbury*, 50 N. Y. State Rep. 531; *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5; *Edwards v. Dooley*, 120 N. Y. 540;

for the agent's acts, although within the appearance of authority but beyond his actual authority, if the third person in dealing with the agent did not rely upon the appearance of authority as caused by the principal, but rather upon the agent's representations or some other circumstances with which the principal has no connection.

### § 197. Universal agents.

In respect to their authority, a third class of agents, known as universal agents, is sometimes said to exist. They are said to be such agents as have authority to do all things which the principal could do himself and which he could delegate. If such an agency exists at all it can only be created by clear and unequivocal language, and will not be inferred from any general expressions, however broad; but the law will rather construe them as restricted to the particular business of the party in respect to which it is presumed his intention to delegate the authority was principally directed.<sup>16</sup> It is no doubt possible for such an agency to exist, but instances of it are very rare. "Indeed it is difficult to conceive of the existence of such an agent practically, inasmuch as it would be to make such an agent the complete master, not merely *dux facti*, but *dominus rerum*, the complete disposer of all the rights and property of the principal."<sup>17</sup>

### § 198. General and special authority—In general.

By general authority is meant authority to transact all the principal's business of a particular kind, or at a particular place, the agent having authority within that line of business to do all legitimate acts for the purpose of conducting it.<sup>18</sup> By special authority is meant authority to

*First Nat. Bank v. Farmers' & Merchants' Bank*, 56 Neb. 149; *Rail v. City Nat. Bank*, 3 Tex. Civ. App. 557.

<sup>16</sup> *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728; *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612; *Barr v. Schroeder*, 32 Cal. 609; *Story, Agency*, § 21.

<sup>17</sup> *Story, Agency*, § 21; *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728; *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612.

<sup>18</sup> *Alabama*: *Gibson v. Snow Hardware Co.*, 94 Ala. 346; *Dearing v. Lightfoot*, 16 Ala. 28.

C. & S.—30.

do one or more specific acts, the agent's authority to do such acts being given to him by express instructions or by necessary implication, and extending to no other business or acts but the ones authorized.<sup>19</sup> But the mere fact that an agent's

*Arkansas:* Keith v. Herschberg Optical Co., 48 Ark. 138.

*Colorado:* Great West Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 46, 13 Am. St. Rep. 204.

*Delaware:* Lattomus v. Farmers' M. F. Ins. Co., 3 Houst. 404.

*Illinois:* Union Stock Yard & Transit Co. v. Mallory, 157 Ill. 554, 48 Am. St. Rep. 341; Gregg v. Wooliscroft, 52 Ill. App. 221; Noble v. Nugent, 89 Ill. 522; National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427; St. Louis S. W. R. Co. v. Elgin Condensed-Milk Co., 74 Ill. App. 619.

*Indiana:* Manning v. Gasharie, 27 Ind. 411; Fatman v. Leet, 41 Ind. 138; Cruzan v. Smith, 41 Ind. 288; Toledo, W. & W. R. Co. v. Owen, 48 Ind. 408.

*Iowa:* Sawin v. Union Bldg. & Sav. Ass'n, 95 Iowa, 477.

*Kentucky:* Bell v. Offutt, 73 Ky. 632.

*Massachusetts:* Lobdell v. Baker, 1 Metc. 193, 35 Am. Dec. 358.

*Pennsylvania:* Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 Am. Dec. 390.

*Tennessee:* Walker v. Skipwith, Meigs, 502, 33 Am. Dec. 161.

In *Cruzan v. Smith*, 41 Ind. 288, a general agent is defined as one who is authorized to transact all the business of his principal, or all his business of some particular kind, or at some particular place. And see *Fatman v. Leet*, 41 Ind. 138; 1 *Wait, Law & P.* (7th Ed.) 196; 1 *Parsons*, Cont. 40. It is a rule that if one who is himself engaged in a particular calling or business be employed to do certain acts in that trade or business, he will be, with respect to his employment, a general agent. *Bell v. Offutt*, 73 Ky. 632. An agent having full charge of another's store, with power to sell and dispose of the stock and replenish it by purchasing new goods, is a general agent, though only employed for a special business. *Pacific Biscuit Co. v. Dugger*, 40 Or. 362.

<sup>19</sup> *United States:* Butler v. Maples, 9 Wall. 766.

*Alabama:* Witcher v. Brewer, 49 Ala. 119.

*Arkansas:* Keith v. Herschberg Optical Co., 48 Ark. 138.

*Colorado:* Great West Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 46, 13 Am. St. Rep. 204.

*Connecticut:* Ladd v. Franklin, 37 Conn. 53.

*Delaware:* Lattomus v. Farmers' Mut. Fire Ins. Co., 3 Houst. 404.

*Illinois:* Union Stock Yard & Transit Co. v. Mallory, 157 Ill. 554, 48 Am. St. Rep. 341; Gregg v. Wooliscroft, 52 Ill. App. 221; *Baxter v. Lamont*, 60 Ill. 237.

authority is limited to a particular business does not make his agency a special one, if such authority is general and gives him power to perform all acts necessary for the transaction of that business, and he is so held out to the world.<sup>20</sup> An agent, having general authority, in the most comprehensive sense of the term, has unlimited power in the discharge of all kinds of business; a person, however, put in the place of another to transact all business of a particular kind, is also as to that business a general agent.<sup>21</sup> Thus, it has been said that a general authority is one which extends to all acts connected with a particular employment embracing an intermediate power. A man may be a general, without being a universal, agent; and general language giving the most extensive agency will be confined within such bounds as to make the agent a general and not a universal agent.<sup>22</sup>

Nor will the mere fact that his authority is limited to buy in a particular locality make him a special agent, if his

*Indiana:* Toledo, W. & W. R. Co. v. Owen, 43 Ind. 408; Fatman v. Leet, 41 Ind. 138; Cruzan v. Smith, 41 Ind. 297; Robinson v. Anderson, 106 Ind. 152.

*Louisiana:* Crescent City Bank v. Hernandez, 25 La. Ann. 43.

*Mississippi:* Brown v. Johnson, 12 Smedes & M. 398, 51 Am. Dec. 118.

*New Hampshire:* Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

*New Jersey:* Gulick v. Grover, 33 N. J. Law, 463, 97 Am. Dec. 728.

*New York:* Rossiter v. Rossiter, 8 Wend. 494, 24 Am. Dec. 62; Beals v. Allen, 18 Johns. 363, 9 Am. Dec. 221; Martin v. Farnsworth, 49 N. Y. 555.

*Pennsylvania:* Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 Am. Dec. 390; Baring v. Peirce, 5 Watts & S. 548, 40 Am. Dec. 534.

*Tennessee:* Walker v. Skipwith, Meigs, 507, 33 Am. Dec. 161.

<sup>20</sup> Noble v. Nugent, 89 Ill. 522; Crain v. First Nat. Bank, 114 Ill. 516; St. Louis S. W. R. Co. v. Elgin Condensed-Milk Co., 74 Ill. App. 619; Cruzan v. Smith, 41 Ind. 297; First Nat. Bank v. Robinson, 105 Iowa, 463; Bell v. Offutt, 10 Bush (Ky.) 632; Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; Anderson v. Coonley, 21 Wend. (N. Y.) 279; Darst v. Slevins, 2 Disn. (Ohio) 473; Rountree v. Denson, 59 Wis. 522.

<sup>21</sup> Wilcox v. Routh, 17 Miss. 476.

<sup>22</sup> 2 Bouv. Inst. (1st Ed.) § 1298.

authority is not otherwise restricted.<sup>23</sup> Thus, an authority to an agent to buy cotton in a certain region and its vicinity, and to buy generally from whomsoever the agent, not his principal, might determine, makes a general agency to buy the cotton there.<sup>24</sup>

The same agent may have both special and general authority; special, as to the kind of property to be dealt with, and general, as to the manner of such dealings.<sup>25</sup>

**§ 199. Distinction between general and special agents.**

The distinction between general and special agencies is thought to be of much importance when the liability of the principal for the acts of his agent is brought into question. "As to the former, the principal is responsible for the acts of the agent, when acting within the general scope of his authority, and the public cannot be supposed connusant of any private instructions from the principal to the agent, but where the agency is a special and temporary one, there the principal is not bound if the agent exceeds his employment."<sup>26</sup> This distinction, however, is not one of the kind of agents, but rather is of the degree of authority possessed by each; a general agent's authority being much broader than that of a special agent. "The cases in which a distinction has been made in the responsibility of a principal for the acts of general and of special agents are those where the special agent did not have, and was not held out as having, full authority to do that which he undertook to do, and where one dealing with him was informed, or should have informed himself, of the limitations of his authority. There is no distinction in the matter of responsibility for the fraud of an agent authorized to do business generally, and of an agent employed to conduct a single transaction, if, in

<sup>23</sup> *Butler v. Maples*, 9 Wall. (U. S.) 766; *Toledo, Wabash & W. R. Co. v. Owen*, 43 Ind. 405; *Cruzan v. Smith*, 41 Ind. 288; *Planters' Bank v. Cameron*, 11 Miss. 609.

<sup>24</sup> *Butler v. Maples*, 9 Wall. (U. S.) 766.

<sup>25</sup> *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476.

<sup>26</sup> *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44, 8 Am. Dec. 219, 222; *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612, 614; *Fenn v. Harrison*, 3 Term R. 757, Wamb. Cas. 254.



either case, he is acting in the business for which he was employed by the principal, and had full authority to complete the transaction. While the principal may not have authorized the particular act, he has put the agent in his place to make the sale, and must be responsible for the manner in which he has conducted himself in doing the business which the principal intrusted to him."<sup>27</sup> As has been said: "There are in the books many loose expressions concerning the distinction between a general and special agency. The distinction itself is highly unsatisfactory, and will be found quite insufficient to solve a great variety of cases. It is not profitable to dwell upon that distinction. Underlying the whole subject is this fundamental proposition, that a principal is bound only by the authorized acts of his agent. This authority may be proved by the instrument which creates it; and beyond the terms of the instrument, or of the verbal commission, it may be shown that the principal has held the agent out to the world in other instances as having an authority which will embrace the particular act in question. I know of no other mode in which a controverted power can be established. But in whichever way this is done, it cannot be limited by secret instructions of the principal on the one hand, nor can it be enlarged by the unauthorized representation of the agent on the other. These principles, I think, are elementary."<sup>28</sup>

The distinction is sometimes set forth on the ground that in a special agency the principal is not bound if the agent exceeds private instructions which have been given to him by the principal, whereas in general agencies, if the agent exceeds his private instructions he nevertheless binds the principal if he otherwise acts within the scope of his authority. This distinction, however, is thought to arise from a failure to distinguish between an agent's authority and his instructions. If an agent acts within the scope of the authority which a third party dealing with him has been in-

<sup>27</sup> *Devens, J., in Haskell v. Starbird*, 152 Mass. 117, 23 Am. St. Rep. 812, Huffc. Cas. 288.

<sup>28</sup> By *Comstock, J., in Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 632.

duced to believe he possessed, his acts will bind his principal, and it makes no difference whether he be a general or a special agent. On the other hand if he acts beyond the scope of his authority the principal will not be bound, and in neither case will the third party be bound by private instructions of which he has no notice.

The true distinction is thought to be this: if the agency is a general one, the party dealing with the agent knows of the usual extent of authority possessed by other agents in the same line of business under similar circumstances, and if any other instructions are given to such agent of which the third party has no notice he will not be bound by them, and he is not bound to inquire for them; whereas if the agent is a special one such party knows that such an agency is usually a restricted one, or is usually accompanied with instructions, enlarging or restricting the agency, and it is his duty to make due inquiry as to such limitations. If he does so he will be protected from the effect of any secret instructions of which he did not acquire notice by such inquiry, or of which no notice has been given to him, and this rule likewise applies to general agencies as we shall see hereafter. In either case it is the duty of the person dealing with the agent to make proper inquiry as to the authority possessed by such agent, but in special agencies the duty is perhaps greater upon him to inquire into the instructions given to such agent. A general agency is, from its very nature, rather broad and the third party is not bound to seek for any private limitations or restrictions, unless there is something in the circumstances of the particular case that indicates to him that such instructions have been given. In a special agency, however, the nature of the agency itself is notice to him that the agent's authority is restricted and he is bound to inquire what such restrictions are.

**§ 200. Authority presumed to be general.**

In the absence of notice otherwise, parties dealing with an agent have a right to presume that his agency is a general one;<sup>20</sup> and also that one known to be an agent is act-

<sup>20</sup> *Austrian v. Springer*, 94 Mich. 343, 34 Am. St. Rep. 350; *Me-*

ing within the scope of his authority.<sup>30</sup> Thus, it is presumed that the superintendent of a mining corporation has deputed to him all the powers and authority necessary to a proper discharge of the duties imposed upon him. It is his manifest duty to extinguish a fire in the company's mine in a proper manner, and, *prima facie*, he has the correlative authority to provide proper means to that end.<sup>31</sup>

### § 201. Continuance of general authority.

Implied authority of an agent arising from a general employment continues after the agency has in reality ceased, so far as concerns parties who have given credit before, and still continue to give credit to it, and who have not actually been notified of the change, and cannot be presumed to have had notice of it.<sup>32</sup> Thus, if an insurance company has appointed an agent to transact business for it, parties dealing with him in that business have a right to rely upon the fact of continuance of his authority as such agent, until informed in some way of its revocation.<sup>33</sup>

### § 202. Extent of general agent's authority.

It may be stated as a general rule, that a general agent may do all acts within the apparent scope of his authority, and thereby bind his principal, although such acts may be

*thuen v. Hayes*, 33 Me. 169; *Trainor v. Morrison*, 78 Me. 160, 57 Am. Rep. 790; *Wood v. Finson*, 89 Me. 459; *Maher v. Moore* (Del.) 42 Atl. 721; *Missouri Pac. R. Co. v. Simons*, 6 Tex. Civ. App. 621. But see *Dickinson County v. Mississippi Valley Ins. Co.*, 41 Iowa, 286, where it was held that the law indulges in no presumptions respecting the character of an agency; and whether an agent is general or special is a question of fact for the jury.

<sup>30</sup> *Austrian v. Springer*, 94 Mich. 343, 34 Am. St. Rep. 350; *English v. Ayer*, 79 Mich. 516; *Bessemer Land & Imp. Co. v. Campbell*, 121 Ala. 50, 77 Am. St. Rep. 17.

<sup>31</sup> *Bessemer Land & Imp. Co. v. Campbell*, 121 Ala. 50, 77 Am. St. Rep. 17.

<sup>32</sup> *Tier v. Lampson*, 35 Vt. 179, 82 Am. Dec. 634; *Wilson v. Commercial Union Assur. Co.*, 51 S. C. 540, 64 Am. St. Rep. 700. See ante, § 173.

<sup>33</sup> *Wilson v. Commercial Union Assur. Co.*, 51 S. C. 540, 64 Am. St. Rep. 700.

done contrary to private instructions of which the third party has no notice, or concerning which he is not put upon inquiry.<sup>84</sup> "A restriction upon the power of an agent

*England*: Whitehead v. Tuckett, 15 East, 407, Wamb. Cas. 277; Fenn v. Harrison, 3 Term R. 757, Wamb. Cas. 254; Beaufort v. Neeld, 12 Clark & F. 248.

*United States*: Lewis v. Shreveport, 108 U. S. 282.

*Alabama*: Syndicate Ins. Co. v. Catchings, 104 Ala. 176; Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612.

*Arkansas*: Morton v. Scull, 23 Ark. 289.

*California*: Kline v. Central Pac. R. Co., 37 Cal. 400, 99 Am. Dec. 282.

*Connecticut*: Willard v. Buckingham, 36 Conn. 395.

*Georgia*: Thompson v. Douglass, 64 Ga. 57; Coweta Falls Mfg. Co. v. Rogers, 19 Ga. 416, 65 Am. Dec. 602; Louisville & N. R. Co. v. Tift, 100 Ga. 86; Georgia Military Academy v. Estill, 77 Ga. 409.

*Illinois*: Union M. L. Ins. Co. v. White, 106 Ill. 67; Home L. Ins. Co. v. Pierce, 75 Ill. 426; Abrahams v. Weiller, 87 Ill. 179; Booth v. Wiley, 102 Ill. 84.

*Indiana*: Cruzan v. Smith, 41 Ind. 288.

*Iowa*: Brett v. Bassett, 63 Iowa, 340; Palmer v. Cheney, 35 Iowa, 281; Davenport v. Peoria M. & F. Ins. Co., 17 Iowa, 276.

*Kansas*: New York L. Ins. Co. v. McGowan, 18 Kan. 300; Asher v. Sutton, 31 Kan. 286.

*Kentucky*: Phoenix Ins. Co. v. Spliers, 87 Ky. 286; Bell v. Offutt, 10 Bush, 632.

*Louisiana*: Arayo v. Currel, 1 La. 536, 20 Am. Dec. 286; Forman v. Walker, 4 La. Ann. 409.

*Maine*: Rhoda v. Annis, 75 Me. 17, 46 Am. Rep. 354.

*Maryland*: Lister v. Allen, 31 Md. 543, 100 Am. Dec. 78; Keener v. Harrod, 2 Md. 63, 56 Am. Dec. 706.

*Massachusetts*: Lobdell v. Baker, 1 Metc. 193, 35 Am. Dec. 358; Byrne v. Massasoit Packing Co., 137 Mass. 313, Huffc. Cas. 211; Williams v. Mitchell, 17 Mass. 98.

*Michigan*: Austrian v. Springer, 94 Mich. 343, 34 Am. St. Rep. 350; Busch v. Wilcox, 82 Mich. 336, 21 Am. St. Rep. 563; Howry v. Eppinger, 34 Mich. 29.

*Mississippi*: Planters' Bank v. Cameron, 11 Miss. 609; Wilcox v. Routh, 17 Miss. 476; McCoy v. McKowen, 26 Miss. 487, 59 Am. Dec. 264.

*Missouri*: Salls v. Miller, 98 Mo. 478; Klinealy v. Burd, 9 Mo. App. 359.

*Montana*: And this liability will not be enlarged. Kircher v. Conrad, 9 Mont. 191, 18 Am. St. Rep. 731; Bank of Billings v. Hall,

not known to persons dealing with him, limiting the usual powers possessed by agents of the same character, would not exempt the principal from responsibility for his acts and contracts which were within the ordinary scope of the business intrusted to him, although he acted in violation of

8 Mont. 341; *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458; *Herbert v. King*, 1 Mont. 475.

*Nebraska*: *Furnas v. Frankman*, 6 Neb. 429; *Lorton v. Russell*, 27 Neb. 372; *Levy v. Hastings First Nat. Bank*, 27 Neb. 557.

*New Hampshire*: *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Mayall v. Boston & M. R. R.*, 19 N. H. 122, 49 Am. Dec. 149.

*New Jersey*: *Millville Mut. M. & F. Ins. Co. v. Mechanics' & Workingmen's B. & L. Ass'n*, 43 N. J. Law, 652; *Redstrake v. Cumberland M. F. Ins. Co.*, 44 N. J. Law, 294.

*New York*: *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415, 11 Am. St. Rep. 674; *Angell v. Hartford F. Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *Munn v. Commission Co.*, 15 Johns. 44, 8 Am. Dec. 219; *Jeffrey v. Bigelow*, 13 Wend. 518, 28 Am. Dec. 476; *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348, 34 Am. Dec. 317; *Westfield Bank v. Corman*, 37 N. Y. 320, 93 Am. Dec. 573.

*Ohio*: *Massachusetts L. Ins. Co. v. Eshelman*, 30 Ohio St. 647.

*Oregon*: *Pacific Biscuit Co. v. Dugger*, 42 Or. 513.

*Pennsylvania*: *Wachter v. Phoenix Assur. Co.*, 132 Pa. 428, 19 Am. St. Rep. 600; *Hubbard v. Tenbrook*, 124 Pa. 291, 10 Am. St. Rep. 585; *Griswold v. Gebble*, 126 Pa. 353, 12 Am. St. Rep. 878; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. 498, 78 Am. Dec. 390; *Williams v. Getty*, 31 Pa. 461, 72 Am. Dec. 757; *Harrington v. Bronson*, 161 Pa. 296.

*South Carolina*: *McClure v. Richardson*, *Rice's Law*, 215, 33 Am. Dec. 105, unless his authority is specifically limited and restricted; *Topham v. Roche*, 2 Hill, Law, 307, 27 Am. Dec. 387; *Carmichael v. Buck*, 10 Rich. Law, 332, 70 Am. Dec. 226; *Redding v. South Carolina R. Co.*, 3 S. C. 1, 16 Am. Rep. 681.

*Tennessee*: *Walker v. Skipwith*, *Meigs*, 502, 33 Am. Dec. 161; *Planters' Ins. Co. v. Sorrels*, 1 Baxt. 352, 25 Am. Rep. 780.

*Texas*: *Planters' Mut. Ins. Co. v. Lyons*, 38 Tex. 253.

*Utah*: *Smith v. Droubay*, 20 Utah, 443.

*Vermont*: *Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 23 Vt. 186; *Kelton v. Leonard*, 54 Vt. 230.

*Virginia*: *Blane v. Proudfit*, 3 Call, 207, 2 Am. Dec. 546; *Continental Ins. Co. v. Kasey*, 25 Grat. 268, 18 Am. Rep. 681.

*Wisconsin*: *Saveland v. Green*, 40 Wis. 431; *Lawson v. Chicago, St. P., M. & O. R. Co.*, 64 Wis. 447, 54 Am. Rep. 634; *Second Nat. Bank v. Larson*, 80 Wis. 469.

As to the meaning of apparent scope of authority, see post, § 208.

special instructions.”<sup>35</sup> Thus, the contract of a salesman not to sell a certain class of goods to any other merchant in a town except the purchaser is within the apparent scope of his authority and is binding on the principal.<sup>36</sup> And where an agent is suffered to act as a general agent for his principal, both in buying and selling articles in the principal’s line of business, the public will be justified in assuming that the agent possesses all the powers of a general agent in buying and selling, and the principal will be liable for goods ordered by the agent in his principal’s name, suited to his business, though the agent uses the same himself.<sup>37</sup> So a principal, whether a corporation or an individual, may be held liable to a third person on account of a wrongful, wanton, and malicious act of his agent, done within the scope of his agency, although such act is not previously authorized nor subsequently ratified by the principal.<sup>38</sup> But the general manager and superintendent of a business corporation has no implied authority to employ and furnish medical aid and assistance to a servant of the corporation who has been injured outside the scope of his employment, and the physician cannot recover therefor from the corporation.<sup>39</sup>

### § 203. General agent’s authority not unlimited.

The fact, however, that an agent is a general one, does not give him an unqualified or unlimited authority. His authority may be very broad in a great number of cases, but

<sup>35</sup> *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5.

<sup>36</sup> *Keith v. Herschberg Optical Co.*, 48 Ark. 138.

<sup>37</sup> *Thurber v. Anderson*, 88 Ill. 167. A purchase on the credit of the principal is within the scope of the apparent authority of an agent having full charge of a store, with power to sell and dispose of the stock and replenish it by purchasing new goods. *Pacific Biscuit Co. v. Dugger*, 40 Or. 362.

<sup>38</sup> *Rucker v. Smoke*, 37 S. C. 377, 34 Am. St. Rep. 758; *Palmer v. Railroad*, 3 S. C. 580, 16 Am. Rep. 750. See *Fifth Ave. Bank v. Forty-second St. & G. St. F. R. Co.*, 137 N. Y. 231, 33 Am. St. Rep. 712; *Adams Min. Co. v. Senter*, 26 Mich. 73; *Grover & Baker Sew. Mach. Co. v. Missouri Pac. R. Co.*, 70 Mo. 672; *New York Life Ins. Co. v. McGowan*, 18 Kan. 300. See post, § 493 et seq.

<sup>39</sup> *Chase v. Swift*, 60 Neb. 696, 83 Am. St. Rep. 552.

it does not give him the right to use any powers he may desire in carrying on the business in which he is engaged. The agent cannot go outside the proper scope of his principal's business. He does not have the powers of a universal agent, but must act within the scope of authority usually exercised by other agents in the same line of business, under similar circumstances, and must conduct the particular business of the principal in the manner usually employed by other agents of the same kind.<sup>40</sup> If he does not do so, but exceeds his authority, the principal will not be bound by his acts.<sup>41</sup> It is a general principle of the law of agency, that the conduct of an agent binds his principal only when he acts within the powers conferred upon him, and in reference

<sup>40</sup> *Whitehead v. Tuckett*, 15 East, 408, Wamb. Cas. 277; *Hodge v. Combs*, 1 Black (U. S.) 192; *Asher v. Sutton*, 31 Kan. 286; *Atlantic & Pac. R. Co. v. Reisner*, 18 Kan. 458; *Leblanc v. Perroux*, 21 La. Ann. 26; *Pennsylvania, Del. & Md. Steam Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543; *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; *Odiorne v. Maxcy*, 13 Mass. 181; *Fougue v. Burgess*, 71 Mo. 389; *Brosnahan v. Philip Best Brewing Co.*, 26 Mo. App. 386; *Cloud v. St. Louis, I. M. & S. R. Co.*, 14 Mo. App. 136; *Wright v. Boynton*, 37 N. H. 9, 72 Am. Dec. 319; *Decker v. Sexton*, 19 Misc. (N. Y.) 59; *Cochran v. Newton*, 5 Denio (N. Y.) 482; *Clark v. Metropolitan Bank*, 3 Duer (N. Y.) 241; *Williams v. Whiting*, 92 N. C. 683; *Walker v. Skipwith, Meigs* (Tenn.) 502, 33 Am. Dec. 161; *Stewart v. Woodward*, 50 Vt. 78, 28 Am. Rep. 488; *La Point v. Scott*, 36 Vt. 604.

<sup>41</sup> *Waters v. Brogden*, 1 Younge & J. 457; *Stanley v. Sheffield Land, Iron & Coal Co.*, 83 Ala. 260; *Consolidated Gregory Co. v. Raber*, 1 Colo. 511; *Abrahams v. Weiller*, 87 Ill. 179; *Beebe v. Equitable Mut. Life & Endowment Ass'n*, 76 Iowa, 129; *Richmond v. Greeley*, 38 Iowa, 666; *Taylor v. White*, 44 Iowa, 295; *Wanless v. McCandless*, 38 Iowa, 20; *Martin v. United States*, 2 T. B. Mon. (Ky.) 89, 15 Am. Dec. 129; *Thomas v. Harding*, 8 Me. 417; *McCoy v. McKowen*, 26 Miss. 487, 59 Am. Dec. 264; *Fougue v. Burgess*, 71 Mo. 389; *Lonkey v. Succor Mill. & Min. Co.*, 10 Nev. 17; *Ellis v. Central Pac. R. Co.*, 5 Nev. 255; *Yellow Jacket Silver Min. Co. v. Stevenson*, 5 Nev. 224; *Town of Canaan v. Derush*, 47 N. H. 212; *Richards v. Columbia*, 55 N. H. 96; *Smith v. Perry*, 29 N. J. Law, 74; *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404; *Booth v. Bierce*, 38 N. Y. 463, 98 Am. Dec. 73; *Hopkins v. Blane*, 1 Call (Va.) 361; *Kelly v. Strong's Estate*, 68 Wis. 152.

to the subject-matter of his employment.<sup>42</sup> Thus, the agent of a corporation whose object is to carry on a particular kind of business is limited in his agency to the business of the company connected with, or relating to such object.<sup>43</sup> A railroad physician cannot bind the company for board for his patient.<sup>44</sup> So one who was authorized to buy the raw materials, and to sell the manufactures of a manufacturing company, could not, by implication, have authority to buy ships or real estate, or any other thing having no relation to the establishment.<sup>45</sup> Nor is a general district insurance agent authorized to bind the company for the price of furniture purchased by him for the furnishing of an office for the transaction of his business.<sup>46</sup> So a general agent has no authority to bind his principal to a submission to arbitration. To be binding, such a reference can be made only under a special authority.<sup>47</sup>

#### § 204. Extent of special agent's authority.

The same general rule may be stated here as in the case of general agents that a special agent may bind his principal by all acts done by him within the scope of his authority, although it must be remembered that the scope of a special agent's authority is not as broad as that of a general agent. In the case of a special agent only, the authority must be more strictly pursued, and the agent cannot go beyond

<sup>42</sup> *Wood v. McCain*, 7 Ala. 300, 42 Am. Dec. 612; *Goodloe v. Godley*, 13 Smedes & M. (Miss.) 233, 51 Am. Dec. 159; *Fortner v. Parham*, 2 Smedes & M. (Miss.) 164; *Wilcox v. Routh*, 9 Smedes & M. (Miss.) 476; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Chouteaux v. Leech*, 18 Pa. 224, 57 Am. Dec. 602; *Hough v. Doyle*, 4 Rawle (Pa.) 291. And see ante, § 196.

<sup>43</sup> *Pennsylvania, Del. & Md. Steam Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543.

<sup>44</sup> *St. Louis, A. & T. R. Co. v. Hoover*, 53 Ark. 377; *Boyle v. Missouri Pac. R. Co.*, 13 Mo. App. 574; *Mayberry v. Chicago, R. I. & P. R. Co.*, 75 Mo. 492; *Shriver v. Stevens*, 12 Pa. 258.

<sup>45</sup> *Odiorne v. Maxcy*, 13 Mass. 181.

<sup>46</sup> *Beebe v. Equitable Mut. Life & Endowment Ass'n*, 76 Iowa, 129.

<sup>47</sup> *MacDonald v. Bond*, 195 Ill. 122, affirming 96 Ill. App. 116; *Trout v. Emmons*, 29 Ill. 433; *Michigan Cent. R. Co. v. Gougar*, 55 Ill. 503.



the restrictions and limitations placed upon such authority if they are known to the party dealing with such agent, or if such party could have had knowledge thereof had he made due inquiry therefor; unless the principal has held the agent out as having certain authority and the third party has, in good faith, relied upon such authority in dealing with the agent. In the latter case the agent's acts will bind the principal although they are in excess of his private instructions, if they are within the apparent scope of his authority.<sup>48</sup> Thus, a railroad company will not be bound

<sup>48</sup> *Jordan v. Norton*, 4 Mees. & W. 155; *East India Co. v. Hensley*, 1 Esp. 112; *Allen v. Ogden*, 1 Wash. C. C. 174, Fed. Cas. No. 233; *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176; *Cox v. Robinson*, 2 Stew. & P. (Ala.) 91; *Morton v. Scull*, 23 Ark. 289; *Thompson v. Stewart*, 3 Conn. 171, 8 Am. Dec. 168; *Jefferson v. Chase*, 1 Houst. (Del.) 219; *Baldwin Fertilizer Co. v. Thompson*, 106 Ga. 480; *Gorham v. Felker*, 102 Ga. 260; *Williams v. Merritt*, 23 Ill. 623; *Baxter v. Lamont*, 60 Ill. 237; *Pursley v. Morrison*, 7 Ind. 356, 63 Am. Dec. 424; *Thomas v. Atkinson*, 38 Ind. 256; *Blackwell v. Ketcham*, 53 Ind. 186; *Drover v. Evans*, 59 Ind. 454; *Elder v. Stuart*, 85 Iowa, 690; *Davis' Sons v. Robinson*, 67 Iowa, 355; *Dickinson County v. Mississippi Valley Ins. Co.*, 41 Iowa, 286; *Strickland v. Council Bluffs Ins. Co.*, 66 Iowa, 466; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Tubman v. Lowekamp*, 43 Md. 318; *Stollenwerck v. Thacher*, 115 Mass. 224; *Snow v. Perry*, 9 Pick. (Mass.) 539; *Adams v. Bourne*, 9 Gray (Mass.) 100; *Saginaw, T. & H. R. Co. v. Chappell*, 56 Mich. 190; *Brown v. Johnson*, 12 Smedes & M. (Miss.) 398, 51 Am. Dec. 118; *King v. Levy* (Miss.) 13 So. 282; *Carter v. Taylor*, 14 Miss. 367; *Howell v. Graft*, 25 Neb. 130; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Hovey v. Brown*, 59 N. H. 114; *Beals v. Allen*, 18 Johns. (N. Y.) 363, 9 Am. Dec. 221; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. 498, 78 Am. Dec. 390; *Baring v. Pierce*, 5 Watts & S. (Pa.) 548, 40 Am. Dec. 534; *Carmichael v. Buck*, 10 Rich. Law (S. C.) 332, 70 Am. Dec. 226; *Powell v. Buck*, 4 Strob. (S. C.) 427; *McClure v. Evarston*, 82 Tenn. 495; *Gordon v. Buchanan*, 5 Yerg. (Tenn.) 71; *Darnell v. Lyon*, 85 Tex. 455; *Buzard v. Jolly* (Tex.) 6 S. W. 422; *Sprague v. Train*, 34 Vt. 150; *Hurlburt v. Kneeland*, 32 Vt. 316; *Blane v. Proudft*, 3 Call (Va.) 207, 2 Am. Dec. 546; *Wooding's Ex'r v. Bradley's Ex'r*, 76 Va. 614; *Bleecker v. Satsop R. Co.*, 3 Wash. St. 77; *Dodge v. Hopkins*, 14 Wis. 636, Wamb. Cas. 1044.

by a contract by a local station agent for the transportation of goods to a point beyond its lines, unless such agent has express authority to so contract or authority may be implied from previous dealings of the parties, or the company holds itself out as a common carrier to such point.<sup>49</sup> So an agent employed to bid for a particular piece of land sold by the state has no authority to bid for another tract; and upon disaffirmance of the act by the principal, and an application before confirmation of the sale, the principal has a right to have the sale rescinded and the money paid by the agent under the contract refunded.<sup>50</sup>

**§ 205. Authority of public agents.**

In regard to public agents, it is held that if such an agent acts contrary to specific instructions given to him, the principal will not be bound, notwithstanding the agent acted within the general scope of his authority and although the party dealing with the agent may have had no actual notice of the restrictions or limitations imposed by the principal's instructions. The fact that the act done or contract made by a public agent, related to a subject within the general scope of his powers, does not make it obligatory upon the principal, if there was a want of specific power to do or make it. Although a private agent, acting in violation of specific instructions, yet within the scope of a general authority, may bind his principal, the rule as to a like act of a public agent is otherwise. The specific definitions and limitations of the powers of a public agent are given by ordinances, orders of court, or by statute, and thus bear the character and force of public laws, ignorance of which can be presumed in favor of no one dealing with him on matters thus conditionally within his official discretion. For this reason the law makes a distinction between the effects of the acts of a public agent and those of a private agent.

<sup>49</sup> *Grover & B. Sew. Mach. Co. v. Missouri Pac. R. Co.*, 70 Mo. 672, 35 Am. Rep. 444; *Turner v. St. Louis & S. F. R. Co.*, 20 Mo. App. 632; *Walt v. Albany & S. R. Co.*, 5 Lans. (N. Y.) 477.

<sup>50</sup> *Brown v. Johnson*, 12 Smedes & M. (Miss.) 398, 51 Am. Dec. 118.

In the latter case, the extent of authority is necessarily known only to the principal and agent, while in the former, it is a matter of record in the books of the corporation or of public law, and the third party cannot plead ignorance thereof in order to bind the principal for acts done by the public agent in excess of his specific instructions.<sup>51</sup> The government or other public body is not bound by acts, declarations or representations of its agent, unless it manifestly appears that the latter is acting within the scope of his authority, or that he is held out as having authority to do the act, or is employed in his capacity as a public agent to make the declaration or representation for such body.<sup>52</sup> "It is better that an individual should now and then suffer by such mistakes than to introduce a rule, against an abuse of which, by improper collusions, it would be very difficult for the public to protect itself."<sup>53</sup> Thus, the United States is not bound by the declarations of its agent, founded upon a mistake of fact, unless it clearly appears that the agent was acting within the scope of his authority, and was empowered in his capacity of agent to make such declaration.<sup>54</sup> So the law prescribes how and in what manner the public property is to be sold, and it is well established that persons dealing with agents or officers in regard thereto are bound to know the extent of their authority, and they will not be protected if such property is sold by an agent in a manner other than that prescribed.<sup>55</sup>

**§ 206. Effect of instructions on agent's authority.**

(a) **In general.**—It has been seen in the preceding sections

<sup>51</sup> *Whiteside v. United States*, 93 U. S. 247; *Parsel v. Barnes*, 25 Ark. 261; *Dart v. Hercules*, 57 Ill. 449; *Baltimore v. Eshbach*, 18 Md. 282; *Baltimore v. Poultney*, 25 Md. 18; *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *Keyes v. Inhabitants of Westford*, 17 Pick. (Mass.) 273; *State v. Bank of Missouri*, 45 Mo. 538.

<sup>52</sup> *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535, citing *Story*, Ag. § 307a; *Whiteside v. United States*, 93 U. S. 247.

<sup>53</sup> *Lee v. Munroe*, 7 Cranch (U. S.) 370.

<sup>54</sup> *Lee v. Munroe*, 7 Cranch (U. S.) 366.

<sup>55</sup> *Johnson v. Frisbie*, 29 Md. 76, 96 Am. Dec. 508; *United States v. Nicoll*, 1 Paine, 646, Fed. Cas. No. 15,879; *Delafield v. State*, 26 Wend. (N. Y.) 192; *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535.

that an agent's authority, whether general or special, is governed to a great extent by the instructions of the principal, and the effect of such instructions has there been considered in a general way; but this subject requires a fuller treatment.

Where an agent has been appointed by a principal, the latter may either enlarge or restrict the agent's authority by instructions given to him; and if a third party has notice of such instructions, the limitations thereby made will be as binding upon him as upon the agent. If, however, notice of such limitations or restrictions is not acquired by the third party they will have no effect, as concerns such party, upon the agent's apparent authority. While the principal has a right to confer upon an agent any authority he desires in respect to things which he may authorize, yet such authority must be so given that knowledge of all of it may be readily acquired by one who desires to deal with such agent. The principal cannot hold the agent out as having a certain authority, general or special, and then put inconsistent secret limitations or restrictions upon it so as to bind third parties who have in good faith relied and acted upon the apparent authority of the agent. The fact that the agent has exceeded his authority as limited by private instructions, will not relieve the principal from liability therefor, if the agent has acted within the authority which he was held out by the principal to possess, and the third person had no notice of any restrictions or limitations, and if they are not properly inferable from the nature of the agent's employment.<sup>56</sup>

<sup>56</sup> *United States*: *Butler v. Maples*, 9 Wall. 766; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. 222.

*Alabama*: *Golding v. Merchant*, 43 Ala. 705; *Lytle v. Bank of Dothan*, 121 Ala. 215; *LaFayette R. Co. v. Tucker*, 124 Ala. 514; *Louisville Coffin Co. v. Stokes*, 78 Ala. 372.

*Arkansas*: *Morton v. Scull*, 23 Ark. 289; *Keith v. Herschberg Optical Co.*, 48 Ark. 138; *Liddell v. Sahline*, 55 Ark. 627.

*Connecticut*: *Paine v. Tillinghast*, 52 Conn. 532.

*Georgia*: *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665; *Armour v. Ross*, 110 Ga. 403.

*Illinois*: *Home L. Ins. Co. v. Pierce*, 75 Ill. 426; *Union M. L. Ins. Co. v. White*, 106 Ill. 67.

*Indiana*: *Cruzan v. Smith*, 41 Ind. 288; *Lake Shore & M. S. R.*

Thus, a purchaser of notes, indorsed in blank, from an agent with full authority to sell, cannot be prejudiced by any violation by the agent of his instructions as to the manner of making the sale, or as to the disposition of the proceeds, where the purchaser had no notice of such instructions.<sup>57</sup>

A subsequent written instruction does not supersede or

*Co. v. Foster*, 104 Ind. 293, 54 Am. Rep. 319; *Cincinnati, I., St. L. & C. R. Co. v. Davis*, 126 Ind. 99.

*Iowa*: *Palmer v. Cheney*, 35 Iowa, 281; *Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa, 276.

*Kentucky*: *Bell v. Offutt*, 10 Bush, 632.

*Maine*: *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427.

*Maryland*: *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Dias v. Chickering*, 64 Md. 348, 54 Am. Rep. 770.

*Massachusetts*: *Lobdell v. Baker*, 1 Metc. 193, 35 Am. Dec. 358; *Williams v. Mitchell*, 17 Mass. 98; *Odiorne v. Maxcy*, 13 Mass. 178; *Brown v. Franklin M. F. Ins. Co.*, 165 Mass. 565, 52 Am. St. Rep. 534.

*Michigan*: *Howry v. Eppinger*, 34 Mich. 29; *Austrian v. Springer*, 94 Mich. 343, 34 Am. St. Rep. 350.

*Mississippi*: *Wilcox v. Routh*, 17 Miss. 476.

*Missouri*: *Gerhardt v. Boatman's Sav. Inst.*, 38 Mo. 60, 90 Am. Dec. 407.

*Nebraska*: *Furnas v. Frankman*, 6 Neb. 429; *Oberne v. Burke*, 30 Neb. 581.

*New Hampshire*: *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Simonds v. Clapp*, 16 N. H. 222.

*New York*: *Munn v. Commission Co.*, 15 Johns. 44, 8 Am. Dec. 219; *Rossiter v. Rossiter*, 8 Wend. 494, 24 Am. Dec. 62; *Commercial Bank v. Kortright*, 24 Wend. 348, 34 Am. Dec. 317; *Quinlan v. Providence Wash. Ins. Co.*, 133 N. Y. 356, 28 Am. St. Rep. 645; *Smith v. Robinson Bros. Lumber Co.*, 88 Hun, 148; *Cox v. Albany Brew. Co.*, 56 Hun, 489.

*Pennsylvania*: *Williams v. Getty*, 31 Pa. 461, 72 Am. Dec. 757; *Adams Exp. Co. v. Schlessinger*, 75 Pa. 246; *Shelhamer v. Thomas*, 7 Serg. & R. 106.

*South Carolina*: *Topham v. Roche*, 2 Hill, 307, 27 Am. Dec. 387; *Carmichael v. Buck*, 10 Rich. Law, 332, 70 Am. Dec. 226; *Whaley v. Duncan*, 47 S. C. 139.

*Tennessee*: *Walker v. Skipwith, Meigs*, 502, 23 Am. Dec. 161; *Murphy v. Southern L. Ins. Co.*, 3 Baxt. 440, 27 Am. Rep. 761.

<sup>57</sup> *Howry v. Eppinger*, 34 Mich. 29.

extinguish a prior parol instruction which it is evident the written instruction was not intended to interfere with or displace.<sup>58</sup>

(b) **In general agencies.**—It is an inherent right in a principal to put any restrictions or limitations he may desire upon the authority of a general agent employed by him, provided he gives notice of such restrictions or limitations to a person dealing with the agent, or provided they are given in such a manner that such person is put upon inquiry as to their extent. As a general agency is not usually accompanied by private instructions the third party is not bound to make inquiry as to them, at least not as to such instructions as do not usually accompany the particular authority, unless there is something that notifies him of their existence, and hence if such circumstances do not otherwise exist it is the principal's duty to see that the third party has notice thereof. But if the party dealing with the agent has notice of the instructions, whether given to him by the principal or acquired from some other source, he should govern his dealings with the agent accordingly, and the principal will not be bound if the agent exceed the restrictions or limitations imposed by such instructions, provided the principal has done nothing to waive them.<sup>59</sup> Thus, an insurance company, as well as an individual, may limit or restrict the powers of its agent, and when such restrictions are known to the person dealing with such agent, the com-

<sup>58</sup> *McLaughlin v. Wheeler*, 1 S. D. 497.

<sup>59</sup> *United States v. Williams*, 1 Ware (175) 173, Fed. Cas. No. 16,724; *American Lead Pencil Co. v. Wolfe*, 30 Fla. 360; *Louisville & N. R. Co. v. Tift*, 100 Ga. 86; *Noble v. Nugent*, 89 Ill. 522; *Catholic Bishop of Chicago v. Troup*, 61 Ill. App. 641; *Longworth v. Conwell*, 2 Blackf. (Ind.) 469; *Graves v. Cord*, 19 Ky. L. R. 1893, 44 S. W. 665; *Russell v. Cox*, 18 Ky. L. Rep. 1087, 38 S. W. 1087; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Barnard v. Wheeler*, 24 Me. 412; *Leathers v. Springfield*, 65 Mo. 507; *Jewett v. Chicago, M. & St. P. R. Co.*, 45 Mo. App. 58; *White v. Massey*, 65 Mo. App. 260; *German Ins. Co. v. Heiduk*, 30 Neb. 288, 27 Am. St. Rep. 402; *Stainer v. Tysen*, 3 Hill (N. Y.) 279; *Quinlan v. Providence Wash. Ins. Co.*, 133 N. Y. 356, 28 Am. St. Rep. 645; *McClure v. Richardson, Rice* (S. C.) 215, 33 Am. Dec. 105; *Wilson v. Commercial Union Assur. Co.*, 51 S. C. 540, 64 Am. St. Rep. 700.

pany is bound only by acts of the agent within the scope of the authority conferred.<sup>60</sup> So if a shipper of goods or freight contracts for the carriage thereof with the general agent of the owner of the vessel, having reason to know that although his agency might be general his authority was restricted in that particular instance, he cannot claim to have the terms of the contract fulfilled as against the principal of such agent.<sup>61</sup>

If, however, private instructions are given to such an agent, of which a third party has no notice, or concerning which he is not put upon inquiry, the agent may bind his principal by all acts done within the general scope of his authority, notwithstanding he has exceeded such private instructions.<sup>62</sup> As to the public, the authority of a general

<sup>60</sup> *German Ins. Co. v. Heiduk*, 30 Neb. 288, 27 Am. St. Rep. 402; *Gladding v. California Farmers' M. F. Ins. Ass'n*, 66 Cal. 6; *Enos v. Sun Ins. Co.*, 67 Cal. 621; *Hartford F. Ins. Co. v. Wilcox*, 57 Ill. 182; *Havens v. Home Ins. Co.*, 111 Ind. 90, 60 Am. Rep. 689; *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216; *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 8 Am. St. Rep. 908; *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414, 15 Am. St. Rep. 275; *Wilkins v. State Ins. Co.*, 43 Minn. 177; *Weldert v. State Ins. Co.*, 19 Or. 261, 20 Am. St. Rep. 809; *Hankins v. Rockford Ins. Co.*, 70 Wis. 1; *Knudson v. Hekla F. Ins. Co.*, 75 Wis. 198.

<sup>61</sup> *Barnard v. Wheeler*, 24 Me. 412.

<sup>62</sup> *England*: *Whitehead v. Tuckett*, 15 East, 400, Wamb. Cas. 277. *United States*: *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. 222; *Russ v. Telfener*, 57 Fed. 973; *Calais Steamboat Co. v. Scudder*, 2 Black, 372; *Butler v. Maples*, 9 Wall. 766.

*Alabama*: *Cawthon v. Lusk*, 97 Ala. 674; *Western Union Tel. Co. v. Cunningham*, 99 Ala. 314; *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176.

*Arkansas*: *Liddell v. Sahline*, 55 Ark. 627.

*Colorado*: *Hamill v. Ashley*, 11 Colo. 180; *Higgins v. Armstrong*, 9 Colo. 38.

*Connecticut*: *Swazey v. Union Mfg. Co.*, 42 Conn. 556; *Willard v. Buckingham*, 36 Conn. 395.

*Georgia*: *Armour v. Ross*, 110 Ga. 403; *Louisville & N. R. Co. v. Tift*, 100 Ga. 86; *Byne v. Hatcher*, 75 Ga. 289; *Thompson v. Douglass*, 64 Ga. 57.

*Illinois*: *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *Hartford F. Ins. Co. v. Farrish*, 73 Ill. 166; *Home L. Ins. Co. v. Pierce*, 75 Ill. 426; *Union Mut. L. Ins. Co. v. White*, 106 Ill. 67.

agent is measured by the usual extent of his general employment, and can be limited by private instructions as to the mode and manner of executing the agency, only where

*Indiana:* Robbins v. Magee, 76 Ind. 381; Cruzan v. Smith, 41 Ind. 288; Commercial Union Assur. Co. v. State, 113 Ind. 331; Talmage v. Bierhauser, 103 Ind. 270.

*Iowa:* City of Davenport v. Peoria Marine & F. Ins. Co., 17 Iowa, 276; Palmer v. Cheney, 35 Iowa, 281.

*Kansas:* Banks v. Everest, 35 Kan. 687; Loomis Mill. Co. v. Vawter, 8 Kan. App. 433.

*Kentucky:* Phoenix Ins. Co. v. Spiers, 87 Ky. 286; Bell v. Offutt, 10 Bush, 632; Givens v. Cord, 44 S. W. 665.

*Maine:* Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96.

*Maryland:* Lister v. Allen, 31 Md. 543, 100 Am. Dec. 78.

*Massachusetts:* Lobdell v. Baker, 1 Metc. 193, 35 Am. Dec. 358; Brown v. Franklin Mut. Fire Ins. Co., 165 Mass. 565, 52 Am. St. Rep. 534; Sanford v. Orient Ins. Co., 174 Mass. 416, 75 Am. St. Rep. 358.

*Michigan:* Austrian v. Springer, 94 Mich. 343, 34 Am. St. Rep. 350; Allis v. Voigt, 90 Mich. 125; Inglish v. Ayer, 79 Mich. 516.

*Minnesota:* Van Santvoord v. Smith, 79 Minn. 316.

*Mississippi:* Wilcox v. Routh, 9 Smedes & M. 476; Potter v. Springfield Mill. Co., 75 Miss. 532.

*Missouri:* Flint-Walling Mfg. Co. v. Ball, 43 Mo. App. 504; New Albany Woolen Mills v. Meyers, 43 Mo. App. 124; Salls v. Miller, 98 Mo. 478; Baker v. Kansas City, St. J. & C. B. R. Co., 91 Mo. 152.

*Nebraska:* Scales v. Paine, 13 Neb. 521; Furnas v. Frankman, 6 Neb. 429.

*New Hampshire:* Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 Am. Rep. 45; Backman v. Charlestown, 42 N. H. 125.

*New Jersey:* Law v. Stokes, 32 N. J. Law, 249, 90 Am. Dec. 655.

*New York:* Commercial Bank of Buffalo v. Kortright, 22 Wend. 348, 34 Am. Dec. 317; Munn v. Commission Co., 15 Johns. 44, 8 Am. Dec. 219; Ruggles v. American Cent. Ins. Co., 114 N. Y. 415, 11 Am. St. Rep. 674.

*Oregon:* Pacific Biscuit Co. v. Dugger, 40 Or. 362.

*Pennsylvania:* Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 Am. Dec. 390; Hubbard v. Tenbrook, 124 Pa. 291, 10 Am. St. Rep. 585; Williams v. Getty, 31 Pa. 461, 72 Am. Dec. 757; Jackson v. Emmens, 119 Pa. 356; Chouteaux v. Leech, 18 Pa. 224, 57 Am. Dec. 602; Anderson v. National Surety Co., 196 Pa. 288.

*South Carolina:* Topham v. Roche, 2 Hill Law, 307, 27 Am. Dec. 387; Wilson v. Commercial Union Assur. Co., 51 S. C. 540, 64 Am.



the parties dealing with him have knowledge thereof.<sup>63</sup> If the instructions impose unusual restrictions or limitations upon the general agent's authority, there is perhaps a greater duty on the principal to see that persons dealing with the agent are notified thereof, than if they were otherwise. For although it is the duty of the third party to ascertain the agent's authority before dealing with him; yet where a general agent is appointed to transact a particular business there are generally certain incidental and implied powers that accompany such appointment, as in similar cases. Of these of course the third party is bound to take notice. But if unusual limitations are put upon such authority, of which the third person is least likely to inquire, they must be imposed in such a manner that they may very readily be noticed, or they must be communicated by the principal, otherwise the principal would be bound by acts done in excess of such instructions, if they are in other respects within the agent's authority. It is not meant by this that the third party is in any manner or to any extent relieved from his duty to ascertain, if possible, the agent's authority; but it is meant that if the person dealing with the agent uses all proper diligence and prudence to ascertain such authority, but by reason of the unusual instructions and the manner in which they are given, he is unable to do so, he will be protected if he deals within the general scope of the authority, as it appears. Of course if there is an evident intention on the part of the principal or agent to keep the instructions secret, the third party will be protected.

(c) **In special agencies.**—A special agent is one appointed for a particular purpose only, and persons who deal with

St. Rep. 700; *Merchants' & Planters' Nat. Bank v. Clifton Mfg. Co.*, 56 S. C. 320.

*Tennessee*: *Walker v. Skipwith*, Meigs, 502, 33 Am. Dec. 161.

*Utah*: *Smith v. Droubay*, 20 Utah, 443.

*Virginia*: *Continental Ins. Co. v. Kasey*, 25 Grat. 268; *Georgia Home Ins. Co. v. Kinnier's Adm'x*, 28 Grat. 88.

*Washington*: *Hall v. Union Cent. Life Ins. Co.*, 23 Wash. 610, 83 Am. St. Rep. 844.

*Wisconsin*: *Young v. Wright*, 4 Wis. 144, 65 Am. Dec. 303.

<sup>63</sup> *Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa, 276.

him are usually put upon notice that his authority is more or less limited by instructions, although his authority to accomplish the particular purpose may, in some cases, be general. If, then, the instructions are known to the third party, or are such as are usually given in similar agencies, the principal will not be bound by any acts or contracts by his agent in excess or violation of such instructions.<sup>64</sup> If the agent is appointed only for a particular purpose, and is invested with limited powers, or, in other words, is a special agent, then it is the duty of persons dealing with such agent to ascertain the extent of his authority, and the principal will not be bound by any act of the agent not warranted expressly by, or by fair and necessary implication from, the terms of the authority delegated to him.<sup>65</sup>

If, however, the instructions are secretly given to such agent respecting the mode and manner of executing his agency, and are not communicated to those with whom he may deal, and are not such as are usually given in similar cases, such instructions are not to be regarded as limitations upon his authority, and the same rule applies as in general agencies; and notwithstanding the agent disregards such instructions, his act, if otherwise within the scope of his agency, will be valid, and bind his principal.<sup>66</sup> "No man is at liberty to send another into the market to buy or sell for him as his agent, with secret instructions as to the manner in which he shall execute his agency, which are not to be communicated to those with whom he is to deal, and then, when his agent has deviated from those instructions, to say

<sup>64</sup> *Fenn v. Harrison*, 3 Term R. 757; *Gorham v. Felker*, 102 Ga. 260; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Quinlan v. Providence Wash. Ins. Co.*, 133 N. Y. 356, 28 Am. St. Rep. 645; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; *Joseph v. Struller*, 25 Misc. (N. Y.) 173; *Breen v. Miehle Printing Press & Mfg. Co.*, 8 Pa. Dist. R. 151, 22 Pa. Co. Ct. R. 275; *Lance v. Barrett*, 1 Hill (S. C.) 204.

<sup>65</sup> *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78.

<sup>66</sup> *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Hatch v. Taylor*, 10 N. H. 538, Wamb. Cas. 291; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Howell v. Graff*, 25 Neb. 130; *Carmichael v. Buck*, 10 Rich Law (S. C.) 332, 70 Am. Dec. 226.

that he was a special agent, that the instructions were limitations upon his authority, and that those with whom he dealt in the matter of his agency acted at their peril, because they were bound to inquire where inquiry would have been fruitless, and to ascertain that of which they were not to have knowledge." If such were the rule, dealing with a special agent would be a hazardous undertaking. "If the principal deemed the bargain a good one, the secret orders would continue sealed; but if his opinion was otherwise, the injunction of secrecy would be removed and the transaction avoided, leaving the party to such remedy as he might enforce against the agent."<sup>67</sup> Thus, where one person employs another to sell a horse, and instructs him to sell him for \$100, if no more can be obtained, but to get the best price he can, and not to sell him for less than that sum, and not to state how low he is authorized to sell, because that will prevent him from obtaining more, such a private instruction can with no propriety be deemed a limitation upon his authority to sell; because it is a secret matter between the principal and agent, which any person proposing to purchase is not to know, at least until the bargain is completed. And if no special injunction of secrecy was made the result would be the same; for from the nature of the case such an instruction, so far as it regards the minimum price, must be intended as a private matter between the principal and agent, not to be communicated to the person to whom he proposed to make a sale, for its obvious tendency would be to defeat the attempt to obtain a greater price, which was the special duty of the agent.<sup>68</sup> So in the case of a person employed to purchase, if the employment be to purchase an article at the best possible price, with private directions that he may give a certain sum but no more. The permission to give this sum, and the direction not to exceed it, are not ordinarily to be communicated to those with whom he negotiates for a purchase, although intended to control the action of the agent himself.<sup>69</sup> It may be otherwise if the principal di-

<sup>67</sup> By Parker, C. J., in *Hatch v. Taylor*, 10 N. H. 538.

<sup>68</sup> *Hatch v. Taylor*, 10 N. H. 538, Wamb. Cas. 296.

<sup>69</sup> *Hatch v. Taylor*, 10 N. H. 538, Wamb. Cas. 297.

rects his agent to offer his horse for sale at the sum of \$100, and to take no less; or to purchase ten bales of cotton, if to be had at a certain sum, and to give no more; for in those cases the whole matter would be open to the knowledge of any one proposing to purchase, or sell, and the direction may stand as part and parcel of, and a limitation upon, the authority itself.<sup>70</sup>

"It is apparent enough that all which may be said to a special agent about the mode in which his agency is to be executed, even if said at the time at which the authority is conferred, or the agency constituted, cannot be regarded as part of the authority itself, or as a qualification or limitation upon it. There may be at all times, upon the constitution of a special agency, and there often is, not only an authority given to the agent, in virtue of which he is to do the act proposed, but also certain communications addressed to the private ear of the agent, although they relate to the manner in which the authority is to be executed, and are intended as a guide to direct its execution. These communications may, to a certain extent, be intended to limit the action of the agent; that is, the principal intends and expects that they shall be regarded and adhered to in the execution of the agency; and should the agent depart from them he would violate the instructions given him by his principal, at the time when he was constituted agent, and execute the act he was expected to perform in a case in which the principal did not intend that it should be done. And yet in such case he may have acted entirely within the scope of the authority given him, and the principal be bound by his acts. This could not be so, if those communications were limitations upon the authority of the agent. It is only because they are not to be regarded as part of the authority given, or a limitation upon that authority, that an act of the agent is valid, although done in violation of them; and the matter depends upon the character of the communications thus made by the principal, and disregarded by the agent."<sup>71</sup> Again it has been said: "It is to be observed that a distinction is

<sup>70</sup> Hatch v. Taylor, 10 N. H. 538, Wamb. Cas. 298.

<sup>71</sup> Hatch v. Taylor, 10 N. H. 538, Wamb. Cas. 295.

to be taken between the limited authority of a special agent, one appointed for a specific purpose, to do certain specified acts, and the private instructions given to such agent. Where the authority is limited in a bona fide manner, and the limitation is to be disclosed by the agent, and is disclosed either with or without inquiry, any departure from such authority or instructions will not bind the principal; but where the authority or instructions given are in the nature of private instructions, and so designed to be, they will not be binding upon the parties dealing with the agent."<sup>72</sup>

It is the duty of third persons dealing with an agent, if the nature of the agency is known, to ascertain the nature and extent of such agent's authority, and the principal is not bound by any act of the agent not warranted expressly by, or fairly and necessarily implied from, the terms of the authority delegated to him.<sup>73</sup> Thus, the depositary of an escrow is a special agent, and the person dealing with him is bound to know the extent of his powers.<sup>74</sup> But if the instructions given to a special agent are of such a nature that they would not be communicated if an inquiry was made, it is not necessary that it should be made.<sup>75</sup>

<sup>72</sup> Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195, 203.

<sup>73</sup> Attwood v. Munnings, 7 Barn. & C. 278, Wamb. Cas. 286; Schimmelpennich v. Bayard, 1 Pet. (U. S.) 264, 290; Ladd v. Franklin, 37 Conn. 53; Chicago & G. W. R. Land Co. v. Peck, 112 Ill. 408; Blackwell v. Ketcham, 53 Ind. 186; Reitz v. Martin, 12 Ind. 306, 74 Am. Dec. 215; Pursley v. Morrison, 7 Ind. 356, 63 Am. Dec. 424; Robinson v. Anderson, 106 Ind. 152; Siebold v. Davis, 67 Iowa, 560; Roberts v. Rumley, 58 Iowa, 301; Lister v. Allen, 31 Md. 543, 100 Am. Dec. 78; Equitable Life Assur. Soc. v. Poe, 53 Md. 28; Baltimore v. Reynolds, 20 Md. 1, 83 Am. Dec. 535; Snow v. Perry, 26 Mass. 542; Bliss v. Clark, 82 Mass. 60; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Hatch v. Taylor, 10 N. H. 547, Wamb. Cas. 291; Denning v. Smith, 3 Johns. Ch. (N. Y.) 344; Stainer v. Tysen, 3 Hill (N. Y.) 279; Joseph v. Struller, 25 Misc. (N. Y.) 173; Biggs v. Insurance Co., 88 N. C. 141; Barling v. Pierce, 5 Watts & S. (Pa.) 548, 40 Am. Dec. 534; Cleveland v. Pearl, 63 Vt. 127, 25 Am. St. Rep. 748; White v. Langdon, 30 Vt. 599; Sprague v. Train, 34 Vt. 150.

<sup>74</sup> Chicago & G. W. R. Land Co. v. Peck, 112 Ill. 408.

<sup>75</sup> Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Hatch v. Taylor, 10 N. H. 538; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96.

(d) **Exception to general rule—In case of emergency.**—Although as a general rule, a principal is bound only when the agent acts within instructions which have been given to him, and of which the third party has notice or is put upon inquiry; yet the circumstances in some cases may be such that, to strictly comply with this rule, would be detrimental to the purposes for which the agent is employed. In such cases an exception to the rule is made. Thus, if through some unexpected emergency, or unforeseen event, without any fault on the part of the agent, it becomes necessary that action should at once be taken in order to protect the principal's interest, and there is no time to communicate with the principal, the agent will be justified if he in good faith and with due prudence and care, pursues the course which he thinks best under the circumstances, and the principal will be bound thereby, although such course is contrary to his instructions, and although, as it afterwards appears, another course would have been more beneficial to the principal.<sup>76</sup> Thus, where an agent is directed to get a certain physician, but, being unable to procure him, employs another instead, the emergency is such as to bind the principal, though he told the latter physician when he arrived at his destination that his services were not required, as the trouble was over.<sup>77</sup> So the clerk in a country store has authority to employ an attorney for his absent employer, to defeat a fraudulent attachment of the goods of the latter's debtor, and such employment, when made in a proper case, will bind the employer of such clerk.<sup>78</sup>

<sup>76</sup> *Forrestier v. Bordman*, 1 Story, 43, Fed. Cas. No. 4,945; *Williams v. Shackelford*, 16 Ala. 318; *Judson v. Sturges*, 5 Day (Conn.) 566; *Greenleaf v. Moody*, 13 Allen (Mass.) 363; *Gould v. Rich*, 7 Metc. (Mass.) 538; *Bartlett v. Sparkman*, 95 Mo. 136, 6 Am. St. Rep. 35; *Drummond v. Wood*, 2 Caines (N. Y.) 310; *Jervis v. Hoyt*, 2 Hun (N. Y.) 637; *Harter v. Blanchard*, 64 Barb. (N. Y.) 617; *Dusar v. Perit*, 4 Bin. (Pa.) 361; *Foster v. Smith*, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604; *Bergstrom v. Franklin*, 74 Tex. 38; *Bernard v. Maury*, 20 Grat. (Va.) 434.

<sup>77</sup> *Bartlett v. Sparkman*, 95 Mo. 136, 6 Am. St. Rep. 35.

<sup>78</sup> *Davis v. Waterman*, 10 Vt. 526, 33 Am. Dec. 216.

## § 207. Effect of custom or usage on authority.

(a) **In general.**—It is one of the fundamental principles of agency that when a principal delegates to his agent authority to do certain acts, the authority conferred includes and carries with it the power to employ all the usual and necessary means of executing it in such manner as to accomplish the objects which the principal had in view in creating the agency.<sup>79</sup> From this it follows that where the principal has given his agent authority to transact a certain business, in respect to which there exists a distinct and well known custom or usage, the law will presume, in the absence of anything to the contrary, that the principal intended the business to be conducted according to such general custom or usage, and he will not be relieved from liability by reason of the fact that the agent acted contrary to instructions, of which the third party had no knowledge, if the agent acted according to such custom or usage.<sup>80</sup> And this rule is applicable

<sup>79</sup> Post, § 209(b).

<sup>80</sup> *Union Stock Yard & Transit Co. v. Mallory*, 157 Ill. 554, 48 Am. St. Rep. 341; *Pickering v. Busk*, 15 East, 38, Wamb. Cas. 272; *Whitehead v. Tuckett*, 15 East, 400, Wamb. Cas. 277; *Minor v. Mechanics Bank*, 1 Pet. (U. S.) 46; *Cawthon v. Lusk*, 97 Ala. 674; *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196; *Willard v. Buckingham*, 36 Conn. 395; *Horan v. Strachan*, 86 Ga. 408, 22 Am. St. Rep. 471; *Phillips v. Moir*, 69 Ill. 155; *Bailey v. Bensley*, 87 Ill. 556; *Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392; *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *Kaufman v. Farley Mfg. Co.*, 78 Iowa, 679, 16 Am. St. Rep. 462; *Davenport v. Peoria Marine & F. Ins. Co.*, 17 Iowa, 276; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *Smythe v. Parsons*, 37 Kan. 79; *Byrne v. Schwing*, 6 B. Mon. (Ky.) 199; *Randall v. Kehlor*, 60 Me. 37; *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 54; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; *Brown v. Franklin M. F. Ins. Co.*, 165 Mass. 565, 52 Am. St. Rep. 534; *Austrian v. Springer*, 94 Mich. 343, 34 Am. St. Rep. 350; *Pennell v. Delta Transp. Co.*, 94 Mich. 247; *Palmer v. Hatch*, 46 Mo. 585; *Kircher v. Conrad*, 9 Mont. 191, 18 Am. St. Rep. 731; *McKee v. Wild*, 52 Neb. 9; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Smith v. Tracy*, 36 N. Y. 79; *McKinstry v. Pearsall*, 3 Johns. (N. Y.) 319; *Frank v. Jenkins*, 22 Ohio St. 597; *Adams v. Pittsburgh Ins. Co.*, 95 Pa. 348, 40 Am. Rep. 663; *Wil-*

whether the principal in fact knows of the custom or not, where it is a general one.<sup>81</sup>

This doctrine has been stated as follows: "Where a mercantile agency is to be executed at a particular place, the principal who employs the agent is presumed to consent that he may execute it, in the absence of particular instructions, according to the general customs and usages relating to that kind of trade or business, whatever it may be. The law implies that he gives his consent for his agent to act as all other similar agents, who are honest and diligent, are accustomed to do, and it is immaterial as a general rule, whether the principal is informed as to such customs and usages or not."<sup>82</sup>

Whether or not certain acts are the usual or customary ones under the circumstances is a question for the jury to determine, under proper instructions from the court.<sup>83</sup>

**(b) Requisites of such custom or usage.**—There are certain requisites, however, which such usage must possess in order that it may have the effect above described. It must be reasonable,<sup>84</sup> not in contravention of positive law,<sup>85</sup> and it must

*Hams v. Getty*, 31 Pa. 461, 72 Am. Dec. 757; *McMasters v. Pennsylvania R. Co.*, 69 Pa. 374, 8 Am. Rep. 264; *Strong v. Stewart*, 56 Tenn. 137; *Hollingsworth v. Holshausen*, 25 Tex. 628; *State v. Chilton*, 49 W. Va. 453; *Pickert v. Marston*, 68 Wis. 465, 60 Am. Rep. 876; *Hibbard v. Peek*, 75 Wis. 619; *Gehl v. Milwaukee Produce Co.*, 105 Wis. 573.

<sup>81</sup> *Union Stock Yard & Transit Co. v. Mallory*, 157 Ill. 554, 48 Am. St. Rep. 341; *Austrian v. Springer*, 94 Mich. 343, 34 Am. St. Rep. 350; *Pennell v. Delta Transp. Co.*, 94 Mich. 247; *Bailey v. Bensley*, 87 Ill. 556; *Guesnard v. Louisville & N. R. Co.*, 76 Ala. 453.

<sup>82</sup> *Guesnard v. Louisville & N. R. Co.*, 76 Ala. 453.

<sup>83</sup> *Alabama Great S. R. Co. v. Hill*, 76 Ala. 303; *Woodford v. McClenahan*, 9 Ill. 85; *Williamson v. Canaday*, 25 N. C. (3 Ired.) 349; *Peters v. Farnsworth*, 15 Vt. 155, 40 Am. Dec. 671; *Roche v. Pennington*, 90 Wis. 107.

<sup>84</sup> *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756; *Smythe v. Parsons*, 37 Kan. 79; *Knowles v. Dow*, 22 N. H. 387, 55 Am. Dec. 163; *Wadley v. Davis*, 63 Barb. (N. Y.) 500; *Barksdale v. Brown*, 1 Nott & McC. (S. C.) 517, 9 Am. Dec. 720.

<sup>85</sup> *Vermilye v. Adams Exp. Co.*, 21 Wall. (U. S.) 139; *Western Union Cold Storage Co. v. Winona Produce Co.*, 94 Ill. App. 618; *Id.*, 197 Ill. 457; *Smythe v. Parsons*, 37 Kan. 79; *Raisin v. Clark*,



be so well established and generally known, that the principal will be presumed to have had knowledge of it when he appointed the agent to transact the business, in respect to which the custom exists.<sup>86</sup> To make a custom or usage obligatory on the parties, it should be so well settled that persons engaged in the trade must be considered as contracting in reference to it. No particular period of time is requisite to the establishment of such a usage. The true test is that it has existed a sufficient length of time, not only to have become generally known to the dealers who are to be affected by it, but also to warrant the presumption that contracts are made with reference to it.<sup>87</sup> If, however, the custom is merely a local or particular one, the principal must be shown to have had actual knowledge thereof, and he may escape liability by showing that he did not have notice of such custom.<sup>88</sup> Thus, evidence showing, among other things, that it was the practice of a considerable num-

41 Md. 158, 20 Am. Rep. 66; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756; *Day v. Holmes*, 103 Mass. 306; *Healey v. Mannheimer*, 74 Minn. 240; *McKee v. Wild*, 52 Neb. 9; *Wadley v. Davis*, 63 Barb. (N. Y.) 500; *Atkinson v. Truesdell*, 127 N. Y. 230; *Minnesota Cent. R. Co. v. Morgan*, 52 Barb. (N. Y.) 217; *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81; *Barnes v. Zettlemoyer*, 25 Tex. Civ. App. 468; *State v. Chilton*, 49 W. Va. 453.

<sup>86</sup> *Guesnard v. Louisville & N. R. Co.*, 76 Ala. 453; *Horan v. Strachan*, 86 Ga. 408, 22 Am. St. Rep. 471; *Citizens' Bank v. Graf-fin*, 31 Md. 507, 1 Am. Rep. 66; *Porter v. Hills*, 114 Mass. 106; *Fowler v. Pickering*, 119 Mass. 33; *Austrian v. Springer*, 94 Mich. 343, 34 Am. St. Rep. 350; *Pennell v. Delta Transp. Co.*, 94 Mich. 247; *Milwaukee & W. Inv. Co. v. Johnston*, 35 Neb. 554; *Smith v. Wright*, 1 Caines (N. Y.) 43, 2 Am. Dec. 162; *Adams v. Pittsburgh Ins. Co.*, 95 Pa. 348, 40 Am. Rep. 662; *Hibbard v. Peek*, 75 Wis. 619.

<sup>87</sup> *Adams v. Pittsburgh Ins. Co.*, 95 Pa. 348, 40 Am. Rep. 663; *Smith v. Wright*, 1 Caines (N. Y.) 43, 2 Am. Dec. 162; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Id.*, 73 Ala. 446; *Shields v. Kansas City S. B. R. Co.*, 87 Mo. App. 637.

<sup>88</sup> *Barnard v. Kellogg*, 10 Wall. (U. S.) 383; *Horan v. Strachan*, 86 Ga. 408, 22 Am. St. Rep. 471; *Caldwell v. Dawson*, 4 Metc. (Ky.) 121; *Fisher v. Sargent*, 10 Cush. (Mass.) 250; *Fowler v. Pickering*, 119 Mass. 33; *Byrne v. Massasolt Packing Co.*, 137 Mass. 313, *Huffc. Cas.* 211; *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407, 413; *Higgins v. Moore*, 34 N. Y. 417; *Bradley v. Wheeler*, 44 N. Y. 500.

ber of houses in the hardware business to give their traveling salesmen authority to agree to pay commissions to third parties for procuring orders, is held not to establish a usage in the hardware business so uniform and long continued as to warrant the court in assuming that the parties contracted with reference thereto or that the plaintiff's traveling salesman had authority to bind his principal to pay such commissions.<sup>89</sup>

The object of admitting evidence of such usages is to explain mercantile expressions and to add incidents, or to annex usual terms and conditions, but such usage cannot be effective if it is inconsistent with the relation existing between the principal and agent;<sup>90</sup> or if it is contrary or repugnant to the terms of the contract between them.<sup>91</sup> Nor can a custom or usage be shown, as between the principal and his agent, or as between the principal and a third party having notice of them, to contravene the positive instructions of the principal.<sup>92</sup> Thus, where an agent is ordered to "sell for cash, or not on credit," and he sold and delivered the goods to a person who promised to pay for them in a few days, which promise he renewed from time to time. In an action by the principal against the agent for the value of the goods, it was held that the agent could not show, in defense, a custom by which such sale was considered a cash sale.<sup>93</sup> Nor

<sup>89</sup> *Hibbard v. Peek*, 75 Wis. 619.

<sup>90</sup> *Robinson v. Mollett*, L. R. 7 H. L. 802, Wamb. Cas. 908; *Allen v. St. Louis Bank*, 120 U. S. 20.

<sup>91</sup> *Randall v. Smith*, 63 Me. 105, 18 Am. Rep. 200; *Robinson v. Mollett*, L. R. 7 H. L. 802, Wamb. Cas. 908; *Brown v. Byrne*, 3 El. & Bl. 703, 715; *Western Union Cold Storage Co. v. Winona Produce Co.*, 197 Ill. 457; *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463; *Meloche v. Chicago, M. & St. P. R. Co.*, 116 Mich. 69; *Atkinson v. Truesdell*, 127 N. Y. 230; *Rogers v. Woodruff*, 23 Ohio St. 632, 13 Am. Rep. 276; *State v. Chilton*, 49 W. Va. 453.

<sup>92</sup> *Barksdale v. Brown*, 1 Nott & McC. (S. C.) 517, 9 Am. Dec 720; *Wanless v. McCandless*, 38 Iowa, 20; *Clark v. Van Northwick*, 1 Pick. (Mass.) 343; *Day v. Holmes*, 103 Mass. 306; *Hutchings v. Ladd*, 16 Mich. 493; *Greenstine v. Borchard*, 50 Mich. 434, 45 Am. Rep. 51; *Leland v. Douglass*, 1 Wend. (N. Y.) 490; *Catlin v. Smith*, 24 Vt. 85; *Osborne v. Rider*, 62 Wis. 235; *Hall v. Storrs*, 7 Wis. 253.

<sup>93</sup> *Catlin v. Smith*, 24 Vt. 85.

can the usage, if unknown to the principal, give the agent authority to enter into an invalid contract.<sup>94</sup>

**§ 208. Apparent scope of authority—In general.**

It has been seen that as a general rule a principal is bound by all acts done or contracts made by his agent within the apparent scope of his authority. The question then presents itself, as to what is meant by "apparent scope of authority." To what extent may an agent go, or within what limits is he restrained so as to be acting within the apparent scope of his authority? No definite rule can be stated as to this, for what may be apparent authority in one case may not be in another. It is believed, however, that the following is the rule in the greater number of cases: The apparent scope of an agent's authority is that authority which a reasonably prudent man, induced by the principal's acts or conduct, and in the exercise of reasonable diligence and sound discretion, under similar circumstances with the party dealing with the agent, and with like knowledge, would

<sup>94</sup> *Perry v. Barnett*, 15 Q. B. Div. 388. In *Forrestier v. Bordman*, 1 Story, 43, Fed. Cas. No. 4,945, it was said: "I take it to be clear that if, by some sudden emergency or supervening necessity, or other unexpected event, it becomes impossible for the supercargo to comply with the exact terms of his instructions, or a literal compliance therewith would frustrate the objects of the owner, and amount to a total sacrifice of his interests, it becomes the duty of the supercargo, under such circumstances, to do the best he can in the exercise of a sound discretion, to prevent a total loss to his owner.

\* \* \* He becomes, in such a case, an agent from necessity for the owner. Suppose, for example, that a cargo of a perishable nature is shipped on a voyage, and is to be carried to a particular port of destination, and there sold, and the ship should in the course of the voyage meet with a storm, which should disable her, and she should go into a port of necessity to refit; and that the cargo should be found so much damaged that the whole must perish before her arrival at the port of destination; would not the supercargo have a right to sell it there, in order to prevent a total loss, although no such case was contemplated in his orders? \* \* \* In all voyages of this sort there is an implied authority to act for the interest and benefit of the owner in all cases of unforeseen necessity and emergency created by operation and intendment of law."

naturally suppose the agent to have.<sup>95</sup> The question is not what was the authority actually given, but what was the third party, dealing with the agent, and induced by the principal's acts, justified in believing the authority to be.<sup>96</sup> The authority of an agent must be determined by the nature of his business and the apparent scope of his employment therein. It cannot be narrowed by private and undisclosed instructions, unless there is something in the nature of the business or the circumstances of the case to indicate that the agent is acting under special instructions or limited powers.<sup>97</sup>

The distinction, between the apparent powers of an agent and his acts apparently but not really within his powers, is not always noticed. "An agent's apparent powers are those which are conferred by the terms of his appointment, notwithstanding secret instructions, or those with which he is clothed by the character in which he is held out to the world, although not strictly within his commission. Whatever is done under an authority thus manifested is actually within the authority as to third persons, and the principal is bound for that reason. But it is obvious that an agent may clothe his act with all the indicia of authority, and yet the act itself may not be within the real or apparent power. The appearance of the power is one thing, and for that the principal is responsible. The appearance of the act is another, and for that, if false, I think the remedy is against the agent only."<sup>98</sup>

As to what is or what is not an agent's apparent scope of authority in any particular case is a question either of

<sup>95</sup> See Huffcut, Ag. § 103.

<sup>96</sup> *Austrian v. Springer*, 94 Mich. 343, 34 Am. St. Rep. 354; *Inglish v. Ayer*, 79 Mich. 516; *Home Life Ins. Co. v. Pierce*, 75 Ill. 426; *St. Louis & M. Packet Co. v. Parker*, 59 Ill. 23; *First Nat. Bank v. Farmers' & Merchants' Bank*, 56 Neb. 149; *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5; *Griggs v. Selden*, 58 Vt. 561; *Dodge v. McDonnell*, 14 Wis. 553.

<sup>97</sup> *Brown v. Franklin M. F. Ins. Co.*, 165 Mass. 565, 52 Am. St. Rep. 534; *Markey v. Mutual Ben. L. Ins. Co.*, 103 Mass. 78; *Nicholson v. Golden*, 27 Mo. App. 132. Ante, § 206.

<sup>98</sup> *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 633.

law or fact, depending upon the facts in the case. If the authority is conferred upon the agent by a written instrument or if the facts of the case are undisputed, what is the agent's apparent scope of authority is a question of law for the court to determine.<sup>99</sup> If, however, such authority is not given to the agent by a written instrument, and the facts of the case are disputed, and the legal effect of such facts, when determined is known, it is then a question of fact for the jury to determine;<sup>100</sup> and in some cases it may be a mixed question of law and fact, it being a question of fact as to the facts of the case, and a question of law as to the legal effect of such facts.<sup>101</sup> Thus, in reference to the elements hereafter considered, it may be said that it is a question of law as to what power is expressly conferred upon an agent; because the terms are express and the only question is, as to what power is given by such terms. So the same is true of the incidental powers, as in determining them the same facts are construed as for actual powers. In reference to the third element, or powers annexed by custom, it is a mixed question of law and fact. It is a question of fact as to the existence of such custom or usage, and a question of law as to its legal effect. And as to what powers are reasonably inferred from the principal's conduct is usually a question of fact for the jury. Although these are the usual rules in each of such cases, the circumstances of a particular case may call into question one of the other rules.

### § 209. Elements of apparent scope of authority.

An agent's apparent scope of authority is composed of several elements, which are generally present in such authority, although it is not essential that all the elements be present in every case, as there may be some cases, in respect to

<sup>99</sup> *Gullick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. 498, 78 Am. Dec. 390.

<sup>100</sup> *Davies v. Eastern Steamboat Co.*, 94 Me. 379; *Holt v. Schneider*, 57 Neb. 523; *Franklin Bank Note Co. v. Mackey*, 83 Hun (N. Y.) 511; *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516.

<sup>101</sup> *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516.

which no custom or usage exists. The elements that go to make up the apparent scope of authority are: (1) Express powers, or such powers as are expressly conferred upon the agent by the principal; (2) incidental powers, or such powers as are necessarily and reasonably incidental to the express powers; (3) powers annexed by custom or usage to the express powers; (4) powers reasonably inferred, or such powers as one may naturally imply from the principal's conduct. Of these elements the first three may be called actual powers, because they are powers that are expressly conferred, or naturally go with such powers; and the fourth apparent powers, because they are not expressly conferred, but are such as appear, from the principal's conduct, to be conferred.

(a) **Express powers.**—The most important element of apparent scope of authority is obviously the power expressly conferred upon the agent by his principal. An agent of course has power to do all acts which his principal expressly authorizes him to do. The principal having authorized the acts they are of the same effect as if done by him in person. This is but an application of the doctrine, *qui facit per alium, facit per se*. But if the agent exceeds his express powers, the principal will not be bound, in the absence of other circumstances, as shall presently be seen. The fact of express powers being an element of an agent's apparent scope of authority is so evident that it needs no further discussion.

(b) **Incidental powers.**—In the absence of some fact or circumstance to the contrary, every express power carries with it, as an incident, all the powers which are necessary, proper, usual and reasonable, as a means of effectuating the purposes for which the original power was conferred.<sup>102</sup> This prin-

<sup>102</sup> *England*: Howard v. Baillie, 2 H. Bl. 618, Wamb. Cas. 261; Pole v. Leask, 28 Beav. 562.

*United States*: Le Roy v. Beard, 8 How. 451.

*Alabama*: Tennessee River Transp. Co. v. Kavanaugh, 101 Ala. 1.

*California*: Goldtree v. Swinford, 74 Cal. 586.

*Colorado*: Arthur v. Gard, 3 Colo. App. 134.

*Connecticut*: Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384.

ciple is founded on the manifest intention of the party conferring such authority, and is in furtherance of such intention. And the rule applies alike to both general and

*Georgia*: Byne v. Hatcher, 75 Ga. 289; Merchants' Bank v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665.

*Illinois*: German F. Ins. Co. v. Grunert, 112 Ill. 68; Springfield Engine & Threshing Co. v. Green, 25 Ill. App. 106; Meister v. Cleveland Dryer Co., 11 Ill. App. 227.

*Indiana*: Shackman v. Little, 87 Ind. 181.

*Iowa*: Kaufman v. Farley Mfg. Co., 78 Iowa, 679, 16 Am. St. Rep. 462.

*Kansas*: Bohart v. Oberne, 36 Kan. 289.

*Kentucky*: Hardee v. Hall, 12 Bush, 327; Vanada v. Hopkins, 1 J. J. Marsh. 285, 19 Am. Dec. 92.

*Louisiana*: Farrar v. Duncan, 29 La. Ann. 126; Joyce v. Duplessis, 15 La. Ann. 242, 77 Am. Dec. 185.

*Maine*: Stanwood v. Laughlin, 73 Me. 112; Kidder v. Inhabitants of Knox, 48 Me. 551.

*Massachusetts*: Valentine v. Piper, 22 Pick. 85, 33 Am. Dec. 715; Simonds v. Heard, 23 Pick. 120; Wood v. Goodridge, 6 Cush. 117, 52 Am. Dec. 771; Hawks v. Locke, 139 Mass. 205.

*Michigan*: Star Line v. Van Vliet, 43 Mich. 364; Michigan Slate Co. v. Iron Range & H. B. R. Co., 101 Mich. 14.

*Minnesota*: Harris v. Johnston, 54 Minn. 177, 40 Am. St. Rep. 312.

*Missouri*: Barns v. Hannibal, 71 Mo. 449; State v. Gates, 67 Mo. 139.

*Nevada*: Sacalaris v. Eureka & P. R. Co., 18 Nev. 155, 51 Am. Rep. 737.

*New Hampshire*: Backman v. Charlestown, 42 N. H. 125; Deming v. Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 467.

*New Jersey*: Law v. Stokes, 32 N. J. Law, 249, 90 Am. Dec. 655.

*New York*: Benninghoff v. Agricultural Ins. Co., 93 N. Y. 495; Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Sandford v. Handy, 23 Wend. 260; Anderson v. Coonley, 21 Wend. 279.

*North Carolina*: Huntley v. Mathias, 90 N. C. 101, 47 Am. Rep. 516.

*Ohio*: Layet v. Gano, 17 Ohio, 466.

*Pennsylvania*: Peck v. Harriott, 6 Serg. & R. 149, 9 Am. Dec. 415; Williams v. Getty, 31 Pa. 461, 72 Am. Dec. 757.

*South Carolina*: Boyd v. Satterwhite, 10 S. C. 45.

*Tennessee*: Franklin v. Ezell, 1 Sneed, 497; Strong v. Stewart, 9 Helsk. 137.

*Texas*: Missouri Pac. R. Co. v. Simons, 6 Tex. Civ. App. 621; McAlpin v. Cassidy, 17 Tex. 449; Taylor v. Hudgins, 42 Tex. 244.

special agents, unless the agent's power expressly provides the manner in which the particular act shall be done.<sup>103</sup> Whatever attributes properly belong to the character bestowed will be presumed to exist, and they cannot be cut off by private instructions of which those who deal with the agent are ignorant. Among those attributes is the power to do all that is usual and necessary to accomplish the object for which the agency was created.<sup>104</sup> Thus, a power, without restriction, to sell and convey real estate gives authority to the agent to contract for a conveyance with general warranty binding on the principal, where under the circumstances this is a common and usual mode of assurance;<sup>105</sup> but it does not give him authority to sell the land on credit without retaining a lien by contract for the security of the purchase money.<sup>106</sup> So a traveling salesman and collecting agent may hire a horse and carriage for the purpose of carrying out his agency, and the principal will be liable for the hire thereof.<sup>107</sup> So if the transaction of a business carried on by an agent for his principal requires the exercise by the agent of the power to borrow money in order to carry it on, then such power is impliedly conferred as an incident to the employment; but the mere fact that the act proposed is more convenient or advantageous, or more effectual in the transaction of the business provided for, does not afford a sufficient ground for the inference of such a power. It must be practically indispensable to the execution of the duties really delegated, in order to justify its

*West Virginia: Piercy v. Hedrick*, 2 W. Va. 453, 98 Am. Dec. 774.

<sup>103</sup> See cases cited above, note 102.

<sup>104</sup> *Austrian v. Springer*, 94 Mich. 343, 34 Am. St. Rep. 354; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459, 462.

<sup>105</sup> *Schultz v. Griffin*, 121 N. Y. 294, 18 Am. St. Rep. 825; *Le Roy v. Beard*, 8 How. (U. S.) 451; *Peters v. Farnsworth*, 15 Vt. 155, 40 Am. Dec. 671; *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92.

<sup>106</sup> *Henderson v. Beard*, 51 Ark. 483.

<sup>107</sup> *Bentley v. Doggett*, 51 Wis. 224, 37 Am. Rep. 827; *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516. Compare *Brockway v. Mullin*, 46 N. J. Law, 448, 50 Am. Rep. 442. And see post, § 244.



inference from the original employment.<sup>108</sup> A general agent, with authority to make collections of cash and notes for his principal, has power to direct an attorney at law to bring suit, and to give a bond of indemnity in the name of such principal.<sup>109</sup> And a power to discount bills carries with it the power to indorse them.<sup>110</sup> Authority given to an agent to open a new channel for the purpose of turning the course of a stream will include authority to erect a dam or breakwater across the old bed of the stream as a means of expediting or accomplishing the work.<sup>111</sup> But the agent of a shipper of stock is not, by virtue of such agency, authorized to contract with the carrier fixing the value of the stock.<sup>112</sup>

Of course the above rule does not apply where the inference of such powers is expressly excluded by the instrument conferring the authority, or by the circumstances of the business to which the authority relates.<sup>113</sup>

The nature and extent of such incidental powers, oftentimes turn upon very nice considerations of actual usage, or implications of law, and it is sometimes difficult to apply the true rule. "Incidental powers are generally derived from the nature and purposes of the particular agency, or from the particular business or employment, or from the character of the agent himself. Sometimes the powers are determined by mere inference of law; in other cases by matter of fact; in others by inference of fact; and in others still, to determine them becomes a question of mixed law and fact."<sup>114</sup>

<sup>108</sup> Consolidated Nat. Bank v. Pacific Coast Steamship Co., 95 Cal. 1, 29 Am. St. Rep. 85; Bickford v. Menier, 107 N. Y. 490; Hurley v. Watson, 68 Mich. 531; Heath v. Paul, 81 Wis. 532. And see post, § 283.

<sup>109</sup> Swartz v. Morgan, 163 Pa. 195, 43 Am. St. Rep. 786; Morgan v. Brown, 12 La. Ann. 159.

<sup>110</sup> Merchants' Bank v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665. And see post, § 269.

<sup>111</sup> Barns v. City of Hannibal, 71 Mo. 449.

<sup>112</sup> Southern Pac. R. Co. v. Maddox, 75 Tex. 300.

<sup>113</sup> Collins v. Cooper, 65 Tex. 460.

<sup>114</sup> Huntley v. Mathias, 90 N. C. 101, 47 Am. Rep. 516; Gilbraith v. Lineberger, 69 N. C. 145; Katzenstein v. Raleigh & G. R. Co., 84

(c) **Powers annexed by custom or usage.**—Besides the express and incidental powers, established custom or usage oftentimes to a great extent adds other powers to the agent's express authority. Thus, it has been seen that when a principal appoints an agent for a certain purpose, in respect to which there are certain well established customs or usages, the law will presume, in the absence of any circumstances showing the contrary, that the principal had such usages in view when he appointed the agent, and if the latter transacts the business according to such customs or usages the principal will be bound thereby.<sup>115</sup> The general rules as to the requisites of a valid usage have been considered in a previous section.<sup>116</sup> Thus, by custom or usage, power is given to a factor to sell on credit,<sup>117</sup> or to an agent to warrant goods sold by him for his principal,<sup>118</sup> or to cashiers of banks to borrow money.<sup>119</sup> Whether or not powers have been given to an agent by custom is a question of mixed law and fact.

(d) **Powers reasonably inferred.**—Another one of the elements of the agent's apparent scope of authority, and perhaps one of the most important, is where the principal has, by his conduct, induced another to believe that the agent possessed certain authority, as where he has held him out as having certain authority, or where he has stood by and permitted the agent to hold himself out as having certain authority, or where such authority may be presumed from the course of dealing between the principal and his agent. If, in such cases, the third party has acted in good faith, with due care and precaution, and has relied upon the

N. C. 688; *Planters' & Farmers' Nat. Bank v. First Nat. Bank*, 75 N. C. 534; *Williams v. Windley*, 86 N. C. 107.

<sup>115</sup> Ante, § 207(a).

<sup>116</sup> Ante, § 207(b).

<sup>117</sup> *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Greely v. Bartlett*, 1 Me. 178, 10 Am. Dec. 54; *Pinkham v. Crocker*, 77 Me. 563; *Robertson v. Livingston*, 5 Cow. (N. Y.) 473.

<sup>118</sup> Post, § 242.

<sup>119</sup> Post, § 284. *Barnes v. Ontario Bank*, 19 N. Y. 152; *Crain v. First Nat. Bank*, 114 Ill. 516.

authority which he is led to believe the agent possessed, such authority will be conclusively presumed, and the principal will be estopped to deny that the agent has such authority.<sup>120</sup> If, through inattention or otherwise, a principal

<sup>120</sup> *England*: *Thompson v. Bell*, 10 Exch. 10; *Brockelbank v. Sugrue*, 5 Car. & P. 21. Compare *Spooner v. Browning* [1898] 1 Q. B. Div. 528.

*United States*: *Bronson's Ex'r v. Chappell*, 12 Wall. 681, *Huffc. Cas.* 101.

*Alabama*: *Gibson v. Snow Hardware Co.*, 94 Ala. 346.

*Connecticut*: *Eagle Bank v. Smith*, 5 Conn. 71, 13 Am. Dec. 37.

*Georgia*: *Weaver v. Ogletree*, 39 Ga. 586.

*Illinois*: *Thurber v. Anderson*, 88 Ill. 167; *St. Louis & M. Packet Co. v. Parker*, 59 Ill. 23.

*Indiana*: *Pursley v. Morrison*, 7 Ind. 356, 63 Am. Dec. 424; *Croy v. Busenbark*, 72 Ind. 48; *Over v. Schiffing*, 102 Ind. 191.

*Kansas*: *Banks v. Everest*, 35 Kan. 687.

*Louisiana*: *Meyer v. King*, 29 La. Ann. 567.

*Maryland*: *Rimmey v. Getterman*, 63 Md. 424.

*Massachusetts*: *Commonwealth v. Holmes*, 119 Mass. 195.

*Michigan*: *Lyell v. Sanbourn*, 2 Mich. 139; *Sorrell v. Brewster*, 1 Mich. 373; *Grover & B. Sew. Mach. Co. v. Polhemus*, 34 Mich. 247; *Connecticut Mut. L. Ins. Co. v. Bulte*, 45 Mich. 113.

*Mississippi*: *Vicksburg & M. R. Co. v. Ragsdale*, 54 Miss. 200.

*Missouri*: *Kiley v. Forsee*, 57 Mo. 390; *Summerville v. Hannibal & St. J. R. Co.*, 62 Mo. 391; *Rice v. Groffman*, 56 Mo. 434; *Fanning v. Cobb*, 20 Mo. App. 577.

*Nebraska*: *Johnston v. Milwaukee & W. Inv. Co.*, 46 Neb. 480; *First Nat. Bank v. Farmers' & Merchants' Bank*, 56 Neb. 149; *Lebanon Sav. Bank v. Henry* (Neb.) 89 N. W. 169.

*New Jersey*: *Columbia Del. Bridge Co. v. Geisse*, 38 N. J. Law, 39.

*New York*: *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *Hanover Nat. Bank v. American Dock & Trust Co.*, 148 N. Y. 612, 51 Am. St. Rep. 721; *Martin v. Niagara Falls Paper Mfg. Co.*, 122 N. Y. 165; *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 N. Y. 195, 60 Am. Rep. 440; *Bank of New York v. American Dock & Trust Co.*, 143 N. Y. 559.

*Pennsylvania*: *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. 498, 78 Am. Dec. 390; *Thomas v. Cummiskey*, 108 Pa. 354; *Hubbard v. Tenbrook*, 124 Pa. 291.

*Texas*: *Collins v. Cooper*, 65 Tex. 460.

*Vermont*: *Fay v. Richmond*, 43 Vt. 25; *Walsh v. Pierce*, 12 V. 130; *Tier v. Lampson*, 35 Vt. 179, 82 Am. Dec. 634; *Griggs v. Selden*, 58 Vt. 561.

*Virginia*: *Hooe v. Oxley*, 1 Wash. 19, 1 Am. Dec. 425.

suffers his agent to act beyond his actual authority without objection, he is bound to those who are not aware of any want of authority, to the same extent as if the power had been directly conferred.<sup>121</sup> Thus, "if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he, with such belief, does act in that way to his damage, the first is estopped from denying that the facts were as represented."<sup>122</sup> Where a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped, as against such third person, from denying the agent's authority.<sup>123</sup> So, where the conduct of a landowner is such as to have reasonably induced another to believe that one with whom he dealt as agent had authority to make sale of the land, and such other, acting upon such belief, paid the purchase price, and expended large sums in improvements, the owner will be estopped to dispute the agent's authority.<sup>124</sup> An agreement by the agent of a telephone company to deliver a message at its destination, in consideration of an extra charge, is binding on the company, notwithstanding instructions prohibiting the agent from making such contracts, where, with the knowledge of the company, its agents habitually disregard the instructions and make such contracts.<sup>125</sup> But to

*Wisconsin:* *Chicago & N. W. R. Co. v. James*, 22 Wis. 194; *Galinger v. Lake Shore Traffic Co.*, 67 Wis. 529.

<sup>121</sup> *Hanover Nat. Bank v. American Dock & Trust Co.*, 148 N. Y. 612, 51 Am. St. Rep. 721; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Holt v. Schneider*, 57 Neb. 523.

<sup>122</sup> *Carr v. London & N. W. R. Co.*, L. R. 10 C. P. 307, 317; *Austrian & Co. v. Springer*, 94 Mich. 343, 34 Am. St. Rep. 350; *Kingsley v. Fitts*, 51 Vt. 414.

<sup>123</sup> *Holt v. Schneider*, 57 Neb. 523.

<sup>124</sup> *Johnson v. Hurley*, 115 Mo. 513.

<sup>125</sup> *Cumberland Telephone Co. v. Brown*, 104 Tenn. 56, 50 L. R. A. 277.

justify a party's reliance on an implied authority of an agent to do a particular act, the act must be necessary to the execution of the duties delegated.<sup>126</sup>

The fact and scope of an agency implied from the conduct of the principal and proved by witnesses are questions of fact, and should be left to the jury.<sup>127</sup>

(e) **Ratification as an element of authority.**—It has been said that a subsequent ratification or confirmation of powers unauthorizedly exercised by an agent includes them within the agent's authority, or makes such powers an element of his apparent scope of authority.<sup>128</sup> But this statement perhaps depends upon whether or not the ratification is in the same transaction. It is a well established rule that a ratification by a principal with full knowledge of all the facts is equivalent to a previous authority, and has the same effect as if the act had been originally authorized, but this does not make the power ratified an original element of authority in the same transaction, although it has that effect. The ratification of an unauthorized act in a previous transaction may, undoubtedly, have a great evidential force in determining the agent's scope of authority in a subsequent transaction of the same nature, but it is not believed that a subsequent ratification can be considered as an element of authority in the same transaction. If the powers thus ratified are considered as an element of the agent's authority, it is not because of the subsequent ratification, but by reason of the fact that the principal has, by his conduct, led the party dealing with the agent to believe that the agent possessed such authority, and for that reason he is estopped to deny it. Of course the same state of facts may constitute the ratification and indicate the element of authority; yet it is believed there is a distinction as above stated, and that all powers that are sought to be held dependent upon

<sup>126</sup> *Miner v. Edison Elec. Illuminating Co.*, 22 Misc. (N. Y.) 543.

<sup>127</sup> *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. 498, 78 Am. Dec. 390; *Johnston v. Milwaukee & Wyo. Inv. Co.*, 46 Neb. 480.

<sup>128</sup> *Mechem, Ag.* § 282.

ratification may be included in the fourth element heretofore stated as "powers reasonably inferred."<sup>129</sup>

**§ 210. Duty of persons dealing with an agent.**

(a) **To ascertain his authority.**—Where persons deal with an agent, knowing him to be such, they are by that fact notified that certain authority has been given to him, within which he must act. They cannot rely upon the agent's representations as to what the authority is, nor can they presume that such authority exists, but it is their duty, whether the agency be a general or a special one, to make due inquiry and to use all proper diligence to ascertain the nature and extent of such authority. If they do not do so, they deal with the agent at their peril, and if the agency or authority is disputed the burden of proof is upon them to prove it.<sup>130</sup> As has been said: "Whoever deals with an

<sup>129</sup> See *supra* (d).

<sup>130</sup> *United States*: *Wheeler v. Northwestern Sleigh Co.*, 39 Fed. 347; *Nat. Bank of Oshkosh v. Munger*, 95 Fed. 87.

*Alabama*: *Johnson v. Alabama Gas, Fuel & Mfg. Co.*, 90 Ala. 505; *Van Eppes v. Smith*, 21 Ala. 317; *Fisher v. Campbell*, 9 Port. 210.

*California*: *Blum v. Robertson*, 24 Cal. 128; *Macdonald v. Cool*, 134 Cal. 502.

*Colorado*: *Lester v. Snyder*, 12 Colo. App. 351; *Victoria Gold Min. Co. v. Fraser*, 2 Colo. App. 14; *McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 393.

*Florida*: *Yates v. Yates*, 24 Fla. 64.

*Georgia*: *Claffin v. Continental Jersey Works*, 85 Ga. 27; *Harris Loan Co. v. Elliott & Hatch Book-Typewriter Co.*, 110 Ga. 302; *American Oil Co. v. Gurr*, 114 Ga. 624.

*Illinois*: *Boltz v. Huston*, 23 Ill. App. 579; *Schilling v. Rosenheim*, 30 Ill. App. 81; *Baxter v. Lamont*, 60 Ill. 237; *Davidson v. Porter*, 57 Ill. 300; *Schneider v. Lebanon Dairy & Creamery Co.*, 73 Ill. App. 612; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113.

*Indiana*: *Reitz v. Martin*, 12 Ind. 306, 74 Am. Dec. 215; *Cruzan v. Smith*, 41 Ind. 288.

*Iowa*: *Dickinson County v. Mississippi Valley Ins. Co.*, 41 Iowa, 286; *Tidrick v. Rice*, 13 Iowa, 214.

*Kansas*: *Leu v. Mayer*, 52 Kan. 419.

*Kentucky*: *Vanada v. Hopkins*, 1 J. J. Marsh. 285, 19 Am. Dec. 92; *Blood v. Herring*, 22 Ky. L. R. 1725, 61 S. W. 273.

*Louisiana*: *Chaffe v. Stubbs*, 37 La. Ann. 656.

agent is put on his guard by that very fact, and does so at his risk. It is his right and duty to inquire into and ascertain the nature and extent of the powers of the agent, and to determine whether the act or contract about to be consummated comes within the province of the agency and

*Maine:* Johnson v. Wingate, 29 Me. 404.

*Maryland:* Lister v. Allen, 31 Md. 543, 100 Am. Dec. 78; Baltimore v. Reynolds, 20 Md. 1, 83 Am. Dec. 535.

*Massachusetts:* Farrington v. South Boston R. Co., 150 Mass. 406, 15 Am. St. Rep. 222; Mt. Morris Bank v. Gorham, 169 Mass. 519.

*Michigan:* Busch v. Wilcox, 82 Mich. 336, 21 Am. St. Rep. 563; Bond v. Pontiac, O. & P. A. R. Co., 62 Mich. 643, 4 Am. St. Rep. 885; Rice v. Peninsular Club, 52 Mich. 87; Hurley v. Watson, 68 Mich. 531.

*Mississippi:* Dozler v. Freeman, 47 Miss. 647; Brown v. Johnson, 12 Smedes & M. 398, 51 Am. Dec. 118.

*Missouri:* Johnson v. Hurley, 115 Mo. 513; Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. App. 135.

*Montana:* First Nat. Bank v. Hall, 8 Mont. 341.

*New Hampshire:* Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

*New Jersey:* Dowden v. Cryder, 55 N. J. Law, 329; Milne v. Kleb, 44 N. J. Eq. 378; National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331.

*New York:* Miner v. Edison Elec. Illuminating Co., 22 Misc. 543; Joseph v. Struller, 25 Misc. 173; Edwards v. Dooley, 120 N. Y. 540; Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 633.

*North Carolina:* Earp v. Richardson, 81 N. C. 6; Ferguson v. Davis & R. Mfg. Co., 118 N. C. 946.

*Oregon:* Coulter v. Portland Trust Co., 20 Or. 469; Foster v. Virtue, 17 Or. 607.

*Pennsylvania:* Weise's Appeal, 72 Pa. 351; Baring v. Peirce, 5 Watts & S. 548, 40 Am. Dec. 534.

*South Dakota:* Ellis v. Walt, 4 S. D. 454; Shull v. New Birdsall Co., 15 S. D. 8.

*Tennessee:* Fabian Mfg. Co. v. Newman (Tenn. Ch. App.) 62 S. W. 218.

*Texas:* Buzard v. Jolly (Tex.) 6 S. W. 422; Taylor Mfg. Co. v. Brown (Tex. App.) 14 S. W. 1071.

*Vermont:* White v. Langdon, 30 Vt. 599; Stewart v. Woodward, 50 Vt. 78, 28 Am. Rep. 488; Cleveland v. Pearl, 63 Vt. 127, 25 Am. St. Rep. 748.

*Virginia:* Stainback v. Read, 11 Grat. 288, 62 Am. Dec. 648; Siliman v. Fredericksburg, O. & C. R. Co., 27 Grat. 119.

will or will not bind the principal.”<sup>181</sup> Such persons, however, are not required to inquire into all the details or particulars of such authority, if the agent is carrying on a general business, and is held out to the world as a general agent.<sup>182</sup> All that would be required in such a case would be for him to ascertain if the agent possessed the authority usually possessed by agents in the same line of business; unless there were other circumstances in the particular case indicating to him that the agent’s authority was restricted or enlarged. One claiming under a contract executed by an agent is bound to know the extent of the agent’s authority, unless he has been held out by his principal as having powers not in fact conferred.<sup>183</sup> A debtor who deals with an attorney holding a claim against him for collection is bound to take notice of the attorney’s authority.<sup>184</sup>

So where a check purports to be indorsed by one as agent of the payee, the burden of proof is on the holder to show authority to make the indorsement.<sup>185</sup> So if a guardian authorized by court to sell a judgment in favor of his ward delivers an assignment thereof to a third person for safekeeping, a purchaser of the judgment from such third person has the burden of proving that the latter is the agent of the guardian and authorized to make delivery and receive payment.<sup>186</sup>

(b) **To act in good faith.**—So in all his dealings with the agent, the third person must always act in good faith, and not attempt to gain an advantage over the principal, by

*West Virginia:* Curry v. Hale, 15 W. Va. 867; Dyer v. Duffy, 39 W. Va. 148; Rosendorf v. Poling, 48 W. Va. 621.

*Wisconsin:* Sawyer v. Chicago & N. W. R. Co., 22 Wis. 402, 99 Am. Dec. 49.

<sup>181</sup> Chaffe v. Stubbs, 37 La. Ann. 656.

<sup>182</sup> Williams v. Getty, 31 Pa. 461, 72 Am. Dec. 757; Landis v. Shadle, 23 Pa. Co. Ct. R. 505; Witcher v. McPhee (Colo. App.) 65 Pac. 806.

<sup>183</sup> Green v. Hugo, 81 Tex. 452, 26 Am. St. Rep. 824; Fitzhugh v. Franco-Texas Land Co., 81 Tex. 306.

<sup>184</sup> Cram v. Sickel, 51 Neb. 828, 66 Am. St. Rep. 478.

<sup>185</sup> Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 93 Am. St. Rep. 113.

<sup>186</sup> Schmidt v. Shaver, 196 Ill. 108, 89 Am. St. Rep. 250.



means of any wrongful schemes or fraud. As has been seen it is his duty to make due inquiry into the authority of the agent. If then he has knowledge of instructions given to the agent or has reason to believe that such instructions have been given and he refrains from further inquiry to find out the effect of the instructions, he will nevertheless be bound by them,<sup>137</sup> although it would be otherwise if he had not such knowledge or was not put upon inquiry concerning secret instructions.

(c) **To use reasonable prudence.**—Likewise it is the duty of a third person, in dealing with an agent, to exercise a reasonable degree of diligence and prudence, in ascertaining the true condition of all matters connected with the transaction. Thus, if the agent is one with whom he has had no previous dealings, it would not be due diligence and prudence on his part to rely alone on the appearances of agency, if such appearances would also seem to indicate other conditions. Nor would the mere fact that such unknown person has in his possession the goods of the party he assumes to represent as agent, excuse his lack of diligence, as such goods may have been stolen by him, or delivered to him in some other capacity than as agent. So if the authority, which the agent has represented himself as having, is of an unreasonable or suspicious nature, this would induce a man of ordinary diligence or prudence to make further inquiry, and it would be negligence on his part to continue to deal with the agent as such without attempting to ascertain the truth. "The principal may be careless in reposing confidence in his agent, yet this does not make him liable to a third party, who, in dealing with such agent fails to exercise the diligence usual with good business men under the circumstances. If there is anything likely to put a reasonable business man upon his guard as to the authority of the agent, it is the duty of the third party to inquire how far the agent's acts are in pursuance of the principal's limitation."<sup>138</sup>

<sup>137</sup> *Rust v. Eaton*, 24 Fed. 830.

<sup>138</sup> *Hurley v. Watson*, 68 Mich. 531.

(d) To see that all formalities or conditions are complied with.—In the case of agencies of a certain nature it is required that the authority must be conferred according to certain formalities, as that it must have been in writing, and under seal, or must have been placed on record. Where such is the case, it is the duty of a third person dealing with such agent to see that all conditions requisite to the conferring of such authority have been complied with, and that the agent has acted within such authority. If he does not do so, he deals with the agent at his own risk.<sup>139</sup> Thus, if the agent's authority is such as must be placed on public record, the record is notice to third parties of the agency and its extent, and they are bound to see that he acts within such authority.<sup>140</sup> In an action against a town to recover the price of liquors sold to an agent of the town for the sale of liquors, the record required by law to be made of the rules and regulations prescribed for the observance of such agent is competent evidence upon the question of the authority of the agent to purchase liquors on the credit of the town; and a person selling liquor to such agent is charged with notice of any limitation of the agent's authority shown by such record.<sup>141</sup> So if the authority given to an agent is made to take effect, only in the event that a certain contingency happens or a certain condition is performed, and these limitations are known to the third party, it is his duty, if he wishes to have dealings under such authority, to ascertain that such contingency has happened or such conditions have been performed, before he may do so.<sup>142</sup>

(e) Where dealing with public agents.—In the case of public agents, the above rules apply with particular force, be-

<sup>139</sup> See *Bosseau v. O'Brien*, 4 Biss. 395, Fed. Cas. No. 1,667; *Frink v. Roe*, 70 Cal. 296; *Baxter v. Lamont*, 60 Ill. 237; *Peabody v. Hoard*, 46 Ill. 242; *Sandford v. Handy*, 23 Wend. (N. Y.) 267; *Nixon v. Hyserott*, 5 Johns. (N. Y.) 58; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

<sup>140</sup> *Woodward v. Campbell*, 39 Ark. 580; *Lewis v. Bourbon County Com'rs*, 12 Kan. 186; *Sprague v. Cornish*, 59 N. H. 161; *New York & C. Steamship Co. v. Harbison*, 16 Fed. 688.

<sup>141</sup> *Sprague v. Cornish*, 59 N. H. 161.

<sup>142</sup> *Craycraft v. Selvage*, 10 Bush (Ky.) 696; *Weise's Appeal*, 72 Pa. 351.

cause the authority of a public agent is a matter of record in the books of the public corporation or public laws, of which the third party is bound to take notice; and it would be his duty to see that the agent is acting within the authority thus expressly given together with its incidental powers.<sup>143</sup> The fact that the contract made or act done related to a subject within the general scope of the agent's powers does not make it obligatory on the principal, if there was a want of specific power to make it. "Although a private agent, acting in violation of specific instructions, yet within the scope of a general authority, may bind his principal, the rule as to the effect of a like act of a public agent is otherwise. The city commissioner was the public agent of a municipal corporation, clothed with duties and powers specially defined and limited by ordinances bearing the character and force of public laws, ignorance of which can be presumed in favor of no one dealing with him on matters thus conditionally within his official discretion. For this reason, the law makes a distinction between the effect of the acts of an officer of a corporation and those of an agent for a principal in common cases. In the latter the extent of authority is necessarily known only to the principal and agent, while in the former, it is a matter of record in the books of the corporation or of public law."<sup>144</sup>

<sup>143</sup> *Whiteside v. United States*, 93 U. S. 247; *The Floyd Acceptances*, 7 Wall. (U. S.) 666; *Curtis v. United States*, 2 Ct. Cl. 144; *Pierce v. United States*, 1 Ct. Cl. 270; *Barton v. Swepston*, 44 Ark. 437; *Hull v. Marshall County*, 12 Iowa, 142; *Clark v. Des Moines*, 19 Iowa, 199, 87 Am. Dec. 423; *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *Baltimore v. Eschbach*, 18 Md. 282; *State v. Bank of Missouri*, 45 Mo. 528; *State v. Hays*, 52 Mo. 578; *Delafield v. State*, 26 Wend. (N. Y.) 192; *Silliman v. Fredericksburg, O. & C. R. Co.*, 27 Grat. (Va.) 119; *State v. Hastings*, 10 Wis. 518.

<sup>144</sup> *Baltimore v. Eschbach*, 18 Md. 282, 283; *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535.

## CHAPTER IX.

### CONSTRUCTION OF AGENT'S AUTHORITY.

#### I. IN GENERAL.

- § 211. In general.
- 212. Where authority is ambiguous.

#### II. RULES OF CONSTRUCTION PERTAINING TO WRITTEN AUTHORITY.

- § 213. In general.
- 214. Question for the court.
- 215. Purpose of the authority to be followed.
- 216. How purpose ascertained.
- 217. Construction of general words or phrases used.
- 218. Authority cannot be enlarged by custom or usage.
- 219. Effect must be given to the whole instrument, if possible.
- 220. To be construed according to the *lex loci*.
- 221. The transaction to stand, if possible.
- 222. To apply to principal's private business only.

#### III. RULES OF CONSTRUCTION PERTAINING TO ORAL OR IMPLIED AUTHORITY.

- § 223. Oral authority.
- 224. Implied authority.

#### I. IN GENERAL.

#### § 211. In general.

Disputes oftentimes arise in reference to acts done by an agent, as to whether or not they are within the scope of the authority conferred upon him by his principal. In construing such authority resort may be had to rules applicable to the construction of contracts, and certain rules of construction applicable especially in certain cases of agency. The rules of construction applicable depend primarily upon the manner in which the authority was conferred upon the agent, whether it has been given by a formal instrument or power of attorney, or whether it is unwritten or implied; or again whether it is certain and specific, or uncertain and ambiguous. It will be the scope of this chapter then to consider

the general rules of construction of an agent's authority, paying special attention to those most generally called into use.

**§ 212. Where authority is ambiguous.**

When a principal gives authority to an agent and he wants it to be executed in a particular manner only, it is his duty to confer the authority or give his instructions so clearly and explicitly that there is no reasonable chance of their being misconstrued. It is within his power to so give the authority or instructions and if he does so the agent will be bound to follow them strictly; if on the other hand he does not confer the authority with certainty he will not be allowed to complain if the wrong construction is put upon them. Accordingly, where authority has been conferred upon an agent in such ambiguous terms, or the instructions to him are so uncertain that such authority may reasonably receive more than one construction, the agent may, in good faith, act according to either, and the principal will be bound by all acts done by him in good faith, and without negligence, under such construction, although the principal may have intended the other construction to be put upon the authority; and it matters not that the principal had reason to believe that the agent so understood the authority.<sup>1</sup> Thus, an agent was instructed to sell goods at such a price as would realize 15s. per ton, net cash. He sold them at 15s. 6d. per ton, subject to two months' credit. It was held that the instruction might fairly be construed as meaning either 15s. net cash, such a price as would eventually realize 15s. after allowing for interest, or a *del credere* com-

<sup>1</sup> *Ireland v. Livingston*, L. R. 5 H. L. 395; *Johnston v. Kershaw*, L. R. 2 Exch. 82, Wamb. Cas. 896; *Loring v. Davis*, 32 Ch. Div. 625; *Pole v. Leask*, 28 Beav. 574; *Le Roy v. Beard*, 8 How. (U. S.) 451; *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; *Loraine v. Cartwright*, 3 Wash. C. C. 151, Fed. Cas. No. 8,500; *Brown v. M'Gran*, 14 Pet. (U. S.) 480; *Oxford Lake Line v. First Nat. Bank*, 40 Fla. 349; *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa, 67; *Mattocks v. Young*, 66 Me. 459; *Mechanics Bank v. Merchants Bank*, 6 Metc. (Mass.) 13; *Foster v. Rockwell*, 104 Mass. 167; *Mann v. Laws*, 117 Mass. 293; *Winne v. Niagara F. Ins. Co.*, 91 N. Y. 185; *Long v. Pool*, 68 N. C. 479; *Bessent v. Harris*, 63 N. C. 542.

mission; and that the sale at 15s. 6d., two months, was within the authority.<sup>2</sup> So where in the course of a telegraphic correspondence between an agent and his principal, one of the agent's messages is erroneously transmitted to the principal, to which the principal replies as he understands it, the agent is justified in acting under the facts as he had stated them, and a settlement based upon and within such an understanding is binding upon the principal.<sup>3</sup> But the fact that the principal's instructions are reasonably susceptible of two meanings does not authorize the agent to disregard both and substitute his own judgment therefor.<sup>4</sup>

## II. RULES OF CONSTRUCTION PERTAINING TO WRITTEN AUTHORITY.

### § 213. In general.

All powers conferred upon an agent by a formal instrument are to receive a strict interpretation, and the authority is never extended by intendment or construction beyond that which is given in terms or is necessary for carrying the authority into effect, and that authority must be strictly pursued.<sup>5</sup>

<sup>2</sup> *Boden v. French*, 10 C. B. 886.

<sup>3</sup> *Hasbrouck v. Western Union Tel. Co.*, 107 Iowa, 160, 70 Am. St. Rep. 181.

<sup>4</sup> *Oxford Lake Line v. First Nat. Bank*, 40 Fla. 349.

<sup>5</sup> *England*: *Withington v. Herring*, 5 Bing. 442; *Bryant v. La Banque du Peuple* [1893] App. Cas. 170, 62 Law J. P. C. 68.

*Alabama*: *Brantley v. Southern Life Ins. Co.*, 53 Ala. 554; *Wimberly v. Windham*, 104 Ala. 409, 53 Am. St. Rep. 70.

*California*: *Hawxhurst v. Rathgeb*, 119 Cal. 531, 63 Am. St. Rep. 142; *Johnston v. Wright*, 6 Cal. 373.

*Georgia*: *Neal v. Patten*, 40 Ga. 363; *Clafin v. Continental Jersey Works*, 85 Ga. 27.

*Illinois*: *Monson v. Kill*, 144 Ill. 248; *Chase v. Dana*, 44 Ill. 262; *Bissell v. Terry*, 69 Ill. 184.

*Indiana*: *White v. Ferguson*, 29 Ind. App. 144.

*Iowa*: *Weare v. Williams*, 85 Iowa, 253.

*Kentucky*: *Vanada v. Hopkins*, 1 J. J. Marsh. 285, 19 Am. Dec. 92.

*Louisiana*: *Farrar v. Duncan*, 29 La. Ann. 126.

*Massachusetts*: *Bliss v. Clark*, 16 Gray. 60; *Wood v. Goodridge*, 6 Cush. 117, 52 Am. Dec. 771.

*Michigan*: *Penfold v. Warner*, 96 Mich. 179, 35 Am. St. Rep. 591; *Jeffrey v. Hursh*, 49 Mich. 31; *Jeffery v. Hursh*, 58 Mich. 246.

This rule has been well stated as follows: "A formal instrument delegating power is ordinarily subjected to strict interpretation, and the authority is not extended beyond that which is given in terms, or which is necessary to carry into effect that which is expressly given. They are not subject to that liberal interpretation which is given to less formal instruments, as letters of instruction, etc., in commercial transactions which are interpreted most strongly against the writer, especially when they are susceptible of two interpretations, and the agent has acted in good faith upon one of the interpretations."<sup>5a</sup> And a party dealing with an agent is chargeable with notice of the contents of the power under which he acts, and must interpret it at his own peril, unless such agent has been held out by his principal as having powers

*Minnesota:* Harris v. Johnston, 54 Minn. 177, 40 Am. St. Rep. 312; Gilbert v. How, 45 Minn. 121, 22 Am. St. Rep. 724; Rice v. Tavernier, 8 Minn. 248, 83 Am. Dec. 778.

*Missouri:* Lamy v. Burr, 36 Mo. 85, 88 Am. Dec. 135; Mechanics' Bank v. Schaumburg, 38 Mo. 228; Ashley v. Bird, 1 Mo. 640, 14 Am. Dec. 313.

*Nebraska:* Dworak v. More, 25 Neb. 735.

*New Jersey:* Camden F. Ins. Ass'n v. Jones, 53 N. J. Law, 189.

*New York:* Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Hubbard v. Elmer, 7 Wend. 446, 22 Am. Dec. 590.

*Oregon:* Security Sav. Bank v. Smith, 38 Or. 72, 84 Am. St. Rep. 756; Coulter v. Portland Trust Co., 20 Or. 469.

*Pennsylvania:* Campbell v. Foster Home Ass'n, 163 Pa. 609, 43 Am. St. Rep. 818.

*Tennessee:* Franklin v. Ezell, 1 Sneed, 497; Strong v. Stewart, 9 Heisk. 137.

*Texas:* Frost v. Erath Cattle Co., 81 Tex. 505, 26 Am. St. Rep. 831; Skaggs v. Murchison, 63 Tex. 353; Gouldy v. Metcalf, 75 Tex. 455, 16 Am. St. Rep. 912; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; McAlpin v. Cassidy, 17 Tex. 449.

A power of attorney to confess judgment at a certain term of court does not give authority to confess judgment at another or later term. Rankin v. Eakin, 3 Head (Tenn.) 229. Authority to an agent to enter into possession of, control, sell, and assign plaintiff's real estate does not authorize the agent to enter into a co-partnership for his principal. Guy v. Rosewater (Colo. App.) 69 Pac. 271.

<sup>5a</sup> Allen, J., in Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150.

not in fact conferred.<sup>6</sup> This rule, however, does not imply that such a construction may be given as will defeat the intention of the parties, and if the intention clearly appears from the language used in the instrument it must prevail.<sup>7</sup>

As has been seen heretofore, every express power impliedly carries with it all other implied powers that are reasonably necessary to accomplish the object for which the original power was given. And when a principal delegates certain express powers to his agent, the law will presume that he intended the agent to have such other implied powers as it may be necessary for him to have to accomplish the original purpose.

#### § 214. Question for the court.

When authority has been conferred upon an agent by a formal written instrument, it becomes a question of law for the court to decide what powers have thus been given to the agent. The party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the act is done; and if the authority has been conferred by writing, the instrument itself must in general be produced or its absence accounted for, and since the construction of writings belongs to the court, and not to the jury, the fact and scope of the agency are, in such cases, questions of law and are properly decided by the judge.<sup>8</sup>

#### § 215. Purpose of the authority to be followed.

In construing such an authority, the court must always keep in mind the purpose or object for which the authority

<sup>6</sup> *Gilbert v. How*, 45 Minn. 121, 22 Am. St. Rep. 724; *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Green v. Hugo*, 81 Tex. 452, 26 Am. St. Rep. 824; *Fitzhugh v. Franco-Texas Land Co.*, 81 Tex. 306; *Stainback v. Read*, 11 Grat. (Va.) 281, 62 Am. Dec. 648; *De Voss v. City of Richmond*, 18 Grat. (Va.) 363.

<sup>7</sup> *Hemstreet v. Burdick*, 90 Ill. 444.

<sup>8</sup> *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. 498, 78 Am. Dec. 390; *Claffin v. Continental Jersey Works*, 85 Ga. 27; *Dobbins v. Etowah Mfg. & Min. Co.*, 75 Ga. 238; *Millay v. Whitney*, 63 Me. 522; *Equitable Life Assur. Soc. v. Poe*, 53 Md. 28; *Stadleman v. Fitzgerald*, 14 Neb. 290; *Oliver v. Sterling*, 20 Ohio St. 391; *Pollock v. Cohen*, 32 Ohio St. 514; *McCreery v. Garvin*, 39 S. C. 375; *Berry v. Harnage*, 39 Tex. 638.



was created. The guiding principle in the construction of powers is to be derived from a consideration of the result, which the agent or depository of power is appointed to accomplish. When a court is called upon to construe a written authority, its first duty is to ascertain what intention or purpose the principal had in view when he gave the authority to the agent; and when that has been ascertained the power is to be construed so as to effect that purpose, if possible, instead of defeating it.<sup>9</sup> In conformity with such purpose or intent a general power may be limited, or a limited power made general. As has been said: "All powers conferred must be construed with a view to the design and object of them, and the means most usual and proper for carrying their design and object into effect, due consideration being given to the language used."<sup>10</sup>

**§ 216. How purpose ascertained.**

(a) **In general.**—The purpose for which an authority is given is primarily ascertained from the words or language used by the parties in the instrument conferring the authority. And where the authority is thus given, one of the parties cannot object because he did not understand the legal effect of the words used in the instrument.<sup>11</sup> The language thus used is to be further aided by the situation of the parties and of the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstances having a legal bearing, and throwing light on the question.<sup>12</sup>

<sup>9</sup> *Le Roy v. Beard*, 8 How. (U. S.) 468; *Holladay v. Dally*, 19 Wall. (U. S.) 606; *National Bank of the Republic v. Old Town Bank*, 112 Fed. 726; *White v. Ferguson*, 29 Ind. App. 144; *Commonwealth v. Hawkins*, 83 Ky. 246; *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600; *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *Wilson v. Troup*, 2 Cow. (N. Y.) 195; *Security Sav. Bank v. Smith*, 38 Or. 72, 84 Am. St. Rep. 756; *Barnard v. Blum*, 69 Tex. 608.

<sup>10</sup> *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92.

<sup>11</sup> *Holmes v. Hall*, 8 Mich. 66, 77 Am. Dec. 444; *Hunt v. Rousmanier's Adm'rs*, 1 Pet. (U. S.) 1; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *White v. Ferguson*, 29 Ind. App. 144.

<sup>12</sup> *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539. See *infra* (b).

(b) **From the circumstances of the parties.**—It may often-times happen that the circumstances, conditions, or relation of the parties have a material effect in determining the authority conferred upon an agent by a written instrument. This does not vary the rule that parol evidence cannot be introduced to contradict or vary the terms of a written instrument, but knowledge of such circumstances is intended merely as an aid to the court in determining what authority was intended to be conferred by the instrument. If the court, in construing an instrument of this sort, has clearly in mind all the circumstances surrounding the giving thereof, it will be better able to give a correct construction of the same. Thus, where the court knows what relation one party bears to the other, or what are the respective circumstances or conditions of each, it is able to stand in such a position as to give a clear construction of the authority conferred. For this reason parol evidence may be introduced in construing such a writing. It may happen that a written authority is apparently valid, yet if the circumstances, conditions, or relations of the parties are inquired into, there will be clear evidence that such authority was forged or fraudulently obtained. Thus, in order to arrive at the intention of the parties and to interpret the scope and meaning of the power, the court may receive evidence as to the relative positions of the parties, their obvious design as to the objects to be accomplished, and the nature of the business or transaction in which the principal was engaged.<sup>13</sup>

(c) **From the whole writing, or writings, connected with the power.**—In determining for what purpose the authority was given, or what was the intention of the principal in giving it, the whole writing or writings by which it was conferred, must be taken into consideration, whether it consists of a single written instrument or any number of writings, properly connected. Thus, if the employment of the agent has been by correspondence, all the letters by both parties in reference to the subject-matter of the agency should be

<sup>13</sup> *Brantley v. Southern Life Ins. Co.*, 53 Ala. 554; *Maynard v. Mercer*, 10 Nev. 33; *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539.

examined in determining the agent's authority, or the purpose for which it was given.<sup>14</sup>

(d) **Parol evidence.**—It is a well-settled rule of the law of evidence that parol contemporaneous evidence is inadmissible to add to, contradict, or vary the terms of a written instrument; and this rule is also applicable to a written instrument conferring authority upon an agent. Where the agent has received his authority by means of a written instrument, parol contemporaneous evidence cannot be introduced to enlarge or vary the authority so conferred.<sup>15</sup> But, although such evidence cannot be introduced to enlarge or vary the powers thus given by the written instrument, it may be admitted for the purpose of interpreting the powers conferred,<sup>16</sup> or for the purpose of showing a special agency to do a particular act beyond the general power.<sup>17</sup> Or such evidence may be admitted for the purpose of showing that the authority given in writing was subsequently enlarged by parol, if the authority was not of a kind that was required to be in writing.<sup>18</sup> Thus, where an agent was authorized, in writing, to sell, or procure a purchaser for, land at sixteen hundred dollars, and execute a contract for such sale, it was held that it might be shown that he was afterwards orally authorized to accept six hundred dollars in cash and the balance on time secured by a mortgage.<sup>19</sup> So if the instrument conferring the authority does not describe the subject-matter of the agency with sufficient cer-

<sup>14</sup> See *Gates Iron Works v. Denver Engineering Works Co.* (Colo. App.) 67 Pac. 173.

<sup>15</sup> *Ashley v. Bird*, 1 Mo. 640, 14 Am. Dec. 313; *Hogg v. Snaith*, 1 Taunt. 347, Wamb. Cas. 269; *Clafin v. Continental Jersey Works*, 85 Ga. 27; *Allis v. Goldsmith*, 22 Minn. 123; *State v. State Bank*, 45 Mo. 528; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Pollock v. Cohen*, 32 Ohio St. 514; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

<sup>16</sup> *Frink v. Roe*, 70 Cal. 296; *Gee v. Bolton*, 17 Wis. 610.

<sup>17</sup> *Williams v. Cochran*, 7 Rich. Law (S. C.) 45.

<sup>18</sup> *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *Coleman v. First Nat. Bank*, 53 N. Y. 388; *Williams v. Cochran*, 7 Rich. Law (S. C.) 45.

<sup>19</sup> *Magill v. Stoddard*, 70 Wis. 75.

tainty, parol evidence may be admitted for the purpose of identifying or describing it.<sup>20</sup>

Parol evidence cannot be introduced for the purpose of explaining or varying any uncertainty or ambiguity that appears upon the face of the instrument conferring the authority; but if it is any matter outside of the instrument in reference to which there seems to be some uncertainty or ambiguity, then parol evidence may be introduced to explain it.<sup>21</sup>

**§ 217. Construction of general words or phrases used.**

Where general words or phrases are used in a written instrument conferring authority upon an agent, they are to receive such a construction, if possible, as will enable the agent to carry out or accomplish the object for which he was employed. If he has been employed to do a certain act or to accomplish a specific purpose and such specific authority is followed by general words, the latter words are to be construed in such manner only as will give him power to accomplish the specific purpose, and are not to receive a more extended construction.<sup>22</sup> "If there is a power of attorney to do a particular act followed by general words, these general words are not to be extended beyond what is neces-

<sup>20</sup> *Pope v. Machias Water Power & Mill Co.*, 52 Me. 535; *Norris v. Spofford*, 127 Mass. 85.

<sup>21</sup> See *Mechem*, Ag. § 299.

<sup>22</sup> *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235; *Esdalle v. La Nauze*, 1 Younge & C. 394; *Perry v. Holl*, 2 De Gex, F. & J. 48; *Attwood v. Munnings*, 7 Barn. & C. 278, Wamb. Cas. 286; *Hogg v. Snaith*, 1 Taunt. 347, Wamb. Cas. 269; *Luke v. Griggs*, 4 Dak. 287; *First Nat. Bank v. Kirkby*, 43 Fla. 376; *Born v. Simmons*, 111 Ga. 869; *Coquillard's Adm'rs v. French*, 19 Ind. 274; *Hazeltine v. Miller*, 44 Me. 177; *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Lawrence v. Gebhard*, 41 Barb. (N. Y.) 575; *Craighead v. Peterson*, 72 N. Y. 283, 28 Am. Rep. 150; *Geiger v. Bolles*, 1 Thomp. & C. (N. Y.) 129; *Security Sav. Bank v. Smith*, 38 Or. 72, 84 Am. St. Rep. 756; *Coulter v. Portland Trust Co.*, 20 Or. 469; *Berry v. Harnage*, 39 Tex. 638; *Frost v. Erath Cattle Co.*, 81 Tex. 505, 20 Am. St. Rep. 831; *Gouldy v. Metcalf*, 75 Tex. 455, 16 Am. St. Rep. 912; *Hewes v. Doddridge*, 1 Rob. (Va.) 143; *Rountree v. Denson*, 59 Wis. 522; *Gee v. Bolton*, 17 Wis. 604; *Chilton v. Willford*, 2 Wis. 1, 60 Am. Dec. 399.

sary for doing that particular act.”<sup>23</sup> Thus, a general clause in a power of attorney given for a specific purpose, authorizing the agent to do “any and every act” in the principal’s name which he could do in person, must be construed to relate to the specific purpose, and does not constitute such agent a general agent.<sup>24</sup> So where books and accounts are placed in an agent’s hands for settlement, the words “for settlement” restrict the authority of such an agent to a power to settle these demands with the persons from whom they are due.<sup>25</sup> An authority to “a general and special agent to do and transact all manner of business,” does not necessarily authorize the agent to sell stocks or other property of the principal.<sup>26</sup> Likewise the words “sell and convey,” when employed in a power of attorney, do not include authority to mortgage or otherwise dispose of the property than by a sale and conveyance.<sup>27</sup> A power of attorney authorizing an agent to sell and convey land “for such price and upon such terms and conditions as he may deem best,” “subject to our approval,” is a limited power and a deed executed without such approval is invalid.<sup>28</sup>

Where a general power of attorney was given to an agent without any limitation as to its duration, in the operative part of the power, but it was preceded by a recital that the principal was going abroad and was desirous of appointing agents to act for him during his absence, it was held that the recital controlled the general power and limited its exercise to the period of the principal’s absence.<sup>29</sup> We shall see more on this subject hereafter in considering the construction and extent of special kinds of authority; and also that powers of attorney and all special powers are to be strictly

<sup>23</sup> By the *Ld. Chancellor*, in *Perry v. Holl*, 2 De Gex, F. & J. 48.

<sup>24</sup> *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Ashley v. Bird*, 1 Mo. 640, 14 Am. Dec. 313; *Hay v. Mayer*, 8 Watts (Pa.) 203, 34 Am. Dec. 453.

<sup>25</sup> *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612.

<sup>26</sup> *Hodge v. Combs*, 1 Black (U. S.) 192.

<sup>27</sup> *Hawxhurst v. Rathgeb*, 119 Cal. 531, 63 Am. St. Rep. 142; *Golinsky v. Allison*, 114 Cal. 458; *Dupont v. Wertheman*, 10 Cal. 354; *Bloomer v. Waldron*, 3 Hill (N. Y.) 361, 366, 367.

<sup>28</sup> *Alcorn v. Buschke*, 133 Cal. 655.

<sup>29</sup> *Danby v. Coutts*, 29 Ch. Div. 500.

construed, and that general words therein are to be construed in reference to the particular terms which form the subject-matter of the instrument in furtherance of, but in subordination to, the general power conferred.

**§ 218. Authority cannot be enlarged by custom or usage.**

Where authority has been conferred upon an agent by a written instrument, parol evidence of a usage of other agents in like cases cannot be introduced, to enlarge the powers thus given, by the instrument itself.<sup>30</sup> There may, however, be some qualifications and limitations properly belonging to this general rule, whereby, especially in cases of general agencies, the usages of a particular trade or business, or of a particular class of persons, are properly admissible; not for the purpose of enlarging the powers of the persons employed therein, but as the means of interpreting and rightly understanding those powers which are actually given.<sup>31</sup>

**§ 219. Effect must be given to the whole instrument, if possible.**

In accordance with the general rules of construction of written instruments, a writing, conferring authority upon an agent, must, if possible, be construed so that the whole instrument will have effect. The law presumes that the parties in drawing up the instrument intended that every part thereof should be of some effect in conferring the authority; as that some certain clause or word should limit or enlarge the general power given by the instrument.

**§ 220. To be construed according to the *lex loci*.**

Unless there are circumstances showing the contrary, every authority conferred upon an agent to transact business for his principal must be construed to authorize him to transact

<sup>30</sup> *Hogg v. Snaith*, 1 Taunt. 347, Wamb. Cas. 269; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Delafield v. State*, 26 Wend. (N. Y.) 192.

<sup>31</sup> *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Frink v. Roe*, 70 Cal. 296; *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539; *Hartford F. Ins. Co. v. Wilcox*, 57 Ill. 180.

such business according to the law of the place where it is to be transacted.<sup>32</sup> But in a late Connecticut case where it was sought to show that a married woman had conferred certain authority upon an agent, it was stated that it is the law of Connecticut which must determine the authority of an agent, as well as the validity of an obligation which the agent, as such, seeks to impose upon her by the delivery in Illinois of an instrument signed by his principal in Connecticut. If the agent has no power to deliver it in Connecticut he has no power to deliver it in Illinois. If this case had been decided according to the law of Illinois a different construction would have been put upon the agent's authority.<sup>33</sup> It will be noticed from an examination of the above case that it does not in fact lay down a rule different from the one above set forth, as this case was really not a construction of the agent's authority but a construction of the power possessed by the married woman under the laws of Connecticut. The court, in this case, said: "It is true that the guaranty, if a binding contract, was a contract made in Illinois. \* \* \* By that law, a married woman was free to enter into such an engagement, and to constitute an agent for that purpose. But the *lex loci contractus* is a rule of decision only when there is a contract, so made as to be subject to that law. It is a *petitio principii* to say that because the guaranty was delivered in Chicago, it is therefore to be held effectual or ineffectual, as against Mrs. Mitchell, by the law of that place. The underlying question is, Was it, as to her, ever delivered at all? It was not so delivered unless delivered by her authority, and by the laws of Connecticut, where she assumed to give such authority, she could not give it."

§ 221. The transaction to stand, if possible.

Another important rule of construction is that a written instrument conferring authority upon an agent should be so construed, if possible, that the purpose for which the author-

<sup>32</sup> *Owings v. Hull*, 9 Pet. (U. S.) 607; *Frank v. Jenkins*, 22 Ohio St. 597.

<sup>33</sup> *Freeman's Appeal*, 68 Conn. 533, 57 Am. St. Rep. 112.

ity was conferred should be accomplished rather than that it should be defeated, *ut res magis valeat quam pereat*. Thus, if such an instrument is capable of two constructions, and it is evident that one of them would defeat the intention of the parties, the other construction, if possible, should be followed. So in accordance with the rule that the law will not presume that the parties intended to do an illegal act, if by one construction an act done under such an authority would be illegal, and by another construction it would be legal, the latter construction should be placed upon the instrument. It is undoubtedly a rule that a special power of attorney is to be strictly construed so as to sanction only such acts as are clearly within its terms; but it is also a rule of equal potency that the object of the parties is always to be kept in view, and, where the language used will permit, that construction should be adopted which will carry out instead of defeat the purpose of the appointment.<sup>34</sup>

**§ 222. To apply to principal's private business only.**

Where a power of attorney is given to act generally in the name and on behalf of the principal, it must be construed, in the absence of anything showing a contrary intent, as conferring authority only to act in the separate individual business of the principal, in which he is authorized, and on his behalf. Such a power should not be construed to give him power to act in any manner contrary to the interests of the principal, as by acting in the interests of the third party, or for the benefit of the agent himself.<sup>35</sup> Thus, a joint bill

<sup>34</sup> *Holladay v. Dally*, 19 Wall. (U. S.) 606; *Spect v. Gregg*, 51 Cal. 198.

<sup>35</sup> *Attwood v. Munnings*, 7 Barn. & C. 278, Wamb. Cas. 286; *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612; *Wallace v. Mobile Branch Bank*, 1 Ala. 565; *Robertson v. Levy*, 19 La. Ann. 327; *Harris v. Johnston*, 54 Minn. 177, 40 Am. St. Rep. 312; *Mechanics' Bank v. Schaumburg*, 38 Mo. 236; *Hazeltine v. Miller*, 44 Me. 177; *Adams' Exp. Co. v. Trego*, 35 Md. 47; *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728; *Camden Safe Deposit & Trust Co. v. Abbott*, 44 N. J. Law, 257; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Stainer v. Tysen*, 3 Hill (N. Y.) 279; *Wilson v. Wilson-Rogers*, 181 Pa. 80; *Hamburg v. Johnson*, 3 Rich. Law (S. C.) 42; *Sewanee Min. Co. v. McCall*, 3 Head (Tenn.) 619; *Stainback v. Read*, 11 Grat. (Va.) 281, 62 Am. Dec. 648; *Hewes v. Doddridge*, 1 Rob. (Va.) 143.



drawn by an agent in the name of his principal, and in his own individual capacity, is not drawn in the separate individual business of the principal, and is therefore not authorized by a power of attorney to draw bills.<sup>36</sup> Nor may he, under a power to execute or indorse bills or notes in the name of his principal, make or indorse them for the accommodation of a third person,<sup>37</sup> or for the agent's own benefit.<sup>38</sup> So, where he is authorized to pledge the stock of his principal for the latter's debts, it gives him no authority to pledge it for the debts of one other than the principal.<sup>39</sup>

### III. RULES OF CONSTRUCTION PERTAINING TO ORAL OR IMPLIED AUTHORITY.

#### § 223. Oral authority.

It is not necessary, in a great number of cases, that the agent's authority should be conferred upon him by a written instrument, but may as well be given by word of mouth. And if such authority is expressly limited it will be subject to the same rules of construction as generally apply to written authorities. But if the oral authority is given generally without any express limitations, a much more liberal rule of construction will be applied than in the case of authority conferred by writing, due consideration being given to the object of the authority and usages of the trade or business.<sup>40</sup>

#### § 224. Implied authority.

(a) **In general.**—In actual affairs of business, a great number of agencies will be found to exist which have neither been conferred by a written instrument nor by express words, but

<sup>36</sup> *Stainback v. Read*, 11 Grat. (Va.) 281, 62 Am. Dec. 648.

<sup>37</sup> *St. John v. Redmond*, 9 Port (Ala.) 428; *Wallace v. Branch Bank*, 1 Ala. 565; *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728.

<sup>38</sup> *Camden Safe Deposit & Trust Co. v. Abbott*, 44 N. J. Law, 257; *Stainer v. Tysen*, 3 Hill (N. Y.) 279; *Stainback v. Bank of Virginia*, 11 Grat. (Va.) 269.

<sup>39</sup> *In re Kern's Estate*, 176 Pa. 373.

<sup>40</sup> *Pole v. Leask*, 28 Beav. 562; *Gillow v. Aberdare*, 9 Times Law R. 12.

are implied from the conduct or relations of the parties. Where such an agency is found to exist, it then becomes a question to determine what authority is possessed by such an agent. As may readily be seen, the same strict rules of construction cannot be made to apply here as in the case of a written authority, for necessarily the same express limitations cannot be put upon the former authority as upon the latter. If the principal leaves the agent's authority to be inferred from his conduct, he necessarily intends that the agent's authority shall have a rather wide scope, and he will not be allowed to complain of any construction that one dealing with the agent in good faith puts upon such authority. If he desires that the agent's authority shall have express limitations, the way is open for him to so limit it; but if he does not do so and leaves the authority to be inferred he will be bound by any construction that is, in good faith, put upon his conduct. It is but a matter of justice that where innocent persons deal with an agent relying in good faith upon the authority which the agent apparently has, that the principal should be estopped to deny that he has such authority, or that it is, as it has been, in good faith construed by such third party.

The fact and scope of an agency not created by writing, but implied from the conduct of the principal and proved by witnesses, are questions of fact to be decided by the jury.<sup>41</sup>

(b) **Necessary or incidental powers.**—Not only does this rule include such authority as may be implied from the principal's conduct, but also all such other powers as may be reasonably necessary or incidental to those thus implied. As has been seen the principal is presumed to intend that the agent shall have all such powers as may be necessary for him to accomplish the end for which he was employed; and when the principal, by his conduct, presumably intends that the agent shall have the powers implied from his conduct,

<sup>41</sup> *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. 498, 78 Am. Dec. 390; *Seiple v. Irwin*, 30 Pa. 513; *Lovejoy v. Middlesex R. Co.*, 128 Mass. 480; *Wilkins v. Commercial Bank*, 6 How. (Miss.) 217; *White v. King*, 87 Mich. 107; *Partridge v. Sterling*, 79 Mich. 302; *Kaufman v. Farley Mfg. Co.*, 78 Iowa, 679, 16 Am. St. Rep. 462; *Ellinger v. Rawlings*, 12 Ind. App. 336.

he is also presumed to intend that he shall have such other powers as may be necessary for him to carry into effect the powers thus implied. It is a general principle, applicable in all such cases, whether the agency be general or special, unless the inference is especially negatived by some fact or circumstance that includes the authority to employ all the usual modes and means of accomplishing the purposes and ends of the agency, and a slight deviation by the agent from the course of his duty will not vitiate the act, if this be immaterial or circumstantial only, and does not, in substance, exceed his power and duty. Such an agency carries with it and includes in it, as an incident, all the powers which are necessary, proper, usual, and reasonable, as a means to effectuate the purposes for which it was created, and it makes no difference whether the authority is general or special, express or implied, it embraces all the appropriate means to accomplish the end to be attained.<sup>42</sup>

Implied authority of a wife left in charge of her husband's farm, to manage and superintend the same during his absence from the state, does not enable her to bind him by an agreement to permit a creditor having an attachment against the husband to cut, remove, and sell on execution, grass growing on the land, and notwithstanding such agreement the husband may maintain trespass against the creditor.<sup>43</sup> The law sometimes implies a larger authority to a wife, left in charge of her husband's property, than to an ordinary agent, but this implied authority does not embrace any power which it is not usual to confer upon a wife.<sup>44</sup>

**(c) Not to be unduly enlarged.**—Although an implied authority is to receive a liberal construction, yet it must

<sup>42</sup> *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516; *Duke of Beaufort v. Neeld*, 12 Clark & F. 248; *Dingle v. Hare*, 7 C. B. (N. S.) 145; *Pole v. Leask*, 28 Beav. 562; *Le Roy v. Beard*, 8 How. (U. S.) 451; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Hardee v. Hall*, 12 Bush (Ky.) 327; *Shackman v. Little*, 87 Ind. 181; *Farrar v. Duncan*, 29 La. Ann. 126; *Star Line v. Van Vliet*, 43 Mich. 364; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495; *Boyd v. Satterwhite*, 10 S. C. 45; *McAlpin v. Cassidy*, 17 Tex. 449.

<sup>43</sup> *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384.

<sup>44</sup> *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384.

always be kept within the proper bounds and not unduly enlarged. If the agent's authority is implied from the habits or course of dealing between the parties, or from acts done by the agent with the tacit consent or acquiescence of the principal, such authority is to be construed to apply only to acts of a similar nature as those from which it is implied;<sup>45</sup> and in no case is it to be extended beyond the obvious purposes for which the agency was apparently created.<sup>46</sup> The fact that the third party may put a liberal construction upon an agent's implied authority does not give him the right to so construe it as to extend it beyond what may reasonably be implied from the facts and circumstances of the case. Thus, an agency cannot be presumed to continue from the fact that the agent has been occasionally employed for special purposes.<sup>47</sup>

(d) **To apply to principal's private business only.**—It has been seen in a previous section that an agent's authority is to be construed as referring to acts done in the private individual business of the principal only and on his behalf; and this rule applies as well to implied agencies as to express ones.<sup>48</sup>

<sup>45</sup> *Pole v. Leask*, 28 Beav. 562; *Odiorne v. Maxcy*, 13 Mass. 178; *Williams v. Mitchell*, 17 Mass. 98; *Wilcox v. Chicago, M. & St. P. R. Co.*, 24 Minn. 269; *Cupples v. Whelan*, 61 Mo. 583; *Towle v. Leavitt*, 23 N. H. 373, 55 Am. Dec. 195. Compare *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458.

<sup>46</sup> *Story*, Ag. § 87; *McAlpin v. Cassidy*, 17 Tex. 449; *Rankin v. New England & N. Silver Min. Co.*, 4 Nev. 78; *Jones v. Warner*, 11 Conn. 40; *Tidrick v. Rice*, 13 Iowa, 214; *Graves v. Horton*, 38 Minn. 66; *Walworth County Bank v. Farmers' Loan & Trust Co.*, 14 Wis. 325.

<sup>47</sup> *Campbell v. Sherman*, 49 Mich. 534; *Reed v. Boggott*, 5 Ill. App. 257.

<sup>48</sup> *Ante*, § 222.

## CHAPTER X.

### CONSTRUCTION AND EXTENT OF SPECIAL KINDS OF AUTHORITY.

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§ 227. Sufficiency of authority.

228. Extent and certainty of such authority.

229. Sale must be executed in manner and on terms authorized.

230. Time of sale.

231. Authority of such agent to receive purchase-money.

232. Authority to sell on credit.

233. Authority to convey.

234. Authority to put in the usual covenants of warranty.

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##### B. *To Sell Personal Property.*

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237. Agent must act according to authority.

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240. Authority of traveling salesman to receive payment.

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242. Authority of agent to warrant quality.

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## II. OF AGENT'S AUTHORITY TO LEASE.

- § 248. In general—How given.
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- § 253. May make it in usual form and insert usual provisions—Implied powers.
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## IX. OF AGENT'S AUTHORITY TO BORROW OR LEND MONEY.

- § 282. In general.
- 283. When implied.
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- 285. Authority of agent to lend money.

## X. OF AGENT'S AUTHORITY TO SHIP.

- § 286. Authority to ship.

## XI. OF AGENT'S AUTHORITY TO EMPLOY.

- § 287. Authority to employ.

## § 225. Scope of chapter.

In the preceding chapter the construction and nature and extent of an agent's authority have been treated of in a general way, without reference to any particular kind of authority. It will be found in business affairs, however, that agents are appointed for certain purposes more frequently than for others; and as these different kinds of authority are deemed perhaps more important than others, or at least as they are the more frequently used, it is thought best to give to them a more extended treatment. It will be the scope of this chapter then to apply the general rules, heretofore considered, to some of these special kinds of authority, especially as to their extent or limitation. There must always be kept in mind the general rules heretofore considered, as a basis upon which the special kinds of authority are to be construed.

## I. OF AGENT'S AUTHORITY TO SELL.

## § 226. In general.

One of the purposes for which an agent is perhaps most frequently appointed is to sell property, real or personal. This subject properly divides itself into two classes, viz., authority to sell real property, and authority to sell personal property; but before considering them separately some con-

sideration will be given to some general rules applicable to both classes, and then afterwards a more extended treatment will be given to each class separately.

One of the first rules applicable to this class of agents is that a general selling agent has no authority to depart from the usual manner of accomplishing that which he is employed to effect. When one authorizes another to sell goods or property of any kind for him, he is presumed to authorize him to sell in the usual manner, and only in the usual manner, in which goods or property of that sort are sold.<sup>1</sup> As a sale is but the making of a contract by the agent for the principal, every sale so made must be for a sufficient consideration. As to what is a sufficient consideration, it may be stated as a general rule that all sales whether of real or personal property must be for a consideration in legal money, unless the agent is specially authorized otherwise.<sup>2</sup> Thus, it is not a sufficient consideration to receive payment for a sale in bonds, checks, notes, or other negotiable paper,<sup>3</sup> unless specially authorized to do so. Where an agent without instructions sold the property of his principal for seven-thirty bonds when such bonds were not circulating as money, the principal was not bound by the contract unless ratified by him.<sup>4</sup> From this it naturally follows that where an agent is employed to sell property, he cannot give it away or sell it for a consideration of love and affection;<sup>5</sup> and a sale or transfer of the property made by the agent without a consideration, or for a nominal consideration only, may be treated as a nullity by the principal.<sup>6</sup> An agent to sell merely has no authority to buy.<sup>7</sup>

<sup>1</sup> *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163. And see cases cited hereafter.

<sup>2</sup> *Falls v. Gaither*, 9 Port. (Ala.) 605; *Mora v. Murphy*, 83 Cal. 12; *Frost v. Erath Cattle Co.*, 81 Tex. 505, 26 Am. St. Rep. 831.

<sup>3</sup> *Sykes v. Giles*, 5 Mees. & W. 645; *Harlan v. Ely*, 68 Cal. 522; *Buckwalter v. Craig*, 55 Mo. 71; *Brown v. Smith*, 67 N. C. 245; *Wright v. Ray*, 3 Humph. (Tenn.) 68; *Hall v. Storrs*, 7 Wis. 253.

<sup>4</sup> *Brown v. Smith*, 67 N. C. 245.

<sup>5</sup> *Dupont v. Wertheman*, 10 Cal. 354; *Mott v. Smith*, 16 Cal. 557.

<sup>6</sup> *Randall v. Duff*, 79 Cal. 115; *Meade v. Brothers*, 28 Wis. 689; *Campbell v. Campbell*, 57 Wis. 288.

<sup>7</sup> *McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 393.



Where an agent has been employed to sell property, unless otherwise specially authorized, his agency is for that purpose only, and when he has accomplished the object of his agency by making a complete contract of sale his authority necessarily ceases, and he has no power thereafter, by virtue of his original employment, to do any act on behalf of his principal in reference to the subject-matter of the agency. He cannot, after the sale has been made, cancel or rescind the contract, or receive back and resell the property thus once sold by him, unless he receives new authority to that effect.<sup>8</sup> This rule, however, does not prevent the agent, after sale, from removing any cloud or correcting any misdescription he may have made in his sale of the property, for until this is done the sale is not complete and his authority does not cease.<sup>9</sup>

*A. To Sell Real Property.*

**§ 227. Sufficiency of authority.**

In order that an agent may have authority to sell real estate it is necessary that such authority should be clearly and distinctly given to him, in such a manner that a reasonably prudent person would have no hesitancy in seeing that such a power was given. We have seen heretofore that all written powers will be strictly construed and will not be extended beyond their obvious purpose; and unless power to sell real estate is clearly given to him, the agent cannot sell it. It is not necessary, however, that such authority should always be expressly given to him, in any particular form, but it may be conferred upon him by implication, as from the conduct of the principal or from the habit and course of dealing between the agent and his principal; but an implied power would not as a general rule include power to convey, as such authority must usually be in writing.<sup>10</sup>

<sup>8</sup> *Luke v. Griggs*, 4 Dak. 287; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Andrews v. Himrod*, 37 Ill. App. 124; *Ludwig v. Gorsuch*, 154 Pa. 413; *Adrian v. Lane*, 13 S. C. 183. Post, §§ 235, 247.

<sup>9</sup> *Boykin v. Wright*, 11 La. Ann. 531.

<sup>10</sup> *Bosseau v. O'Brien*, 4 Biss. 395, Fed. Cas. No. 1,667; *Blum v. Robertson*, 24 Cal. 127; *Tod v. Benedict*, 15 Iowa, 591; *Stewart v. Pickering*, 73 Iowa, 652; *Cooper v. Finke*, 38 Minn. 2; *Graves v.*

If there are any conditions prescribed they must be complied with or the power does not arise. Thus where one, in giving a naked power, prescribes in the instrument creating it the manner of exercising it, every requirement must be strictly complied with.<sup>11</sup> Where a power of attorney confers authority to "sell or dispose of any or the whole" of the principal's property, and in his name to "sign and execute any and all instruments of writing," it confers power to sell real estate.<sup>12</sup> But a power to sell land or real estate cannot be construed from a power of attorney to sell "claims and effects,"<sup>13</sup> nor from a power to locate and survey lands,<sup>14</sup> nor from a power authorizing the collection of debts and the granting of acquittances or other discharges, or the execution and delivery of deeds of conveyance, upon receipt of the claims.<sup>15</sup> Nor will authority to sell and convey real estate be construed from a power "to superintend my real and personal estate, to make contracts, to settle outstanding debts, and generally to do all things that concern my interests in any way, real or personal, whatsoever, giving my said attorney full power to use my name to release others or bind myself as he may deem proper and expedient."<sup>16</sup> Nor will authority to act in all the principal's business generally give the agent power to sell and convey the principal's land;<sup>17</sup> but such a power thus given in general terms will be construed to authorize the

Horton, 38 Minn. 66; Stillman v. Fitzgerald, 37 Minn. 186; Smith v. Allen, 86 Mo. 178; Johnson v. Hurley, 115 Mo. 513, Huffc. Cas. 105; Michael v. Eley, 61 Hun (N. Y.) 180.

<sup>11</sup> Rice v. Tavernier, 8 Minn. 248, 83 Am. Dec. 778. See, also, Jaques v. Todd, 3 Wend. (N. Y.) 83; Loomis v. McClintock, 10 Watts (Pa.) 274.

<sup>12</sup> Gardiner v. Griffith (Tex. Civ. App.) 56 S. W. 558.

<sup>13</sup> De Cordova v. Knowles, 37 Tex. 19.

<sup>14</sup> Moore v. Lockett, 2 Bibb (N. Y.) 67, 4 Am. Dec. 683.

<sup>15</sup> Berry v. Harnage, 39 Tex. 638.

<sup>16</sup> Billings v. Morrow, 7 Cal. 171, 68 Am. Dec. 235; Treat v. De Cells, 41 Cal. 202; Lord v. Sherman, 2 Cal. 498; Hunter v. Sacramento Val. Beet-Sugar Co., 11 Fed. 15.

<sup>17</sup> Coquillard v. French, 19 Ind. 274; Smith v. Stephenson, 45 Iowa, 645; Ashley v. Bird, 1 Mo. 640, 14 Am. Dec. 313; Watson v. Hopkins, 27 Tex. 637.

execution of a lease for a term exceeding one year.<sup>18</sup> And the mere fact that a person wrote to the owner of land inquiring what he would take for certain real estate, to which the latter replied stating the price, does not give such person authority to sell the property as the agent of the owner.<sup>19</sup> Nor can an agent who has authority only to receive proposals to purchase the property of his principal, and submit the same to the latter for acceptance or rejection, make an absolute contract of sale, which will be binding on the principal.<sup>20</sup>

A power of attorney "to ask, demand, recover, or receive the maker's lawful part of a decedent's estate, giving and granting thereby to his said attorney his sole and full power and authority to take, pursue, and follow such legal course for the recovery, receiving, and obtaining the same, as he himself might or could do were he personally present, and upon the receipt thereof, acquittances, and other sufficient discharges for him, and in his name, to sign, seal, and deliver," does not give such attorney power to sell and convey the real estate.<sup>21</sup> So a power of attorney to one to sell certain real estate in "lots as surveyed by" a certain person, where the land was about to be surveyed as an addition to a town, does not empower the agent to sell the entire tract for a certain sum or at so much per acre.<sup>22</sup>

Although the authority given to an agent may not be sufficient to empower him to sell and convey the real estate, it may, in some cases, be sufficient to authorize him to make a

<sup>18</sup> *Jones v. Marks*, 47 Cal. 242. Compare *De Rutte v. Muldrow*, 16 Cal. 505.

<sup>19</sup> *Prentiss v. Nelson*, 69 Minn. 496. A memorandum made and signed by the owner of land, containing a written description of the land, with a price, and handed to an agent, does not constitute sufficient authority in the agent to execute a written contract of sale binding on the owner. *Donnan v. Adams*, 30 Tex. Civ. App. 615.

<sup>20</sup> *Johnson v. American Freehold Land Mortg. Co. of London*, 111 Ga. 490; *Armstrong v. Oakley*, 23 Wash. 122.

<sup>21</sup> *Hay v. Mayer*, 8 Watts (Pa.) 203, 34 Am. Dec. 453; *Hotchkiss v. Middlekauf*, 96 Va. 649.

<sup>22</sup> *Rice v. Tavernier*, 8 Minn. 248, 83 Am. Dec. 778.

contract for its sale.<sup>23</sup> Thus the following authority: "I wish you to manage (my property) as you would your own; if a good opportunity offers to sell everything I have, I would be glad to sell," was held to authorize the agent to contract for the sale of the real estate, but not to convey it; and a deed executed to a purchaser, though invalid as a conveyance, was held good as a contract for the sale of the property therein described.<sup>24</sup>

Where one sells the land of another under an assumed authority to do so, this, as against him, is *prima facie* evidence of written authority; and when the question of agency becomes material, the burden of proof is upon him to rebut the presumption arising from his claim of authority.<sup>25</sup>

It must be noted in this connection that there is a distinction between a power to sell merely, and a power to convey. "A person may give another authority to sell land without giving him authority to execute conveyances, or he may give him power to execute conveyances without the power to make sales, or he may give him power to do both. Authority to convey can only be given by deed, while authority to sell may be given by parol. \* \* \* The power to sell, as distinguished from the power to convey, may be modified or changed by parol, and, where the power is both to sell and convey (the power to convey being general and without limitation), if the agent exceeds his authority as to the terms of sale, and executes a conveyance, the deed is voidable merely, and the sale may be ratified by parol."<sup>26</sup>

#### § 228. Extent and certainty of such authority.

(a) **In general.**—The certainty of a power of attorney to sell real estate should be equal to that requisite in the deeds to be executed by virtue thereof; and therefore such deeds,

<sup>23</sup> *Jones v. Marks*, 47 Cal. 242; *De Rutte v. Muldrow*, 16 Cal. 505; *Jackson v. Badger*, 35 Minn. 52; *Matherson v. Davis*, 2 Cold. (Tenn.) 443; *Lyon v. Pollock*, 99 U. S. 668; *Ledbetter v. Walker*, 31 Ala. 175.

<sup>24</sup> *Lyon v. Pollock*, 99 U. S. 668.

<sup>25</sup> *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122.

<sup>26</sup> *Dayton v. Nell*, 43 Minn. 246.

in pursuance of an uncertain authority, will be valid or void, as they would be were the uncertainty of the power transferred to them.<sup>27</sup> Thus a conveyance of "a piece of land in C., belonging to the bank," there being in C. more than one piece so belonging, is too uncertain to pass anything, nor will it give the grantee a right of election between the different pieces.<sup>28</sup> But a power of attorney to convey lands need not describe in detail the lands authorized to be conveyed, where the authority is to sell all the land belonging to the principal.<sup>29</sup> A power of attorney to "bargain, sell, grant, release, and convey," but which is silent as to what the attorney was to sell or convey, is sufficiently broad to authorize the attorney to sell and convey whatever estate the grantor might then own.<sup>30</sup> And where the agent has power to sell and convey all of certain land not before sold and conveyed, he may convey a parcel previously sold but not conveyed by the principal.<sup>31</sup> Although the property may be indefinitely described in the power of attorney, yet this indefiniteness may be cured in the deed conveying the property under such power.<sup>32</sup>

A joint power of attorney given by two persons, authorizing another to enter upon, take possession of, and convey all lands in which they may be interested, does not authorize the donee of the power to convey lands in which one only of the donors is interested; and a conveyance made in the name

<sup>27</sup> *Lumbard v. Aldrich*, 8 N. H. 31, 28 Am. Dec. 381; *Gage v. Gage*, 30 N. H. 420; *Clark v. Graham*, 6 Wheat. (U. S.) 577; *Gee v. Bolton*, 17 Wis. 624; *Aleman v. Daly*, 36 Cal. 90; *Crimp v. Yokeley*, 20 Tex. Civ. App. 231; *Pool v. Unknown Heirs of Foster* (Tex. Civ. App.) 49 S. W. 923.

<sup>28</sup> *Lumbard v. Aldrich*, 8 N. H. 31, 28 Am. Dec. 381.

<sup>29</sup> *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273; *Roper v. McFadden*, 48 Cal. 346; *Vaughn v. Sheridan*, 50 Mich. 155, where it was held that a power to sell "three certain lots of land in the village of P., in said county of O., belonging to me," was sufficiently certain to support the sales of three tracts, lying within said town and belonging to the person who gave the power.

<sup>30</sup> *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600. Compare *Gee v. Bolton*, 17 Wis. 624.

<sup>31</sup> *Mitchell v. Maupin*, 3 T. B. Mon. (Ky.) 188.

<sup>32</sup> *Valentine v. Hawley*, 37 La. Ann. 303.

of both is void, unless both had an interest in the lands conveyed.<sup>33</sup>

Where an agent to negotiate a sale of lots has no authority to make a contract without his principal's consent, a parol license given a purchaser to use adjoining land as a private way, of which the owner has no knowledge, is not binding on the owner.<sup>34</sup>

(b) **As to after-acquired land.**—There has been some conflict among the authorities as to whether or not the authority of an agent, who has been employed to sell real estate generally, applies to land which has been acquired by the principal after the execution of the power and before its termination. By one, and perhaps the better rule, it is held that a power authorizing the attorney to sell all property owned by the principal authorizes the former to convey not only all property owned by the latter at the time of the execution of the power, but also all that he may thereafter acquire before the power is revoked.<sup>35</sup> Thus a power of attorney authorizing the agent to sell, grant, and convey, any and all lands which the principal "may own," will give the agent power to convey an estate acquired by the principal subsequent to the execution of the power, and will not be confined to lands owned by him at the time of its execution.<sup>36</sup> So a power given to a husband by his wife, to "sign my name to all conveyances of real estate to which I have any right of dower, \* \* \* giving and granting unto my said at-

<sup>33</sup> *Gilbert v. How*, 45 Minn. 121, 22 Am. St. Rep. 724; *Holladay v. Daily*, 19 Wall. (U. S.) 606; *Dodge v. Hopkins*, 14 Wis. 630. In *Davenport v. Parsons*, 10 Mich. 42, 81 Am. Dec. 772, where a deed purported to be made by attorneys under power from two grantors, and some evidence was given of the existence of a joint power from them, but only a power from one of them individually was produced, it was held that the execution of the deed could not be referred to this separate power, so as to uphold it as the deed of the grantor who had given such power.

<sup>34</sup> *Noftsgar v. Barkdoll*, 148 Ind. 531.

<sup>35</sup> *Fay v. Winchester*, 4 Metc. (Mass.) 513; *Berkey v. Judd*, 22 Minn. 287; *Bigelow v. Livingston*, 28 Minn. 57; *Benschoter v. Atkins*, 25 Neb. 645; *Benschoter v. Lalk*, 24 Neb. 251; *Alexander v. Goodwin*, 20 Neb. 216.

<sup>36</sup> *Bigelow v. Livingston*, 28 Minn. 57.

torney full power and authority to do and perform all and every act and thing whatsoever required and necessary to be done in and about the premises; it being intended to convey hereby all my right, title, and interest, in and to the above-described real estate," will not be limited so as to authorize the attorney to convey the dower interest alone of the principal, but it will be construed to authorize him to convey all the right, title, and interest of the principal of whatever kind or nature in the real estate described, and to apply to lands acquired by the latter subsequent to its execution and before its revocation, as well as to that owned and possessed by him or her at the time the power was given.<sup>87</sup>

On the other hand there are cases holding that a power of attorney given to an agent to sell and convey any and all lands belonging to the principal applies only to lands then belonging to the principal and does not refer to lands acquired by him after the execution of the power.<sup>88</sup> Thus a power of attorney given by parents to their son, authorizing him to sell and convey all land belonging to them, in a certain county, applies only to the land then owned by them, and does not confer authority upon the son to sell land conveyed by his father to his mother after the execution of such power, although at the time of its execution she had an inchoate right of dower in the land so conveyed.<sup>89</sup>

This conflict, however, is more apparent than real, for it will be found upon an examination of the cases that where

<sup>87</sup> *Benschoter v. Lalk*, 24 Neb. 251; *Benschoter v. Atkins*, 25 Neb. 645.

And where the plaintiff and his wife joined in a power authorizing an attorney in fact to convey all pieces of land which they then owned, or might thereafter acquire, "or in which they may now or hereafter be in any way interested," the attorney was authorized to convey a tract of land thereafter acquired by the husband as a soldier's additional homestead, and to bar the wife's inchoate dower right. *Snell v. Weyerhauser*, 71 Minn. 57; *Tuman v. Pillsbury*, 60 Minn. 520.

<sup>88</sup> *Penfold v. Warner*, 96 Mich. 179, 35 Am. St. Rep. 591; *Weare v. Williams*, 85 Iowa, 253.

A power of attorney to sell mortgages of which the principal is "now" possessed confers no authority to sell after-acquired mortgages. *Union Trust Co. v. Means*, 201 Pa. 374.

<sup>89</sup> *Penfold v. Warner*, 96 Mich. 179, 35 Am. St. Rep. 591.

the power is confined to land owned by the principal at the time of the execution of the power, there was something in the language or circumstances, that manifested an intention on the part of the principal to so limit the agent's authority. And where his power has been held to refer to after-acquired property, the power itself was sufficiently broad to cover such property. For example, where the power was to "control, sell, convey, and mortgage any and all real estate I own or control," the words "I own" were held to mean present possession or ownership as distinguished from that which is to be acquired in the future.<sup>40</sup> But where the power was to sell, grant, and convey any and all lands which the principal "may own," it was held "to include not only lands owned by the principal at the time when the power was executed, but also lands afterwards acquired and owned by him at any time before the power of attorney is revoked."<sup>41</sup>

Where a power of attorney is given to sell any real property which the principal then owned, or was interested in, a deed made thereafter to land which the principal then owned, but in which at the time of the execution of the power he had only a mortgagee's interest, does not confer a perfect title, as such power refers to a legal interest and a mortgagee's interest is not such.<sup>42</sup>

(c) **Where authority is to buy and sell.**—A power of attorney authorizing an attorney, among other things, "to buy and sell real estate, and in my name to receive and execute all necessary contracts and conveyances therefor," does not authorize such attorney to sell and convey lands to which, as the proper record shows, the principal has acquired title before the execution of the power. Such power is to be construed as having reference to a business to be inaugurated after its execution.<sup>43</sup>

<sup>40</sup> *Weare v. Williams*, 85 Iowa, 253.

<sup>41</sup> *Bigelow v. Livingston*, 28 Minn. 57.

<sup>42</sup> *Turner v. McDonald*, 76 Cal. 177, 9 Am. St. Rep. 189.

<sup>43</sup> *Greve v. Coffin*, 14 Minn. 345, 100 Am. Dec. 229; *Allis v. Goldsmith*, 22 Minn. 123. But see *Texas Loan Agency v. Miller*, 94 Tex. 464, where the plaintiff's ancestor executed a power of attorney to her son "to buy and sell land, and to transact all business necessary in all transactions," etc., the ancestor being an illiterate widow,



**§ 229. Sale must be executed in manner and on terms authorized.**

Where an agent is employed to sell land it is incumbent upon him to sell it in the manner or upon the terms authorized in his power of attorney and for the price limited therein.<sup>44</sup> Thus, if he is authorized to enter into written contracts for the sale of land, a parol contract for such sale and his admission of the purchaser into possession are unauthorized, and do not take the case out of the statute of frauds, nor furnish a defense to an action of trespass by the owner.<sup>45</sup> So if the agent is positively instructed to sell the whole of the property and he undertakes to sell a portion thereof, the principal will not be compelled to make specific performance.<sup>46</sup> And if an agent is authorized to sell realty for a specified sum he cannot bind the principal by selling for less.<sup>47</sup> So where, after some correspondence, a real estate broker writes his customer that he can sell his land for four thousand dollars, one-half cash, balance in one and two years, at eight per cent. interest, to which the customer telegraphs, "Accept four thousand dollar proposition," the broker is not authorized to make a binding contract to sell for cash.<sup>48</sup> But authority to an agent to sell land for one-half cash, and the other half "payable on or before one year," authorizes a sale for one-half cash, and the other half "payable in one year."<sup>49</sup> If his authority is to sell for "about one half cash," he may sell and contract for the entire price to be

having land and chattels scattered over a large territory, it was held that the son had authority to sell lands already owned by the ancestor.

<sup>44</sup> *Thornton v. Boyden*, 31 Ill. 200; *Monson v. Kill*, 144 Ill. 248; *Siebold v. Davis*, 67 Iowa, 560; *Dayton v. Buford*, 18 Minn. 126; *Jackson v. Badger*, 35 Minn. 52; *Dana v. Turlay*, 38 Minn. 106; *Everman v. Herndon*, 71 Miss. 823.

<sup>45</sup> *Baring v. Pierce*, 5 Watts & S. (Pa.) 548, 40 Am. Dec. 534.

<sup>46</sup> *Davis v. Gordon*, 87 Va. 559.

<sup>47</sup> *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343; *Holbrook v. McCarthy*, 61 Cal. 216.

<sup>48</sup> *Everman v. Herndon*, 71 Miss. 823.

<sup>49</sup> *Deakin v. Underwood*, 37 Minn. 98, 5 Am. St. Rep. 827. Compare *Dana v. Turlay*, 38 Minn. 106; *Monson v. Kill*, 144 Ill. 248.

paid in cash on the delivery of the deed.<sup>50</sup> Where one was authorized by a power of attorney to sell and convey real estate for such sum or sums of money as to him should seem most to the advantage of the principal, and he conveyed real estate worth three or four thousand dollars for the nominal consideration of one dollar, the deed might be treated as a nullity by the principal.<sup>51</sup> A power of attorney to sell and convey real estate on such terms as the agent shall deem meet does not authorize him, upon such sale, to defer the payment of a portion of the purchase price until the determination of the validity of an attachment on the land, of which the owner has no notice.<sup>52</sup>

### § 230. Time of sale.

In the absence of instructions otherwise, the agent may exercise his discretion in selling at any time within a reasonable period, if in so doing he acts in good faith for his principal's interests. Of course, if the time within which the sale is to be made is specially limited in his authority, the sale should be made within such time. But if nothing is said in the power as to the time of sale then the agent may, in good faith, exercise his discretion in selling at such time as he honestly believes will best subserve the interests of his principal. He cannot exercise such discretion, however, to sell at a very remote date from the time of his employment, although it should happen in the particular case that the property has greatly increased in value. Thus, if an agent is authorized to make a sale at a given price, and three years afterwards, when the value has greatly increased and is rapidly rising, he sells at the price named and at a great sacrifice, without informing his principal of the rise in value, it is such a fraud upon the principal that a court of equity will refuse to enforce the conveyance.<sup>53</sup> Where the sale is authorized to be made within "a short time," such authority will be followed if the agent sells within two

<sup>50</sup> *Witherell v. Murphy*, 147 Mass. 417. Compare *Monson v. Kill*, 144 Ill. 248; *Everman v. Herndon*, 71 Miss. 823.

<sup>51</sup> *Meade v. Brothers*, 28 Wis. 689.

<sup>52</sup> *Morton v. Morris*, 27 Tex. Civ. App. 262.

<sup>53</sup> *Proudfoot v. Wightman*, 78 Ill. 553.

weeks.<sup>54</sup> But a sale a month afterwards is unauthorized, where the authority was to sell at a certain price if he could find a purchaser "immediately."<sup>55</sup> Where the agent's authority states specifically the day or date on which the sale must be made, the agent has no authority to make it on any other day or date.<sup>56</sup>

**§ 231. Authority of such agent to receive purchase money.**

There cannot be a perfected sale and conveyance of land by an agent, in the absence of statute, without an authority under seal, as a conveyance cannot generally be made without such power; but where such a power of attorney is given to an agent to sell and convey land for cash, it would confer upon him authority to receive in cash the purchase money, or at least so much as is to be paid at the time of sale.<sup>57</sup>

A power of attorney to an agent, "to grant, bargain, and sell land, or any part or parcel thereof, for such sum or price and on such terms as to him shall seem meet, and for me and in my name to make, execute, acknowledge, and deliver good and sufficient deeds and conveyances for the same, with or without covenants and warranty," authorizes him to sell on a reasonable credit, and to receive the purchase money.<sup>58</sup> But where the agent's authority is merely to contract for the sale of land, the agent has authority to receive so much only of the purchase money as is to be paid in hand.<sup>59</sup> This is based on the principle that after the agent has completed the contract of sale, his duty is performed and his agency terminates; but as receiving so much of the purchase money as is to be paid at the time of

<sup>54</sup> *Smith v. Fairchild*, 7 Colo. 510.

<sup>55</sup> *Matthews v. Sowle*, 12 Neb. 398.

<sup>56</sup> *Bliss v. Clark*, 16 Gray (Mass.) 60.

<sup>57</sup> *Morrill v. Cone*, 22 How. (U. S.) 81; *Peck v. Harriott*, 6 Serg. & R. (Pa.) 146, 9 Am. Dec. 415; *Alexander v. Jones*, 64 Iowa, 207; *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539; *Johnson v. McGruder*, 15 Mo. 365; *Goodale v. Wheeler*, 11 N. H. 424; *Mann v. Robinson*, 19 W. Va. 49, 42 Am. Rep. 771; *Dyer v. Duffy*, 39 W. Va. 148; *Farquharson v. Williamson*, 1 Grant Ch. 93.

<sup>58</sup> *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539.

<sup>59</sup> *Alexander v. Jones*, 64 Iowa, 207. And see *Yerby v. Grigsby*, 9 Leigh (Va.) 387.

the sale is part of the contract, he has authority to receive such, but beyond that he has no authority. As a parol authority to sell would mean simply an authority to make a contract for the sale of the land, for no parol authority could be given to make a perfected sale, that is, a conveyance, such an authority, or an authority merely to sell, would not ordinarily carry with it an authority to collect the whole purchase price.<sup>60</sup>

But where the principal has held the agent out as having such authority, or where he has permitted the agent to so hold himself out, or where the principal has otherwise conducted himself so as to lead third parties to believe that the agent has authority to receive payments on land sales, he will be estopped from denying it to the prejudice of one who has acted thereon; and a payment made by the purchaser to an agent under any of the above circumstances will protect such purchaser.<sup>61</sup> Thus a company is estopped to assert that

<sup>60</sup> *Mann v. Robinson*, 19 W. Va. 49, 42 Am. Rep. 771; *Dyer v. Duffy*, 39 W. Va. 148; *Mynn v. Joliffe*, 1 Moody & R. 327. In *Ireland v. Thomson*, 56 E. C. L. 167, Maule, J., says: "In the case of *Mynn v. Joliffe*, 1 Moody & R. 326, it was decided that an agent employed to sell an estate is not as such authorized to receive the purchase-money. And there is no doubt that on the sale of an estate, to imply such an authority would be most inconvenient and unnecessary; it being clearly for the interest of the vendor that he, and not his agent, should receive the purchase-money; and no inconvenience to any one arises out of the limit to the authority of the agent, which excludes his right to receive the money. The proper course is clearly that the vendee should retain the money and the vendor the estate till the conveyance is made; and thus neither of them runs any risk of losing the money."

*Green, J.*, in *Mann v. Robinson*, 19 W. Va. 49, 42 Am. Rep. 771, commenting on *Yerby v. Grigsby*, 9 Leigh (Va.) 387, says: "So far as I can see there was no authority from anything appearing in this case to justify the reporter in stating in the syllabus of this case, that so broad a proposition was held in it, as that 'when the owner of lands authorized another to make a contract for the sale thereof, the authority of the agent to receive so much of the purchase-money as is to be paid in hand is a necessary incident to the power to sell.' Nothing of the sort is said by the court; and no such broad proposition can possibly be inferred from the statement of the case or the decree entered."

<sup>61</sup> *Wolford v. Young*, 105 Iowa, 512.

its agent had not authority to receive deferred payments on land sales, though he had originally no authority therefor, he having on several occasions collected and remitted them without objection from the company, having in some instances been requested by the company to collect some small balances, and it having been known that payment by other persons had been made to him before those in question, and had been recognized by the company.<sup>62</sup> So the fact that an agent had managed the rental of his principal's property for several years, and collected the rent, is sufficient to show his authority to collect the purchase price of the property when sold by him as her agent.<sup>63</sup>

Where the authority of the agent is merely to sell the land, and his agency is limited to a particular period, and according to the terms on which he is authorized to sell, the payments are not to be made until after his agency expires, he has no power to receive payment.<sup>64</sup> So mere authority to sell land and collect payments does not authorize the agent, after deeds had been given, and purchase-money notes had been sent the vendor, to take new notes in substitution, though the agent erroneously supposed the first notes had miscarried in the mails.<sup>65</sup>

### § 232. Authority to sell on credit.

In the absence of special authority or custom or usage to the contrary, an agent authorized to sell land usually has no implied power to sell on credit. If nothing is said in his power to that effect or it is not usual or customary to give credit, it is presumed that the sale was intended to be for cash,<sup>66</sup> unless he retains a lien by contract for the security of the purchase money.<sup>67</sup> But where it is customary to sell on credit in like cases, and the power of attorney is general, containing no limitation upon the attorney and no directions

<sup>62</sup> *Little Rock & F. S. R. Co. v. Wiggins*, 65 Ark. 385.

<sup>63</sup> *McCartney v. Stanfill*, 19 Ky. L. R. 612, 41 S. W. 278.

<sup>64</sup> *Johnson v. Craig*, 21 Ark. 533.

<sup>65</sup> *Hill v. Bess* (Tex. Civ. App.) 40 S. W. 202.

<sup>66</sup> *Dyer v. Duffy*, 39 W. Va. 148; *Lumpkin v. Willson*, 5 Helsk. (Tenn.) 555.

<sup>67</sup> *Henderson v. Beard*, 51 Ark. 483.

whether the sale shall be for cash or on time, the agent may exercise his discretion and sell on the customary credit.<sup>68</sup> Even where the authority to sell on credit is expressly given to the agent, he has not an unlimited discretion in that respect, but is subject to the condition that the credit must be reasonable and such as is usual and customary in like sales in the same locality.<sup>69</sup> Thus where the agent was authorized to sell, "for such sum or price and on such terms as to him shall seem meet," he was authorized to sell on a reasonable credit.<sup>70</sup>

The fact that the owner of lands, in authorizing another to sell them for him on credit, added that he expected a mortgage for the unpaid purchase price, and that he wanted a reliable purchaser, one such as the agent thinks will make all payments promptly, does not justify the principal in rejecting a contract of sale because he thinks the purchaser not reliable. The language employed by him indicates that he will permit the agent to determine that question.<sup>71</sup>

#### § 233. Authority to convey.

As has been seen, where authority is given to an agent to do anything, he has also all such other implied powers as

<sup>68</sup> *Silverman v. Bullock*, 98 Ill. 11.

<sup>69</sup> *Brown v. Central Land Co.*, 42 Cal. 257.

<sup>70</sup> *Carson v. Smith*, 5 Minn. 58, 77 Am. Dec. 539. The court, by Flandrau, J., in this case says: "I think it is clear that the words 'and on such terms as to him shall seem meet,' following the words immediately 'for such sum or price,' must refer to such previous words, and mean the terms upon which the 'sum or price' is to be paid. In the case of *Leroy v. Beard*, 8 How. (U. S.) 466, the court, in construing the word 'terms' as used in a power of attorney similar in all respects to the one under consideration, use this language: "'Terms' is an expression applicable to the 'conveyance and covenants to be given, as much as to the amount and time of paying the consideration;'" "and this case holds that the word 'terms' in a power of attorney authorized a covenant of warranty in a deed made under the power. We feel clear that Huff was fully empowered to sell on reasonable credit." And see *Rundle v. Cutting*, 18 Colo. 337 (holding that authority to sell real estate for cash does not authorize a sale on credit); *Morrill v. Cone*, 22 How. (U. S.) 81; *Silverman v. Bullock*, 98 Ill. 11; *Etheridge v. Biney*, 9 Pick. (Mass.) 272.

<sup>71</sup> *Peay v. Seigler*, 48 S. C. 496, 59 Am. St. Rep. 731.

are reasonably necessary for him to carry into effect the powers originally granted. In accordance with this rule, where a power of attorney is given to an agent to sell real estate, it also impliedly gives him authority to execute all instruments that may be necessary to complete the sale, if such a construction is consistent with the general tenor of the instrument conferring the power, or where such is the evident purpose of the power given.<sup>72</sup> Where the design and terms of the power manifest an intent to give the agent authority to effect a sale and conveyance, and the instrument assumes to ratify the "bargains" he may make, it will be held to give him authority to bind his principal to convey.<sup>73</sup> Thus, an authority to sell land conferred by a writ in the sheriff's hands carries with it authority to execute all the instruments required by law to the completion of the sale; namely, a certificate of sale, and in case no redemption is had, a conveyance to the purchaser.<sup>74</sup> So where a man who was about to leave home, without much prospect of returning, made a power of attorney to another, giving him full authority to transact all business of every kind and description, to collect and receipt for all moneys due, and to sell and dispose of all of his property, the agent may make a deed of trust to a third person to secure and pay off the

<sup>72</sup> *People v. Boring*, 8 Cal. 406, 68 Am. Dec. 331; *Fogarty v. Sawyer*, 17 Cal. 589. And see *Delano v. Jacoby*, 96 Cal. 275, 31 Am. St. Rep. 201 (where it is held that a mere authority to sell does not, as a general rule, in the absence of any words or circumstances qualifying the language, empower the attorney to execute a conveyance); *Hemstreet v. Burdick*, 90 Ill. 444; *Hull v. Glover*, 126 Ill. 122; *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600; *Inhabitants of Nobleboro v. Clark*, 68 Me. 87, 28 Am. Rep. 22; *Macgruder v. Peter*, 4 Gill & J. (Md.) 323; *Alexander v. Walter*, 8 Gill (Md.) 239, 50 Am. Dec. 688; *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; *Farnham v. Thompson*, 34 Minn. 330, 57 Am. Rep. 59; *Plummer v. Buck*, 16 Neb. 322; *Benschoter v. Lalk*, 24 Neb. 251; *Alexander v. Goodwin*, 20 Neb. 216; *Paolillo v. Faber*, 56 App. Div. (N. Y.) 241; *Hunter v. Eastham* (Tex. Civ. App.) 67 S. W. 1080; *Id.*, 95 Tex. 648.

<sup>73</sup> *Tyrrell v. O'Connor*, 56 N. J. Eq. 448.

<sup>74</sup> *People v. Boring*, 8 Cal. 406, 68 Am. Dec. 331.

creditors of the principal.<sup>75</sup> So at a legal town meeting, the town "chose H. agent to sell the balance of the town landing, if he thinks it will be for the interest of the town to do so." It was held that by this vote H. had authority to sell the premises, and to execute a proper deed of conveyance therefor in behalf of the town.<sup>76</sup> And a power of attorney "to sell or lease any and all real estate" belonging to the maker of the instrument confers the power to contract to sell and to convey or transfer the property sold.<sup>77</sup>

This rule, however, usually applies only where the agent's authority has been given by an instrument under seal, for as a general rule unless his authority is so given he cannot execute a valid conveyance. But where for any reason the authority given to him is insufficient to enable him to make a conveyance, he may bind the principal by entering into an executory contract to convey, as a sealed authority is not required for this act. If then power is given to an agent to sell real estate, but the authority given is not sufficient to enable him to convey the property, he may nevertheless make a contract, binding on the principal, for the sale of such property.<sup>78</sup> But it seems that if it is only a general authority given to a real estate agent or broker, he has not even the power to enter into an executory contract, and his authority is only to find a purchaser.<sup>79</sup> Thus, it is held that a mere power to sell lands, without more, will not authorize the agent to bind his principal by written contract to convey.<sup>80</sup>

<sup>75</sup> *Lamy v. Burr*, 36 Mo. 85, 88 Am. Dec. 135. Compare *Smith v. Morse*, 2 Cal. 524.

<sup>76</sup> *Inhabitants of Nobleboro v. Clark*, 68 Me. 87, 28 Am. Rep. 22.

<sup>77</sup> *Hemstreet v. Burdick*, 90 Ill. 444. Compare *Hall v. Gambrill*, 88 Fed. 709.

<sup>78</sup> *Watson v. Sherman*, 84 Ill. 263; *Minor v. Willoughby*, 3 Minn. 154; *Groff v. Ramsey*, 19 Minn. 44; *Jackson v. Badger*, 35 Minn. 52; *Smith v. Allen*, 86 Mo. 178; *Force v. Dutcher*, 18 N. J. Eq. 401. Compare *Haydock v. Stow*, 40 N. Y. 363.

<sup>79</sup> *Armstrong v. Lowe*, 76 Cal. 616; *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Hamilton v. Cutts*, 6 Mackey (D. C.) 208; *Ryon v. McGee*, 2 Mackey (D. C.) 17; *Morris v. Ruddy*, 20 N. J. Eq. 236. See § 751 et seq.

<sup>80</sup> *Tyrrell v. O'Connor*. 56 N. J. Eq. 448.



**§ 234. Authority to put in the usual covenants of warranty.**

The authorities on this subject have not been altogether harmonious, but the great preponderance of authority now is that a power, without restriction, to sell and convey real estate, gives authority to the agent to deliver deeds with general warranty binding on the principal, where, under the circumstances, this is the common and usual mode of assurance.<sup>81</sup> Thus, an agent to sell real estate may bind his principal by covenants of warranty in his deed, where his authority is to "sell for the best prices, either by public auction or by private contract, etc., and to sign, seal, and execute all or any such contracts, agreements, conveyances, and assurances, and to do and perform all such acts or things for perfecting such sales as shall be requisite and necessary in that behalf."<sup>82</sup> But this rule refers only to such covenants as are usual in similar cases, and does not give him power to make any unusual covenants or representations as to the quality, quantity, or title of the land;<sup>83</sup> although it seems that he may make representations as to its cost or location or boundaries, if the purchaser has had no opportunity of seeing the property.<sup>84</sup>

Where land is conveyed by a husband and wife, without covenants of warranty, to an agent, to be by him sold for the

<sup>81</sup> *Le Roy v. Beard*, 8 How. (U. S.) 451; *Taggart v. Stanbery*, 2 McLean, 543, Fed. Cas. No. 13,724; *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 293, 19 Am. Dec. 92; *Bronson v. Coffin*, 118 Mass. 156; *Ward v. Bartholomew*, 6 Pick. (Mass.) 409; *Farnham v. Thompson*, 34 Minn. 330; *Backman v. Charlestown*, 42 N. H. 132; *Schultz v. Griffin*, 121 N. Y. 294, 18 Am. St. Rep. 825; *Peters v. Farnsworth*, 15 Vt. 155, 40 Am. Dec. 671. But see *Howe v. Harrington*, 18 N. J. Eq. 495, and *Nixon v. Hyseratt*, 5 Johns. (N. Y.) 58. The court in this last case says: "A conveyance or assurance is good and perfect without either warranty or personal covenants, and therefore they are not necessarily implied in an authority to convey."

<sup>82</sup> *Peters v. Farnsworth*, 15 Vt. 155, 40 Am. Dec. 671.

<sup>83</sup> *National Iron Armor Co. v. Bruner*, 19 N. J. Eq. 331; *Tondro v. Cushman*, 5 Wis. 279.

<sup>84</sup> *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Green v. Worman*, 83 Mo. App. 568.

benefit of the wife, the agent, on a sale, has no power to make covenants binding on her.<sup>85</sup>

**§ 235. Powers not included in authority to sell realty.**

(a) **Power to barter or exchange, or give away.**—When an agent is employed "to sell land, in the absence of anything to the contrary, it is presumed that he is to sell only, and for cash; and unless authority to do so appears he has no authority to barter, exchange, or give away the property which he is employed to sell."<sup>86</sup> Thus, a power of attorney does not authorize an agent to barter or exchange the principal's land for other property, where it is "to sell, transfer, and convey all lands that I may have, \* \* \* and generally to do and perform all acts and deeds for me, and in my name, concerning any and all property that I now own."<sup>87</sup> Nor will it be an exception to this rule that the consideration was received partly in cash and the balance in something else.<sup>88</sup>

(b) **Nor power to mortgage.**—A power of attorney to sell and convey real estate, not coupled with an interest, does not confer power to mortgage, and a mortgage executed under such a power is void.<sup>89</sup> Thus a letter of attorney with naked

<sup>85</sup> *Yazel v. Palmer*, 88 Ill. 597.

<sup>86</sup> *Morrill v. Cone*, 22 How. (U. S.) 75, 81; *Chapman v. Hughes*, 134 Cal. 641; *Mott v. Smith*, 16 Cal. 533 (or for a consideration of love and affection); *Dupont v. Wertheman*, 10 Cal. 354; *McMichael v. Wilkie*, 18 Ont. App. 464; *Holmes v. Redhead*, 104 Iowa, 399; *Hampton v. Moorhead*, 62 Iowa, 91; *Taylor v. Galloway*, 1 Ohio, 232, 13 Am. Dec. 605; *Lumpkin v. Wilson*, 52 Tenn. 555; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Rhine v. Blake*, 59 Tex. 240; *Mann v. Robinson*, 19 W. Va. 49, 42 Am. Rep. 771.

<sup>87</sup> *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

<sup>88</sup> *Hampton v. Moorhead*, 62 Iowa, 91.

<sup>89</sup> *Devaynes v. Robinson*, 24 Beav. 86; *Haldenby v. Spofforth*, 1 Beav. 390 (and see *Davy v. Waller*, 81 Law T. [N. S.] 107); *Paptasco Guano Co. v. Morrison*, 2 Woods (U. S.) 395; *Hawxhurst v. Rathgeb*, 119 Cal. 531, 63 Am. St. Rep. 142; *Golinsky v. Allison*, 114 Cal. 458; *Dupont v. Wertheman*, 10 Cal. 354; *Salem Nat. Bank v. White*, 159 Ill. 136; *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Hoyt v. Jaques*, 129 Mass. 286; *Jeffrey v. Hursh*, 49 Mich. 31; *Morris v. Watson*, 15 Minn. 212; *Kinney v. Mathews*, 69 Mo. 520; *Stokes v. Payne*, 58 Miss. 614, 38 Am. Rep. 340; *Ferry*

authority to sell and convey, uncoupled with any interest in the land or fund, does not authorize the attorney in fact to execute a bond and mortgage in the name of the principal.<sup>90</sup> So an agent has no power to mortgage realty under a power "to buy and sell real and personal property;" to make "good and sufficient deeds \* \* \* in transferring and conveying the same;" and generally to make contracts for the profitable improvement and use of the principal's property, for the enlargement of his estate, unless it appears that the making of such mortgage was necessary to the execution of the authority given;<sup>91</sup> nor under a power by will to "sell and dispose of" the estate.<sup>92</sup> Nor does a power of attorney giving authority to manage, control, lease, and sell land include or imply authority to mortgage the same.<sup>93</sup> So a power of attorney, with authority to sell all the grantor's right, title, and interest in the land, and to convey the same by warranty deed, does not authorize the grantee to mortgage the land.<sup>94</sup>

But if the grantee of the power has an interest in the subject-matter of the power, such person will also have power to mortgage the property. Thus, if a will vests the testator's wife with a life estate in his property, with power to sell or convey the same by deed, and to use the proceeds for her comfort, or otherwise, as she may think proper, she has power

v. Laible, 31 N. J. Eq. 566; Albany Fire Ins. Co. v. Bay, 4 N. Y. 9; Bloomer v. Waldron, 3 Hill (N. Y.) 361; Morris v. Ewing, 8 N. D. 99; Campbell v. Foster Home Ass'n, 163 Pa. 609, 43 Am. St. Rep. 818; Head v. Temple, 4 Heisk. (Tenn.) 34; Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316. A husband having a power of attorney from his wife to exercise supervision over all her lands, to sell any part thereof, or any estate, right, title, or interest that she may have therein or thereto, and to mortgage any part of her lands or interest therein, is not authorized to mortgage his own lands so as to bar her inchoate right of dower therein. Security Savings Bank v. Smith, 38 Or. 72, 84 Am. St. Rep. 756.

<sup>90</sup> Campbell v. Foster Home Ass'n, 163 Pa. 609, 43 Am. St. Rep. 818.

<sup>91</sup> Wood v. Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771.

<sup>92</sup> Stokes v. Payne, 58 Miss. 614, 38 Am. Rep. 340.

<sup>93</sup> First Nat. Bank v. Hicks, 24 Tex. Civ. App. 269.

<sup>94</sup> Morris v. Ewing, 8 N. D. 99.

to mortgage.<sup>95</sup> So where the power conferred upon the agent includes a trust coupled with a power to sell or lease, it is held that he may mortgage the property;<sup>96</sup> although in California a contrary doctrine is held, where the agent is authorized to sell real estate, in which he has an interest under a trust agreement with his principal.<sup>97</sup>

(c) **Nor power to partition.**—A power of attorney to sell and convey land does not give the agent power to make a partition of lands in which the principal is tenant in common.<sup>98</sup> But it has been held that a power to “sell and exchange” lands includes a power to partition.<sup>99</sup>

(d) **Nor power to change boundaries.**—Nor will a power to rent or sell the principal’s land give the agent authority to agree to a change of the boundaries of such land.<sup>100</sup>

(e) **Nor power to permit waste, or sell timber separate from land.**—Where an agent is authorized to bargain and sell land, he cannot, by virtue of such authority, license any one to enter and commit waste, or cut timber; nor has he power to sell the timber separate from the land.<sup>101</sup> And the fact that an agent in possession and control of lands rented part of them, taking rent notes therefor, which were afterwards found in the owner’s possession, and that he employed surveyors, kept off trespassers, and collected pay for timber cut and sold from such lands, does not constitute him the owner’s general agent with relation to such lands, so as to

<sup>95</sup> *Kent v. Morrison*, 153 Mass. 137, 25 Am. St. Rep. 616.

<sup>96</sup> *Allan v. Backhouse*, 2 Ves. & B. 65; *Ball v. Harris*, 4 Mylne & C. 264; *Mills v. Banks*, 3 P. Wms. 1; *Wayne v. Myddleton*, 2 Ga. 383; *Watson v. James*, 15 La. Ann. 386; *Williams v. Woodward*, 2 Wend. (N. Y.) 492; *Pennsylvania Ins. Co. v. Austin*, 42 Pa. 257. Or such an agent may execute a lease for life containing a provision for its eventual sale. *Williams v. Woodward*, 2 Wend. (N. Y.) 488.

<sup>97</sup> *Chapman v. Hughes*, 134 Cal. 641.

<sup>98</sup> *Borel v. Rollins*, 30 Cal. 408; *Wirt v. McEnery*, 21 Fed. 233; *Gosselin v. Chicago*, 103 Ill. 623; *Frost v. Erath Cattle Co.*, 81 Tex. 505, 26 Am. St. Rep. 835.

<sup>99</sup> *Phelps v. Harris*, 101 U. S. 370.

<sup>100</sup> *Fore v. Campbell*, 82 Va. 808.

<sup>101</sup> *Hubbard v. Elmer*, 7 Wend. (N. Y.) 446, 22 Am. Dec. 590. And see *Suffern v. Townsend*, 9 Johns. (N. Y.) 35; *Cooper v. Stower*, 9 Johns. (N. Y.) 331.

authorize a person to purchase timber from him and make payment to him without the principal's knowledge, and without inquiring into the extent of the agency.<sup>102</sup>

(f) **Nor power to dedicate to public use.**—Power given to an agent to sell and convey land cannot be construed as giving the agent authority to dedicate the land or a part thereof to public use,<sup>103</sup> unless such authority is expressly authorized<sup>104</sup> or is a necessary incident of the power originally granted. Thus a power of attorney to sell and convey real estate simply, confers no power to lay off the same into town lots, so as to vest the fee of the streets in the municipality for the use of the public.<sup>105</sup> But authority to lay out streets and dedicate them to public use may be implied, where the agent is empowered to purchase a town site and lay out a town,<sup>106</sup> or where he is authorized to "lay out" the grounds of the principal in order to dispose of them.<sup>107</sup> And an agreement that an agent for the sale of lots shall lay out and grade streets and put in sewers and water mains, and that the principal shall deed him sufficient lots to pay the cost, does not authorize the agent to contract with a purchaser of lots to lay walks and pavements and put in a sewer.<sup>108</sup>

(g) **Nor power to convey to pay agent's or principal's debts.**—Where an agent is employed to sell and convey real estate he cannot convey it in trust for the payment of his own debts.<sup>109</sup> Nor will such an agent be empowered to transfer it in payment of his principal's debts, as his authority is to sell only.<sup>110</sup> Thus, a power of attorney to sell and con-

<sup>102</sup> *Birmingham Mineral R. Co. v. Tennessee Coal, Iron & R. Co.*, 127 Ala. 137.

<sup>103</sup> *Gosselin v. Chicago*, 103 Ill. 623; *Wirt v. McEnery*, 21 Fed. 233; *Anderson v. Bigelow*, 16 Wash. 198.

<sup>104</sup> *Wirt v. McEnery*, 21 Fed. 233.

<sup>105</sup> *Gosselin v. Chicago*, 103 Ill. 623.

<sup>106</sup> *Bartean v. West*, 23 Wis. 416.

<sup>107</sup> *State v. Atherton*, 16 N. H. 203.

<sup>108</sup> *Hogan v. O'Brien*, 29 App. Div. (N. Y.) 59.

<sup>109</sup> *Frink v. Roe*, 70 Cal. 296; *Hemstreet v. Burdick*, 90 Ill. 444; *Lewis v. Lewis*, 203 Pa. 194.

<sup>110</sup> *Durham v. Oddie* (La.) 1 Mart. (N. S.) 444, 14 Am. Dec. 190; *Frost v. Erath Cattle Co.*, 81 Tex. 505, 26 Am. St. Rep. 831.

vey land, and also containing general words, does not include power to convey in discharge of a debt or in settlement of an adverse claim.<sup>111</sup>

(h) **Nor power to discharge mortgage.**—Nor has an agent, who is empowered to sell and convey land, authority to discharge a mortgage of his principal,<sup>112</sup> nor to foreclose one that has been taken as a security for deferred payments.<sup>113</sup> But where an agent, having a general authority to deal in lands, takes a conveyance, subject to a mortgage upon the premises, which the grantee, his principal, by the terms of the deed, “assumes,” the latter thereby becomes bound for the mortgage debt.<sup>114</sup>

(i) **Nor power to rescind contract for sale of land.**—As soon as an agent accomplishes the object of his agency, in the absence of anything indicating the contrary, his authority then ceases and he has no power to perform acts thereafter; and where an agent has been employed to make contracts for the sale of land, after he has made such contracts his authority ceases, and he cannot thereafter revoke, cancel, or rescind the contract so made, and enter into new ones, without the principal's consent.<sup>115</sup> Thus an agent, acting under a written power of attorney authorizing him to sell real estate, exhausts his power to sell as to the subject-matter, and he cannot cancel the sale, and make a new contract of sale to another person having knowledge of the first sale, so as to make the principal liable in damages for a breach of the second contract.<sup>116</sup> But an agent of execution creditors buying the land at an execution sale has the power to agree with the execution debtor to reconvey the land on payment of the judgment debt.<sup>117</sup>

(j) **Nor power to invest proceeds.**—After an agent has sold his principal's real estate and collected the purchase money

<sup>111</sup> Frost v. Erath Cattle Co., 81 Tex. 505, 26 Am. St. Rep. 831.

<sup>112</sup> Barger v. Miller, 4 Wash. C. C. 280, Fed. Cas. No. 979.

<sup>113</sup> Aultman v. Jones, 1 Woolw. 99, Fed. Cas. No. 657.

<sup>114</sup> Schley v. Fryer, 100 N. Y. 71.

<sup>115</sup> Luke v. Griggs, 4 Dak. 287; West-End Hotel & Land Co. v. Crawford, 120 N. C. 347.

<sup>116</sup> Luke v. Griggs, 4 Dak. 287.

<sup>117</sup> Brown v. Jackson (Tex. Civ. App.) 40 S. W. 162.

therefor, he has no authority, by virtue of his power to sell the land and collect the proceeds, to reinvest the money so received in any other property or investments that he might consider advantageous to his principal.<sup>118</sup>

*B. To Sell Personal Property.*

**§ 236. When agent has such authority—Mere possession not sufficient.**

Authority to dispose of personal property may be given to an agent either expressly or impliedly. If it is given expressly, of course his powers will be determined thereby; but in perhaps the majority of cases the authority is not so given, but is implied from the circumstances of the case. Where the authority is thus implied it is oftentimes difficult to determine the extent of the agent's authority.

The authority in any case must clearly appear. The bare possession of goods by one, though he may happen to be a dealer in that class of goods, does not clothe him with power to dispose of the goods as though he were owner, or as having authority as agent to sell or pledge the goods, to the preclusion of the right of the real owner. If he sells as owner there must be some other indicia of property than mere possession. There must be some act or conduct on the part of the real owner whereby the party selling is clothed with the apparent ownership, or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of an innocent third party dealing on the faith of such appearances.<sup>119</sup> Two things must concur, in the absence of

<sup>118</sup> *Stoddart v. United States*, 4 Ct. Cl. (U. S.) 516.

<sup>119</sup> *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 337; *Pickering v. Busk*, 15 East, 38, Wamb. Cas. 272, Huffc. Cas. 223; *Harris Loan Co. v. Elliott & Hatch Book Typewriter Co.*, 110 Ga. 302; *Willson v. Loeb*, 69 Ill. App. 445; *Conable v. Lynch*, 45 Iowa, 84; *Baehr v. Clark*, 83 Iowa, 313; *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 434, 48 Am. St. Rep. 400 (though the agent is a dealer in that class of property); *Howell v. Graff*, 25 Neb. 130, Huffc. Cas. 207; *Smith v. Clews*, 105 N. Y. 283, 59 Am. Rep. 502; *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 542; *Sanders v. Keber*, 28 Ohio St. 640; *Osborn v. McClelland*, 43 Ohio St. 307; *Velsian v. Lewis*, 15 Or. 539, 3 Am. St. Rep. 184.

express authority, in order that an agent thus having possession may sell the same and confer a good title: (1) The owner must clothe the person assuming to dispose of the property with the apparent title to, or implied authority to dispose of, the property; and (2) the purchaser must have acted and parted with value upon the faith of such apparent authority, so that he will be the loser if the appearances to which he trusted are not real.<sup>120</sup> Thus, if the principal send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended, as against a bona fide purchaser, that the commodity was sent thither for the purpose of sale.<sup>121</sup> But where the owner of a diamond ring put it in the hands of a jeweler to match it, or failing in that to get an offer for it, it was held that the jeweler had no authority to sell it.<sup>122</sup> So a person having notice that another in possession of an assignment of a judgment is not the owner thereof, nor entitled to its proceeds, and that they belong to a third party, is bound at his peril to ascertain the authority of the holder of the assignment to make delivery thereof and receive payment for the judgment as the agent of such third person.<sup>123</sup>

The above doctrine is based upon a well established principle of the common law, founded, as it would seem, upon a maxim of the civil law, *nemo plus juris in alium transferre potest quam ipse habet*, that a sale by a person who has no right or power to sell is not effective as against the rightful owner. At the common law, therefore, a person in possession of goods cannot confer upon another, by sale, any other or better title than he himself has. If, however, the real owner of the goods has so acted as to clothe the seller with apparent authority to sell, he will, even by the common law, be precluded from denying, as against those who have acted bona fide on the faith of that apparent authority, that he had given such authority, and the result as to them is the same as if he had really given it; unless the parties acted

<sup>120</sup> See *Bernard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289.

<sup>121</sup> *Pickering v. Busk*, 15 East, 38, Wamb. Cas. 272, Huffc. Cas. 223. Compare *Heath v. Stoddard*, 91 Me. 499.

<sup>122</sup> *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332.

<sup>123</sup> *Schmidt v. Shaver*, 196 Ill. 108, 89 Am. St. Rep. 250.



with notice of the want or limitation of authority. This rule has been changed by statutes in some states, under what are known as the Factor's Acts, which will be fully discussed elsewhere.<sup>124</sup>

**§ 237. Agent must act according to authority.**

In the absence of special instructions otherwise, the agent is authorized to sell the property in the usual manner pursued by other agents selling similar goods; and he is not empowered to go beyond such authority or to act contrary to any instructions that may have been given to him in the particular case.<sup>125</sup> Thus, if the usual manner of making a sale is privately, and there are no instructions otherwise, the agent cannot sell the goods at public auction.<sup>126</sup> So if he is instructed to sell at public auction he cannot bind the principal by a private sale,<sup>127</sup> although such sale may have been of greater advantage to the principal.<sup>128</sup> These rules will be noted more fully in the following sections. So an agent authorized to sell a yacht is not thereby given authority to sell a naphtha launch sometimes used as a tender to the yacht, but which is not legally an appurtenance thereto.<sup>129</sup>

So an agent to sell personalty has implied power to do all acts that are usual and necessary in transactions of that nature. This is but a further application of the rule we have seen in a previous section, that authority to do a certain thing carries with it all such other powers as are necessary and usual to accomplish the original power.<sup>130</sup> And

<sup>124</sup> See post, § 838.

<sup>125</sup> *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163, Wamb. Cas. 316; *Durand & Kasper Co. v. Rockwell*, 23 Ind. App. 11. See, also, *Inman v. Crawford*, 116 Ga. 63.

<sup>126</sup> *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

<sup>127</sup> *The G. H. Montague*, 4 Blatchf. 461, Fed. Cas. No. 5,377; *Jaques v. Todd*, 3 Wend. (N. Y.) 91.

<sup>128</sup> *Jaques v. Todd*, 3 Wend. (N. Y.) 91.

<sup>129</sup> *Forrest v. Vanderbilt*, 107 Fed. 734.

<sup>130</sup> *McCormick Harvesting Mach. Co. v. Snell*, 23 Ill. App. 79; *Boynton Furnace Co. v. Clark*, 42 Minn. 335; *Hayner v. Churchill*, 29 Mo. App. 676; *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427. An agent, authorized to sell goods when manufactured, has no authority to sell before they are manufactured. *Merriam v. De Turk*, 66 Cal. 549. And see cases following.

where an agent authorized to make sales treats a consignment of goods made by him as an actual sale, his election is binding on his principal.<sup>131</sup>

**§ 238. Time of sale.**

Where an agent is specially instructed to sell goods at a particular time, he must sell them at that time and cannot do so at an earlier or later date.<sup>132</sup> But where authority to sell has been given to him, without any restriction or limitation as to the time at which such sale must be made, the agent may exercise his discretion in selling within a reasonable time, taking into consideration all the circumstances of the case, such as the nature and condition of the property to be sold, the state of the market, and any other matters that may bear on the subject.<sup>133</sup>

**§ 239. Authority of agent to receive payment for goods sold.**

(a) **In general.**—There is some conflict among the authorities as to the right of an agent, who is employed to sell personal property, to receive payment for the goods so sold. For this reason no definite rule can be stated, but whether or not such an agent possesses such authority in any given case will depend, to a great extent, upon the facts and circumstances of that particular case. Of course such authority may be expressly given to him, or it may be implied either as incidental to the express power, or, in some cases, from the usages of agents in that particular line of business. If the agent's authority is to sell the goods for cash this would generally carry with it the power to receive the purchase money thereof.<sup>134</sup> So if a store has no "pay at the desk" system, it cannot be supposed that the owner intended that goods

<sup>131</sup> *McDonald v. Preston Nat. Bank*, 111 Mich. 649.

<sup>132</sup> *Bliss v. Clark*, 16 Gray (Mass.) 60.

<sup>133</sup> See *Thornton v. Boyden*, 31 Ill. 200; *Bliss v. Clark*, 16 Gray (Mass.) 60; *Smith v. Fairchild*, 7 Colo. 510; *Matthews v. Sowle*, 12 Neb. 398.

<sup>134</sup> *Mann v. Robinson*, 19 W. Va. 49, 42 Am. Rep. 771; *Hackney v. Jones*, 3 Humph. (Tenn.) 612; *Taylor v. Nusbaum*, 2 Duer (N. Y.) 302; *Higgins v. Moore*, 6 Bosw. (N. Y.) 344; *Cross v. Haskins*, 13 Vt. 536.

should go out without receiving pay therefor, and in such case the clerk certainly would have implied power to receive payment at the time of sale for goods so sold by him.<sup>135</sup> But if the principal forbids such payments, and requires all payments to be made to himself personally, or to a cashier, and gives a customer notice thereof, the customer would have no right to insist upon the apparent rather than the real authority of the agent.<sup>136</sup> This authority, however, only gives the clerk a right to receive payment over the counter at the time of the sale, and if he receives such payment elsewhere at any other time, it will not be binding on the principal;<sup>137</sup> though some cases hold that a power to sell goods includes a power to receive payment, although such payment is not made at the time of the delivery of the goods.<sup>138</sup>

Authority to receive payment may likewise be implied from the habit or course of dealing of the principal,<sup>139</sup> or it may be implied from the usages among the agents dealing in that particular class of goods, or line of business.<sup>140</sup> So an unconditional, unrestricted authority given to an agent to sell goods, contradistinguished from a mere power to negotiate a sale, such an authority as will bind the owner to deliver the goods, implies the power to receive payment.<sup>141</sup> This incidental authority does not exist, however, if the agent is merely employed to negotiate a sale without the possession of the property,<sup>142</sup> as where he is employed merely to take orders for the sale of goods, which he is required to submit to his principal for acceptance or rejection.<sup>143</sup>

<sup>135</sup> *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655; *Hirshfield v. Waldron*, 54 Mich. 649; *Kaye v. Brett*, 5 Exch. 269; *Davis v. Waterman*, 10 Vt. 526, 33 Am. Dec. 216.

<sup>136</sup> *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 657.

<sup>137</sup> *Kaye v. Brett*, 5 Exch. 269; *Hirshfield v. Waldron*, 54 Mich. 649.

<sup>138</sup> *Rice v. Groffmann*, 56 Mo. 434; *Brooks v. Jameson*, 55 Mo. 505; *Capel v. Thornton*, 3 Car. & P. 352.

<sup>139</sup> *Brooks v. Jameson*, 55 Mo. 505.

<sup>140</sup> *Meyer v. Stone*, 46 Ark. 210, 55 Am. Rep. 577; *Trainor v. Morrison*, 78 Me. 160, 57 Am. Rep. 790.

<sup>141</sup> *Higgins v. Moore*, 6 Bosw. (N. Y.) 344; *Hackney v. Jones*, 3 *Humph. (Tenn.)* 612; *Hoskins v. Johnson*, 5 *Sneed (Tenn.)* 469.

<sup>142</sup> See *infra* (d).

<sup>143</sup> *Fabian Mfg. Co. v. Newman* (Tenn. Ch. App.) 62 S. W. 218.

(b) **Mere possession of bill not sufficient.**—But an agent who has sold personal property is not authorized to receive payment therefor simply because he has in his possession the bill or account of such goods.<sup>144</sup> Thus, where goods ordered through an agent are sent to the purchaser accompanied by a bill, the latter is not authorized to pay the agent, in the absence of something else showing the agent's authority to receive the same.<sup>145</sup>

(c) **Where agent has possession of property or indicia of ownership thereof.**—Where, however, the principal has given the agent possession of the goods, which he is employed to sell and deliver, the possession and delivery of the property clothes the agent with the indicia of authority to receive the purchase price, and if the purchaser is not apprised of any limit placed upon the agent's authority, the latter may receive payment at the time of the sale and delivery, and it will be as binding as if made to the principal in person.<sup>146</sup>

(d) **Where agent has not possession—Cannot receive payment.**—But where "the agent has not the possession of the goods, or other indicia of authority, and is only authorized to sell, or solicit orders, if the purchaser pays the price to the agent he does so at his peril, and it devolves upon him, in a suit for the purchase money by the principal, to prove that

<sup>144</sup> *Hirshfield v. Waldron*, 54 Mich. 649; *McDonough v. Heyman*, 38 Mich. 334. See *Luckie v. Johnston*, 89 Ga. 321.

<sup>145</sup> *Kornemann v. Monaghan*, 24 Mich. 36.

<sup>146</sup> *Meyer v. Stone*, 46 Ark. 210, 55 Am. Rep. 577; *Pickering v. Busk*, 15 East, 38, Wamb. Cas. 272, Huffc. Cas. 223; *Capel v. Thornton*, 3 Car. & P. 352; *Lumley v. Corbett*, 18 Cal. 494; *Bailey v. Partridge*, 134 Ill. 188; *Greely v. Bartlett*, 1 Me. 173, 10 Am. Dec. 54; *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795; *Rice v. Groffmann*, 56 Mo. 434; *Sumner v. Saunders*, 51 Mo. 39; *Brooks v. Jameson*, 55 Mo. 505; *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655; *Higgins v. Moore*, 34 N. Y. 417; *Whitton v. Spring*, 74 N. Y. 169; *Seiple v. Irwin*, 30 Pa. 513; *Cross v. Haskins*, 13 Vt. 536.

If a guardian, authorized by court to sell a judgment in favor of his ward, delivers an assignment thereof to a third person for safekeeping, a purchaser of the judgment from such third person has the burden of proving that the latter is the agent of the guardian and authorized to make delivery and receive payment. *Schmidt v. Shaver*, 196 Ill. 108, 89 Am. St. Rep. 250.

the agent was also authorized to receive payment."<sup>147</sup> Thus, where an agent is employed to merely solicit orders for goods he has no implied authority to receive payment therefor.<sup>148</sup> So where the goods are sold by sample, the agent not having the goods themselves in his possession, he has no authority to receive payment on such sale.<sup>149</sup> Nor does the employment of a canvassing agent for the sale of books by subscription confer authority to receive payment for books sold but not delivered by him, nor ever in his possession.<sup>150</sup> But although the agent has not possession of the goods sold by him, he may still receive payment so as to bind his principal, where such is the general and known usage, and it has been recognized by the principal.<sup>151</sup>

(c) **Where agent sells on credit.**—An agent employed to make sales, and selling on credit, is not authorized to subsequently collect the price in the name of the principal; and payment to him will not discharge the purchaser unless he can show some authority in the agent other than that necessarily implied in a mere power to make sales.<sup>152</sup> Such authority, however, may be shown by proof either that the agent was expressly authorized to receive and discharge debts, or that he was held out by his principal to the public,

<sup>147</sup> *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 798; *Meyer v. Stone*, 46 Ark. 210, 55 Am. Rep. 577; *Greenhood v. Keator*, 9 Ill. App. 183; *Clark v. Smith*, 88 Ill. 298; *Abrahams v. Weiller*, 87 Ill. 179; *Harris v. Simmerman*, 81 Ill. 413; *Kane v. Barstow*, 42 Kan. 465, 16 Am. St. Rep. 490; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Kornemann v. Monaghan*, 24 Mich. 86; *Janney v. Boyd*, 30 Minn. 319; *Chambers v. Short*, 79 Mo. 204; *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655; *Higgins v. Moore*, 34 N. Y. 417; *Wright v. Cabot*, 89 N. Y. 570; *Crosby v. Hill*, 39 Ohio St. 100; *Seiple v. Irwin*, 30 Pa. 513; *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740.

<sup>148</sup> *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740; and other cases cited in preceding note. Post, § 240.

<sup>149</sup> *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Butler v. Dorman*, 68 Mo. 298; *Dunn v. Wright*, 51 Barb. (N. Y.) 244.

<sup>150</sup> *Chambers v. Short*, 79 Mo. 204.

<sup>151</sup> *Meyer v. Stone*, 46 Ark. 210, 55 Am. Rep. 577.

<sup>152</sup> *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655; *Seiple v. Irwin*, 30 Pa. 513; *Clark v. Smith*, 88 Ill. 298; *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795.

or to the defendant, as having such authority.<sup>153</sup> Thus, where an agent selling goods only by sample, and forbidden to receive payment, sold them on a credit of four months, a payment thereafter to him of a part of the purchase money did not protect the purchaser.<sup>154</sup> And where an agent is authorized to sell property and take a note in payment in the name of the principal, after he has delivered the note to the principal he has not implied authority to receive payment thereof.<sup>155</sup>

**§ 240. Authority of traveling salesman to receive payment.**

(a) **In general.**—A traveling salesman usually has not possession of the goods which he is employed to sell, or at most has only samples thereof, nor does he usually deliver the goods which he sells. Hence in such cases he has no indicia of authority to receive payment for the goods for which he takes orders, upon which the customer may rely as a protection in case he makes payment to such agent. It is a general rule, then, that where a traveling salesman solicits orders or makes contracts for the sale of goods, of which he has not possession, and which he does not deliver, he has no implied authority to collect the price thereof, and payment made to him by the purchaser, in the absence of other circumstances conferring real or apparent authority, or of custom or usage to that effect, does not discharge the purchaser, who is still liable to the principal for the purchase price of the goods.<sup>156</sup> Thus, where the agent is merely employed to

<sup>153</sup> *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655; *Howe Mach. Co. v. Ballweg*, 89 Ill. 318; *Harris v. Simmerman*, 81 Ill. 413; *Brooks v. Jameson*, 55 Mo. 505; *Sumner v. Saunders*, 51 Mo. 89; *Packer v. Hinckley Locomotive Works*, 122 Mass. 484; *Estey v. Snyder*, 76 Wis. 624. Compare *Hogarth v. Wherley*, L. R. 10 C. P. 630.

<sup>154</sup> *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795.

<sup>155</sup> *Draper v. Rice*, 56 Iowa, 114, 41 Am. Rep. 88; *Strachan v. Muxlow*, 24 Wis. 21; *Rhodes v. Belchee*, 36 Or. 141. See *Baldwin v. Tucker*, 23 Ky. L. R. 1538, 65 S. W. 841, 57 L. R. A. 451, where the agent took a note payable to himself, title to the goods sold did not pass.

<sup>156</sup> *Simon v. Johnson*, 105 Ala. 344, 53 Am. St. Rep. 125; *Lake-side Press & Photo-Engraving Co. v. Campbell*, 39 Fla. 523; *Clark*

solicit orders, which are sent to the office of the principal, subject to his approval, this fact of itself shows that the agent has no authority to make collections, and a payment to him in the face thereof will be no defense to an action by the principal for the purchase price of the goods.<sup>157</sup> And the fact that such a salesman falsely claims to be a member of the firm he represents does not warrant a customer in paying money to him.<sup>158</sup>

Where, however, there is a general and known usage of trade to that effect, which has been recognized by the principal, a traveling salesman may receive payment for the goods sold by him, and such payment will be binding on the principal.<sup>159</sup> So if the traveling salesman has possession of the goods which he is employed to sell, he has implied authority to receive payment for the goods so sold by him.<sup>160</sup>

(b) **Divers other cases.**—In other cases, however, it is held, in apparent conflict with the above doctrine, that where such an agent is employed to sell goods he may collect payment therefor, in the absence of a prohibition known to the purchaser, from circumstances, custom, or direct notice.<sup>161</sup> In accordance with this rule, it has been held that inasmuch as

*v. Smith*, 88 Ill. 298; *Harris v. Simmerman*, 81 Ill. 413; *Bailey v. Pardridge*, 134 Ill. 188; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Kane v. Barstow*, 42 Kan. 465, 16 Am. St. Rep. 490; *Clough v. Whitcomb*, 105 Mass. 482; *Kornemann v. Monaghan*, 24 Mich. 36; *Janney v. Boyd*, 30 Minn. 319; *Brown v. Lally*, 79 Minn. 38; *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795; *Chambers v. Short*, 79 Mo. 204; *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655; *Dunn v. Wright*, 51 Barb. (N. Y.) 244; *Seiple v. Irwin*, 30 Pa. 513; *Kohn v. Washer*, 64 Tex. 131, 53 Am. Rep. 745; *Crawford v. Whittaker*, 42 W. Va. 430; *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740. Or from course of dealing between agent and principal. *Kasson v. Noltner*, 43 Wis. 646.

<sup>157</sup> *Greenhood v. Keator*, 9 Ill. App. 183; *Fabian Mfg. Co. v. Newman* (Tenn. Ch. App.) 62 S. W. 218.

<sup>158</sup> *Crawford v. Whitaker*, 42 W. Va. 430.

<sup>159</sup> *Meyer v. Stone*, 46 Ark. 210, 55 Am. Rep. 577. Compare *Trainor v. Morrison*, 78 Me. 160, 57 Am. Rep. 790.

<sup>160</sup> *Bailey v. Pardridge*, 134 Ill. 188; *Keown v. Vogel*, 25 Mo. App. 35; *Hutchinson Mfg. Co. v. Henry*, 44 Mo. App. 263; *Rice v. Groffmann*, 56 Mo. 434; *Cross v. Haskins*, 13 Vt. 536.

<sup>161</sup> *Trainor v. Morrison*, 78 Me. 160, 57 Am. Rep. 790; *Scott v.*

persons dealing with such an agent have a right to presume that his agency is general, and not limited, if the agent, in making the sale, makes it part of the terms of sale that payment for the goods shall be made to him, the purchaser will be protected if he makes such payment to the agent, although there might have been words on the bill of sale limiting the agent's authority not to receive payment, of which restriction the purchaser had no direct notice.<sup>162</sup> Thus, where a merchant makes a contract for the purchase of goods of an agent who agrees to receive other merchandise of a specified amount and price in part payment, and the goods purchased are shipped to the merchant by the principal, the agreement of the agent in regard to the method of payment is binding upon the principal though it was unauthorized by him.<sup>163</sup>

In some of these cases the bill or invoice sent to the purchaser by the principal expressly states that the agent is not authorized to receive payment of the goods sold by him. If the purchaser has actual notice of this restriction there would be no question as to the effect of a payment to the agent. But it may happen that he does not have actual notice thereof; and as to whether or not such printed limitations are constructive notice to the purchaser, the authorities are not entirely in harmony. Thus, where a bill with the provision, "all remittances on account, or in settlement of bills, must be made direct to the principal; and salesmen not authorized to collect," was received by the purchaser's bookkeeper, but the printed stipulations were not read, and afterwards the purchaser paid the agent for the goods, it was

Hopkins, 2 N. Y. St. Rep. 324; *Collins v. Newton*, 7 Baxt. (Tenn.) 269; *Hoskins v. Johnson*, 5 Sneed (Tenn.) 469.

In *Trainor v. Morrison*, *supra*, Haskell, J., says: "An agent who has authority to contract for the sale of chattels has authority to collect pay for them (at the time, or as a part of the same transaction), in the absence of any prohibition known to the purchaser." citing *Capel v. Thorn*, 3 Car. & P. 352; *Greely v. Bartlett*, 1 Me. 173, 10 Am. Dec. 54; *Goodenow v. Tyler*, 7 Mass. 37, 5 Am. Dec. 22; *Story*, Ag. § 102.

<sup>162</sup> *Trainor v. Morrison*, 78 Me. 160, 57 Am. Rep. 790; *Billings v. Mason*, 80 Me. 496; *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682; *Hoskins v. Johnson*, 5 Sneed (Tenn.) 469.

<sup>163</sup> *Billings v. Mason*, 80 Me. 496.



held that this did not discharge the debt to the plaintiff.<sup>164</sup> The court, in this case, said: "Not to have seen the directions in the bill-head was the grossest negligence, and to permit a party to defend under the protection of his own carelessness would be to offer a premium for negligence, and open the door to fraud, especially so when the party is himself bound to see to it that the person with whom he transacts business as an agent has the authority which he assumes."<sup>165</sup> So the words "agents not authorized to collect," in large print on the face of a bill of goods, have been held to constitute conclusive notice to the purchaser not to pay an agent therefor.<sup>166</sup> Other cases, however, hold that such provisions are not constructive notice to the purchaser, basing their decisions on the fact that, especially in those particular cases, the provisions were placed upon the bills in such an obscure manner that the purchaser could not be held to have noticed them, and payment made in good faith to the agent would bind the principal. Thus, where the principal sent a bill, with the words "payable at office" thereon, without any letter, when the goods were sent, which was three months before the time of payment agreed upon, and the purchaser examined the bill as to the items charged, and filed it away, never noticing the words, the court said: "In view of the obscure manner in which those words were written on the bill-head, and of the circumstances under which, and the purposes for which in other respects, the bill was sent, and of the terms of the contract as to whom and when and where payment was to be made, we do not think the defendants were guilty of such negligence in not seeing the words, as to be chargeable with notice which they did not in fact have."<sup>167</sup> So the words, "all bills must be paid by check to our order, or in current funds at our office," printed in red ink at the top of the bill, were held not to constitute constructive notice of such limitation, as they were not so

<sup>164</sup> *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655.

<sup>165</sup> *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 658.

<sup>166</sup> *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740.

<sup>167</sup> *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682; *Luckie v. Johnston*, 89 Ga. 321. See, also, *Scott v. Hopkins*, 2 N. Y. St. Rep. 324.

prominent upon the bill as to constitute a distinctive feature of it, and one that would be likely to attract attention in the hurry of business, and that ought to have been seen by the purchasers.<sup>168</sup> It will be noticed that these decisions apply more especially to those cases which hold that a traveling salesman may receive payment for goods sold, in the absence of a prohibition, or custom or usage, to the contrary. Under the rule that such an agent has not such authority, it would seem to be immaterial whether the purchaser had notice of that fact or not.

**§ 241. Authority of agent to warrant title to goods.**

It is a general rule in the law of sales of personal property that where the vendor has the property in his possession at the time of sale, he impliedly warrants that he has title to the same. From this it follows that if an agent is employed to sell personal property, as the property of his principal, he would have authority to warrant the principal's title thereto. Or the rule has been stated that: "A general authority to sell personal property, or even one particular article, carries with it the power to warrant, both the title and quality of the thing sold, so as to bind the owner, for whom the sale is thus made."<sup>169</sup>

**§ 242. Authority of agent to warrant quality.**

(a) **In general.**—It has been seen heretofore that when an agent is employed to do a certain act or accomplish a certain purpose he has implied power to do all acts that are usually done in like cases. In accordance with this principle, it may be stated as a general rule that where an agent is employed to sell personal property, he has, in the absence of circumstances indicating the contrary, implied power to give such a warranty of the quality of the goods as is usually given of that class of goods, in that market, by such agents, and no private restrictions upon the agent's authority unknown

<sup>168</sup> *Trainor v. Morrison*, 78 Me. 160, 57 Am. Rep. 790. See, also, *Wass v. Mutual Marine Ins. Co.*, 61 Me. 537; *Kinsman v. Kershaw*, 119 Mass. 140.

<sup>169</sup> *Ezell v. Franklin*, 2 Sneed (Tenn.) 236.

to the purchaser can affect such warranty.<sup>170</sup> Hence, where it is not shown that it is a custom of a trade for a selling agent to warrant the quality of the goods he sells and there is no proof that his principal has authorized him to warrant quality, a warranty by him does not bind his principal.<sup>171</sup> Thus a buyer cannot recover damages for breach of warranty of goods sold by an agent without proof that the agent had authority to warrant, or that warranty customarily attended

<sup>170</sup> *Alexander v. Gibson*, 2 Camp. 555; *Dingle v. Hare*, 7 C. B. (N. S.) 145 (in this case, Earle, C. J., says: "The strong presumption is that, when a principal authorizes an agent to sell goods for him, he authorizes him to give all such warranties as are usually given in the particular trade or business"); *Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Skinner v. Gunn*, 9 Port. (Ala.) 305; *Cocke v. Campbell*, 13 Ala. 286; *Bradford v. Bush*, 10 Ala. 386; *Croom v. Swann*, 1 Fla. 211; *Huguley v. Morris*, 65 Ga. 666; *Woodford v. McClenahan*, 9 Ill. 85; *Edwards v. Dillon*, 147 Ill. 14, 37 Am. St. Rep. 199; *McCormick Harvesting Mach. Co. v. Snel*, 23 Ill. App. 79; *Talmage v. Bierhaue*, 103 Ind. 270, *Huff. Cas.* 221; *Applegate v. Moffitt*, 60 Ind. 104 (compare *Court v. Snyder*, 2 Ind. App. 440, 50 Am. St. Rep. 247); *Murray v. Brooks*, 41 Iowa, 45; *Pitsinowsky v. Beardsley*, 37 Iowa, 9; *Randall v. Kehler*, 60 Me. 37; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; *J. I. Case Threshing-Mach. Co. v. McKinnon*, 82 Minn. 75; *McCormick v. Kelly*, 28 Minn. 135; *Palmer v. Hatch*, 46 Mo. 585; *Hayner v. Churchill*, 29 Mo. App. 676; *Morris v. Bowen*, 52 N. H. 416, 421; *Smilie v. Hobbs*, 64 N. H. 75; *Cooley v. Perrine*, 41 N. J. Law, 322, 32 Am. Rep. 210; *Decker v. Fredericks*, 47 N. J. Law, 469; *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 635; *Smith v. Tracy*, 36 N. Y. 79; *Wait v. Borne*, 123 N. Y. 592; *Ahern v. Goodspeed*, 72 N. Y. 108; *Hunter v. Jameson*, 28 N. C. (6 Ired.) 252; *Davis v. Burnett*, 49 N. C. (4 Jones, Law) 71, 67 Am. Dec. 263; *Williamson v. Canaday*, 25 N. C. (3 Ired.) 349; *Dayton v. Hooglund*, 39 Ohio St. 671; *Ezell v. Franklin*, 2 Sneed (Tenn.) 236; *Reese v. Bates*, 94 Va. 321; *Deming v. Chase*, 48 Vt. 382; *Fay v. Richmond*, 43 Vt. 25; *Pickert v. Marston*, 68 Wis. 465, 60 Am. Rep. 876; *Boothby v. Scales*, 27 Wis. 626; *Waupaca Elec. Light R. Co. v. Milwaukee Elec. R. & Light Co.*, 112 Wis. 469.

<sup>171</sup> *Ellner v. Priestley*, 39 Misc. (N. Y.) 535. And see cases cited in preceding note.

the sale of such goods.<sup>172</sup> But a purchaser of machinery may recover from the seller for a breach of warranty by the agent of the latter, upon proof of a general custom amongst agents selling such machinery to warrant it.<sup>173</sup> But where an agent gives a warranty without authority, the principal may by his conduct, as by accepting the benefit of the sale, ratify such warranty and make it as binding upon him as if originally authorized.<sup>174</sup> Such authority to warrant, however, does not extend to any other time than at the sale of the goods.<sup>175</sup> Whether or not it is usual or customary to warrant the quality of goods in a certain case is usually a question for the jury to determine.<sup>176</sup>

This rule has been stated: "That an agent upon whom general authority to sell is conferred will be presumed to have authority to warrant, unless the contrary appears. Authority to sell generally, without any restrictions, carries with it *prima facie* authority to do any act or make any declaration in regard to the subject-matter of the sale necessary to consummate the contract, and usually incident thereto, and until the contrary is made to appear, it will be presumed that a warranty is not an unusual incident to a sale by an agent for a dealer in a commodity or article, where the thing sold is not present and subject to the inspection of the purchaser."<sup>177</sup> A general agent for the sale of reapers is presumed to be invested with power to warrant them, and such authority, nothing appearing to the contrary, is not restricted

<sup>172</sup> *Pennsylvania & Del. Oil Co. v. Spitelnik*, 27 Misc. (N. Y.) 557; *Ellner v. Priestley*, 39 Misc. (N. Y.) 535. And see cases cited above.

<sup>173</sup> *Larson v. Aultman & Taylor Co.*, 86 Wis. 281, 39 Am. St. Rep. 893; *McCormick v. Kelly*, 28 Minn. 135. Post, § 243.

<sup>174</sup> *Eadie v. Ashbaugh*, 44 Iowa, 519; *Farrar v. Peterson*, 52 Iowa, 420. See ante, chap. 6.

<sup>175</sup> *Helyear v. Hawke*, 5 Esp. 72.

<sup>176</sup> *Pickert v. Marston*, 68 Wis. 465, 60 Am. Rep. 877; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 6; *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; *Reese v. Bates*, 94 Va. 321.

<sup>177</sup> *Mitchell, C. J.*, in *Talmage v. Bierhouse*, 103 Ind. 270, *Huffc. Cas.* 221.

to warranties in writing.<sup>178</sup> An agent seeking to introduce a new fertilizer for his nonresident principal has implied power, in making a sale, to warrant the same.<sup>179</sup> So where an agent sells goods by sample, he will have authority to make the warranty that is usual in such cases, and that is that the goods are the same or as good as the sample.<sup>180</sup> Thus authority, without restriction, to an agent to sell flour to be manufactured for the purchaser carries with it authority to warrant that it shall be equal, when manufactured, to certain brands made by another, and adopted as a sample, for the purpose of such sale.<sup>181</sup>

Where printed warranties are furnished to the agent by the principal, and the former's authority is expressly limited to the giving of such warranties, and the purchaser has knowledge of this fact, an oral warranty different in its terms would not be binding on the principal,<sup>182</sup> although it would be otherwise if the purchaser had not knowledge of such limitation.<sup>183</sup> And it has been held that the fact that the purchaser has been furnished with such printed warranties is sufficient notice to him of a provision therein that the agent has no authority to change or vary its terms.<sup>184</sup>

— **To make declarations, etc.** An agent to sell property, in the absence of express limitations of his powers, is authorized to make any proper and reasonable declarations or representations regarding the property necessary to effect a sale, and usually incidental thereto; and declarations thus made, if within the scope of his authority, are binding on the principal, though the sale was not concluded until a subsequent day.<sup>185</sup>

<sup>178</sup> *Murray v. Brooks*, 41 Iowa, 45; *McCormick v. Kelly*, 28 Minn. 135.

<sup>179</sup> *Hille v. Adair*, 22 Ky. L. R. 742, 58 S. W. 697.

<sup>180</sup> *Murray v. Smith*, 4 Daly (N. Y.) 277; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Dayton v. Hooglund*, 39 Ohio St. 671; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *The Monte Allegre*, 9 Wheat. (U. S.) 644; *Cooley v. Perrine*, 41 N. J. Law, 322, 32 Am. Rep. 213.

<sup>181</sup> *Loomis Milling Co. v. Vawter*, 8 Kan. App. 437.

<sup>182</sup> *Wood Mowing & Reaping Mach. Co. v. Crow*, 70 Iowa, 340.

<sup>183</sup> *Murray v. Brooks*, 41 Iowa, 45.

<sup>184</sup> *Furneauux v. Esterly*, 36 Kan. 539.

<sup>185</sup> *Reynolds v. Mayor, Lane & Co.*, 39 App. Div. (N. Y.) 218.

Any verbal statements and representations of an agent having authority to sell, and made at the time of selling personalty, and constituting an incident in, or inducement to the trade, which amount to a warranty of any quality in the thing sold, will bind the principal.<sup>186</sup>

(b) **Warranty by agents in sales of horses.**—In the sales of horses, whether or not the agent has authority to warrant the soundness of the horse depends upon whether or not he has been specially empowered to do so, and whether he is generally employed in the selling of horses, or whether he has been employed in one or several instances only as a special agent.

Where a general agent is employed to carry on a business of horse dealing for his employer, he has implied authority to warrant soundness in selling a horse, as it is the usual manner of selling a horse in like cases.<sup>187</sup> And where a horse dealer or other person who is accustomed to buying and selling horses authorizes an agent to sell a horse privately, the agent has implied authority to give a warranty on the sale of the horse.<sup>188</sup> Thus a purchaser of a stallion from the owner's general agent, who had authority to warrant that the horse was of average breeding qualities, has, in the absence of any information to the contrary, the right to assume that he has the authority to warrant the horse to be a "sure foal getter."<sup>189</sup> Where a private person puts his horse in the hands of a horse dealer to sell, he thereby impliedly authorizes such agent to make all such warranties as are usually made in the ordinary course of the business of selling horses.<sup>190</sup> But where the agent is employed by a private person only as a special agent to sell and

<sup>186</sup> *Ezell v. Franklin*, 2 Sneed (Tenn.) 236; *Murray v. Smith*, 4 Daly (N. Y.) 277. See, also, *J. I. Case Threshing Mach. Co. v. Eichinger* (S. D.) 91 N. W. 32.

<sup>187</sup> *Edwards v. Dillon*, 147 Ill. 14, 37 Am. St. Rep. 199. The superintendent of a stock farm owned by a nonresident, having authority to sell a horse on the farm belonging to his principal, had authority to make a warranty thereof. *Belmont's Ex'r v. Talbot*, 2 Ky. L. R. 453, 51 S. W. 588.

<sup>188</sup> *Howard v. Sheward*, L. R. 2 C. P. 148; *Baldry v. Bates*, 52 Law T. 620. Or at a fair or market. *Alexander v. Gibson*, 2 Camp. 555.

<sup>189</sup> *First Nat. Bank v. Robinson*, 105 Iowa, 463.

<sup>190</sup> *Taylor v. Gardiner*, 8 Manitoba, 310.

deliver the horse, he is not authorized to bind his employer by a warranty of quality, and to do so, authority in fact must be shown.<sup>191</sup>

The distinction has thus been stated: "I take the distinction to be, that, if a person keeping livery stables, and having a horse to sell, directed his servant not to warrant him, and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant, but if the owner of the horse were to send a stranger to a fair with express directions not to warrant the horse, and the latter acted contrary to orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty."<sup>192</sup> The underlying principle is that where a general agent is empowered to sell, he has authority to use all proper and usual means for effectuating the sale, and a warranty of quality is both a proper and usual means for that purpose. But in the case of a special agent, this principle does not apply as broadly, and such an agent would have no authority to go outside of his actual powers in making the sale, in the absence of circumstances giving him implied power.

In some cases, no distinction is made between agents who are general agents or who are employed by persons who make it a business of dealing in horses, and agents who are employed by private persons as special agents. In such cases it is stated as the rule that as it is most usual, on the sale of horses, to require a warranty, an agent who is employed to sell, when he warrants the horse, may fairly be presumed to be acting within the scope of his authority.<sup>193</sup> In a Wiscon-

<sup>191</sup> *Brady v. Todd*, 9 C. B. (N. S.) 592, Wamb. Cas. 328; *Cooley v. Perrine*, 41 N. J. Law, 322, 32 Am. Rep. 210; *Decker v. Fredericks*, 47 N. J. Law, 469. Compare *Tice v. Gallup*, 2 Hun (N. Y.) 446; *Deming v. Chase*, 48 Vt. 382.

<sup>192</sup> By *Ashhurst, J.*, in *Fenn v. Harrison*, 3 Term R. 757, Wamb. Cas. 254. Compare *Brooks v. Hassall*, 49 Law T. (N. S.) 569.

<sup>193</sup> *Alexander v. Gibson*, 2 Camp. 555; *Helyear v. Hawke*, 5 Esp. 72; *Skinner v. Gunn*, 9 Port. (Ala.) 305; *Bradford v. Bush*, 10

sin case it was held that an agent authorized to sell a horse cannot bind his principal by a warranty that the animal is sound, in the absence of express authority or of a usage to warrant on such sale.<sup>194</sup>

(c) **Limitations to general rule.**—If, however, an agent with express authority to sell personalty has no actual authority to warrant the quality of the goods sold by him, such authority cannot be implied where the property sold is of a description not usually sold with a warranty, or if it is not usually warranted by such an agent, or with such a warranty.<sup>195</sup> Thus a general selling agent has no authority to warrant that flour sold by him will keep sweet during a voyage from Massachusetts to California.<sup>196</sup> A commission merchant has no implied power to undertake that the goods sold by him are in any respect other than or different from what they actually are, and if he goes beyond his authority and warrants the quality of the goods, the warranty will be his own, and he will be personally liable for its breach.<sup>197</sup> So one employed to make a sale of bank stock is not, presumptively, empowered to warrant it in the name of his principal.<sup>198</sup> Nor has a broker implied authority, from the usage of trade, to warrant goods sold by him to be of a merchantable quality.<sup>199</sup>

And although the property may usually be sold with a warranty of quality, yet it does not authorize the agent to give an unusual warranty, as by warranting that liquors sold by

Ala. 386; *Croom v. Swann*, 1 Fla. 211; *Tice v. Gallup*, 2 Hun (N. Y.) 446; *Lane v. Dudley*, 6 N. C. (2 Murph.) 119, 5 Am. Dec. 523; *Fay v. Richmond*, 43 Vt. 25.

<sup>194</sup> *Westurn v. Page*, 94 Wis. 251.

<sup>195</sup> *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 7; *Dodd v. Farlow*, 11 Allen (Mass.) 426, 87 Am. Dec. 726; *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; *Palmer v. Hatch*, 46 Mo. 585; *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 635; *Walt v. Borne*, 123 N. Y. 592; *Argersinger v. Macnaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687.

<sup>196</sup> *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163.

<sup>197</sup> *Argersinger v. Macnaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687.

<sup>198</sup> *Smith v. Tracy*, 36 N. Y. 79.

<sup>199</sup> *Dodd v. Farlow*, 11 Allen (Mass.) 426, 87 Am. Dec. 726.



him will not be seized on account of a violation of the revenue laws.<sup>200</sup>

**§ 243. Authority of agent as to sales on approval.**

Where an agent has an unrestricted authority to sell machines, or other articles, he may sell them on approval, giving the purchasers a reasonable time to try them and to return them if unsatisfactory.<sup>201</sup> What is a reasonable time within which the buyer should offer to return the article purchased, if it does not correspond to the terms of the warranty, depends upon the circumstances of each case, and is usually a question for the jury.<sup>202</sup> And where an agent has authority to sell such machines on trial, he also has authority to waive their return, if unsatisfactory,<sup>203</sup> or to waive notice of the failure of the machines.<sup>204</sup> But waiver of this notice on the part of the principal cannot be presumed from the act of such agent, nor from that of any employe who is not shown to have

<sup>200</sup> *Palmer v. Hatch*, 46 Mo. 585.

<sup>201</sup> *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446; *Jesse French Piano & Organ Co. v. Cardwell*, 114 Ga. 340; *Marion Mfg. Co. v. Harding*, 155 Ind. 648; *Furieux v. Esterly*, 36 Kan. 539; *Oster v. Mickley*, 35 Minn. 245; *Deering v. Thom*, 29 Minn. 120; *Boothby v. Scales*, 27 Wis. 626; *Warder, Bushnell & Glessner Co. v. Plischer*, 110 Wis. 363.

A sales agent authorized to sell and warrant farm machinery under written conditions to be required of the purchaser may bind his principal by an oral warranty, where he withholds from the purchaser all knowledge of such limitations upon his authority. *Parsons Band Cutter & Self-Feeder Co. v. Haub*, 83 Minn. 180.

<sup>202</sup> *Boothby v. Scales*, 27 Wis. 626.

<sup>203</sup> *McCormick Harvesting Mach. Co. v. Brower*, 88 Iowa, 607; *Gaar v. Rose*, 3 Ind. App. 269; *Pitsinowsky v. Beardley*, 37 Iowa, 9; *Warder v. Robertson*, 75 Iowa, 585; *Peterson v. Wood Mowing & Reaping Co.*, 97 Iowa, 148, 59 Am. St. Rep. 399.

A general agent, empowered to sell and warrant the machinery of his principal, has authority, after entering into a contract of sale and warranty, to change or waive the terms thereof. *Blaess v. Nichols & Shepard Co.*, 115 Iowa, 373.

<sup>204</sup> *Acker v. Kimmie*, 37 Kan. 276; *Hellman Mach. Works v. Dolarhide*, 32 Mo. App. 178; *Peterson v. Wood Mowing & Reaping Co.*, 97 Iowa, 148, 59 Am. St. Rep. 399.

special authority from the vendor to make such waiver.<sup>205</sup> Thus if a purchaser, claiming that a machine does not conform to a warranty thereof, returns it to the agent of whom he purchased, and demands a return of notes given therefor, which the agent agrees to make, this is a waiver of the written notice of a breach of warranty, if the agent has authority to make such a waiver.<sup>206</sup> And though a contract for the sale of a machine stipulates that if, when started, it does not work well, written notice shall immediately be given, and that no one is authorized to add to or abridge the warranty, yet if the agent of the seller is present when the trial is made, and knows from his own observation that the machine does not work well, and agrees to return the notes given by the purchaser therefor, this is a waiver of written notice.<sup>207</sup> If, however, the contract of warranty of the machines expressly provides that the machine, if unsatisfactory, shall be returned to certain persons at a certain place, and that no agent has authority to make representations or warranty beyond such contract, an agent has no authority to release the purchaser from returning the machine according to the contract, if it proves unsatisfactory.<sup>208</sup> Where there has been no waiver of such notice and the purchaser has not given notice as provided for in the warranty, or complied with other conditions precedent, the warranty cannot be enforced against the seller.<sup>209</sup> So where the warranty requires the purchaser to give notice both to the vendor and to the agent of the alleged defects in the property, the vendee cannot recover for a breach of warranty

<sup>205</sup> *Fahey v. Esterley Machine Co.*, 3 N. D. 220, 44 Am. St. Rep. 554.

<sup>206</sup> *Peterson v. Wood Mowing & Reaping Co.*, 97 Iowa, 148, 59 Am. St. Rep. 399.

<sup>207</sup> *Peterson v. Wood Mowing & Reaping Co.*, 97 Iowa, 148, 59 Am. St. Rep. 399. Compare *Aultman & Taylor Co. v. Gunderson*, 6 S. D. 226, 55 Am. St. Rep. 837; *Fahey v. Esterley Mach. Co.*, 3 N. D. 220, 44 Am. St. Rep. 554.

<sup>208</sup> *Bragg v. Bamberger*, 23 Ind. 198. See *Massillon Engine & Thresher Co. v. Schirmer* (Iowa) 93 N. W. 599.

<sup>209</sup> *Furneaux v. Esterly*, 36 Kan. 539; *Nichols v. Larkin*, 79 Mo. 264; *Nichols v. Hall*, 4 Neb. 210; *Miller v. Nichols*, 5 Neb. 478; *Bomberger v. Greiner*, 18 Iowa, 477; *Dewey v. Erie Borough*, 14 Pa. 211.

where, though he gave notice to the agent, he did not to the vendor.<sup>210</sup>

A warranty, upon the sale of a steam engine, requiring, in case the machine failed to operate well, written notice, stating wherein it failed to satisfy the warranty, to be given by the purchaser to the seller, at headquarters, by registered letter, is not satisfied by a verbal notice to a local agent of whom the machine was bought; and evidence that the local agent afterward notified the seller, "by letter or otherwise," is properly rejected, if it is not shown when or how, or that such notice was ever received by the seller, or any agent authorized to receive it; and the fact that experts of the seller happened to be present on other business, and examined the engine, but without any general authority being shown for them to do so, could not take the place of the required notice to the seller, or render it unnecessary.<sup>211</sup>

An agent may agree that the machine may be retained on trial a longer time than specified in the written contract of sale, and that it should be fixed up and made to work satisfactorily.<sup>212</sup>

#### § 244. Implied authority of traveling salesman.

(a) **In general.**—A traveling salesman, like other agents, has implied authority to do all acts or make all contracts that are reasonably necessary and proper, or usually done or made by other agents in the same or a similar line of business. But he is in no case authorized to go beyond the apparent scope of his authority, unless he is specially authorized to do so, or unless there are special circumstances in the particular case permitting it.<sup>213</sup> In the absence of special authority to bind the principal, a drummer can merely solicit and transmit an

<sup>210</sup> *Fahey v. Esterley Mach. Co.*, 3 N. D. 220, 44 Am. St. Rep. 554.

<sup>211</sup> *Aultman & Taylor Co. v. Gunderson*, 6 S. D. 226, 55 Am. St. Rep. 837.

<sup>212</sup> *Bannon v. Aultman*, 80 Wis. 307, 27 Am. St. Rep. 37; *Reeves v. Cress*, 80 Minn. 466; *McCormick Harvesting Mach. Co. v. Smith*, 9 Kulp (Pa.) 448; *Holt Mfg. Co. v. Dunnigan*, 22 Wash. 134.

<sup>213</sup> *Sage v. Shepard & M. Lumber Co.*, 158 N. Y. 672; *Charles Brown Grocery Co. v. Becket*, 22 Ky. L. 393, 57 S. W. 458.

order, and the contract of sale does not become completed until the order is accepted by his principal;<sup>214</sup> and the fact that the drummer and the proposed buyer exchange memoranda of the proposed contract signed by them does not alter the rule.<sup>215</sup> Agents sent out by manufacturers to solicit orders are held out to the trade as having authority to act according to general usage, practice, and course of business conducted by such manufacturers through such agents; and the question of what is usual or necessary to be done by such agents is ordinarily for the jury.<sup>216</sup> Thus, where a salesman sold goods at a lower price than he was authorized to do, the employer was bound by the contract, the customer having the right to believe from former dealings that the salesman had authority to fix the price of goods.<sup>217</sup> Where by general custom and usage of the business, a traveling salesman has authority to bind his principal by his contracts, subject to the right of the principal to reject orders when the financial standing of the purchaser is unsatisfactory, and previous orders taken by the salesman from a customer have been recognized, the principal cannot refuse to fill an order on other grounds, as that the price is unsatisfactory.<sup>218</sup> But the authority of an agent, who travels to solicit orders for a commercial house, does not embrace power to cancel his contracts and receive back goods shipped to, and not satisfactory to, a customer.<sup>219</sup> Nor has a drummer or commercial traveler, who is employed to sell and take orders for goods, to collect accounts, and to receive money and checks payable to the order of his principal, authority to indorse the latter's name to such checks.<sup>220</sup>

<sup>214</sup> *John Matthews' Apparatus Co. v. Renz*, 22 Ky. L. R. 1528, 61 S. W. 9. Compare *Pittsburg Sheet Mfg. Co. v. West Penn Sheet Steel Co.*, 197 Pa. 491.

<sup>215</sup> *John Matthews' Apparatus Co. v. Renz*, 22 Ky. L. R. 1528, 61 S. W. 9.

<sup>216</sup> *Austrian v. Springer*, 94 Mich. 343, 34 Am. St. Rep. 350.

<sup>217</sup> *Scudder-Gale Grocer Co. v. Russell*, 65 Ill. App. 281.

<sup>218</sup> *Mabray v. Kelly-Goodfellow Shoe Co.*, 73 Mo. App. 1.

<sup>219</sup> *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154. Post, § 247.

<sup>220</sup> *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81. For authority of a traveling salesman to receive payment, see ante, § 240.

(b) **To hire horses.**—An agent who is employed to travel and sell goods for his principal has implied authority to hire horses and vehicles for the purpose of aiding him in carrying out the business in which he is employed; and the principal will be liable for any injury thereto, or for the hire thereof,<sup>221</sup> although he may have previously furnished the agent with funds to pay for such hire, but the agent neglected to do so, the party furnishing the service being ignorant of that fact.<sup>222</sup> The fault of the agent, in not paying out of the money of his principals in his hands, cannot deprive the party furnishing the service of the right to enforce the contract against them, he being ignorant of the restricted authority of the agent. If, however, such party knew that the agent had been furnished by his principal with the money to pay for the service, and had been forbidden to pledge the credit of his principal for such service, he would be in a different position. Under such circumstances, if he furnished the service to the agent, he would be held to have furnished it upon the sole credit of the agent, and he would be compelled to look to the agent alone for his pay.<sup>223</sup>

Nor has such an agent authority to sell a horse which has been furnished to him by his principal to be used in the principal's business. Thus a traveling salesman had in his possession a horse belonging to his principals, and

<sup>221</sup> *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516; *Bentley v. Doggett*, 51 Wis. 224, 37 Am. Rep. 827. But see *Howe Mach. Co. v. Ashley*, 60 Ala. 496.

<sup>222</sup> *Bentley v. Doggett*, 51 Wis. 224, 37 Am. Rep. 827. As was said in this case: "There can be no question, that from the nature of the business required to be done by their agent, the defendants held out to those who might have occasion to deal with him, that he had the right to contract for the use of teams and carriages necessary and convenient for doing such business, in the name of his principals, if he saw fit, in the way such service is usually contracted for; and we may perhaps take judicial notice that such service is usually contracted for payment to be made after the service is performed. It would seem to follow that as the agent had the power to bind his principals by a contract for such service, to be paid in the usual way, if he neglects or refuses to pay for the same after the service is performed, the principals must pay."

<sup>223</sup> *Bentley v. Doggett*, 51 Wis. 224, 37 Am. Rep. 827.

used in their business, and his principals wrote him that they should charge him with the horse unless he paid for it, or returned it to them and accounted for his sales. He did not pay for it, or return, or account, but sold the horse, showing the purchaser the letter. It was held that the letter was not a proposition of sale, and the purchaser got no title.<sup>224</sup>

(c) **Cannot sell samples.**—A commercial traveler, authorized in fact only to exhibit samples and solicit, receive, and forward orders, has no implied authority to sell his samples and take pay for them.<sup>225</sup>

(d) **Cannot make hotel bills, or other expenses.**—An agent employed to travel and sell the goods of his principal, cannot bind his principal to pay for a hotel bill contracted by him in the course of his principal's business unless such authority is expressly or impliedly given to him. "A contract, binding the principal, cannot be presumed, from the mere fact that an agent has obtained lodging at a hotel, while prosecuting the business of his principal, and while having in charge property belonging to the principal."<sup>226</sup> "Supplies afforded for the personal use of an agent are not among the objects presumed to be included in the agency, but if related to it at all, are merely collateral to it. It follows that authority to procure such supplies, on the credit of the principal, is not to be presumed, nor will the law presume a contract in such a case, from the mere fact of furnishing such supplies. Two things are necessary to enable an agent to bind his principal: first, he must have authority for that purpose; second, he must duly exercise it. Receiving entertainment at a hotel, by an agent, is not, standing by itself, an exercise of such power, even if he had it."<sup>227</sup> Thus a drummer could not bind his principal for board furnished him from time to time through a period of

<sup>224</sup> Calhoun v. Thompson, 56 Ala. 166, 28 Am. Rep. 754.

<sup>225</sup> Kohn v. Washer, 64 Tex. 131, 53 Am. Rep. 745; Savage v. Pelton, 1 Colo. App. 148. But see Bailey v. Pardridge, 134 Ill. 188.

<sup>226</sup> Sampson v. Singer Mfg. Co., 5 S. C. 465; Nicholson v. Pease, 61 Vt. 534; Grand Ave. Hotel Co. v. Friedman, 83 Mo. App. 491.

<sup>227</sup> Sampson v. Singer Mfg. Co., 5 S. C. 465.

several months, it being the custom in like cases to pay cash.<sup>228</sup> Nor can a traveling salesman bind his principal for laundry and other items, such as express and telegrams, unless connected with his business.<sup>229</sup> Nor will the mere fact that an agent employed to sell goods has in his possession a horse and wagon furnished him by the principal, for the purpose of carrying out his agency, give him implied authority to bind the principal for the board of such horse.<sup>230</sup> Where such a salesman is furnished with money to pay his expenses while on the road, he cannot bind his principal for the payment of such expenses, if, before notice from the party extending such credit, the employer has settled with the salesman and allowed him the amount of such expenses;<sup>231</sup> and a party seeking to recover for the agent's board and for that of his horse, in such a case, must show either an authority in the agent to bind the principal in this instance, or that the agent had been accustomed to do business in this manner, and that the principal knew it.<sup>232</sup>

**§ 245. Authority of agent to fix price and terms of sale.**

Where an agent is employed generally to sell goods, as incident to his general authority, he has power to fix the terms of sale, including the time, place, and mode of delivery, the price, quality, and quantity of the goods, and the time and mode of payment, to the extent at least of what is customary and not extraordinary.<sup>233</sup> Thus, where the power to take an order or make a contract of sale is incident to an agent's employment, the power to fix time of de-

<sup>228</sup> *Covington v. Newberger*, 99 N. C. 523.

<sup>229</sup> *Grand Ave. Hotel Co. v. Friedman*, 83 Mo. App. 491.

<sup>230</sup> *Sampson v. Singer Mfg. Co.*, 5 S. C. 465; *Grover & B. Sew. Mach. Co. v. Polhemus*, 34 Mich. 247; *Nicholson v. Pease*, 61 Vt. 534.

<sup>231</sup> *Nicholson v. Pease*, 61 Vt. 534.

<sup>232</sup> *Nicholson v. Pease*, 61 Vt. 534.

<sup>233</sup> *Scudder-Gale Grocer Co. v. Russell*, 65 Ill. App. 281; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Flanders v. Putney*, 58 N. H. 358; *Morris v. Bowen*, 52 N. H. 416; *Backman v. Charlestown*, 42 N. H. 125; *Stirn v. Hoffman House Co.*, 8 Misc. (N. Y.) 246; *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682. And see *Griffith v. Fields*, 105 Iowa, 362.

livery is also incident.<sup>234</sup> Of course it is within the principal's rights to prescribe the terms of sale and if he does so the agent must sell accordingly, and if he does not so sell the principal will not be bound by the sale, if the purchaser had notice of the instructions given to the agent in regard to such terms of sale.<sup>235</sup> Thus an agent authorized to sell only at the list price cannot bind his principal by an agreement to give a rebate of ten per cent.<sup>236</sup> But if the purchaser does not receive notice of such instructions and he deals with the agent in good faith, the principal will not be allowed to plead such instructions as against the purchaser, who has relied upon the agent's apparent authority.<sup>237</sup> Where an agent is authorized to make sales and collections, he has apparent authority to allow a deduction from a balance due for goods sold, where the agent, in selling the goods, has reduced the price without objection from the principal.<sup>238</sup> So where an agent telegraphed to his principal for prices on certain goods, which the principal promptly wired him, and added, "See letter of yesterday," the agent was authorized to make a sale according to the prices telegraphed, without waiting for the letter.<sup>239</sup>

<sup>234</sup> *Smith v. Droubay*, 20 Utah, 443.

<sup>235</sup> See *Steele v. Ellmaker*, 11 Serg. & R. (Pa.) 86; *Wolfe v. Luyster*, 1 Hall (N. Y.) 146; *Nester v. Craig*, 69 Hun (N. Y.) 543. And where one having the custody of goods for sale has no authority to sell at a certain price, it is immaterial that the one claiming to act by his appointment as a subagent in making the sale was a mere clerk. *Lucas v. Rader*, 29 Ind. App. 287.

<sup>236</sup> *Taylor Mfg. Co. v. Brown* (Tex. App.) 14 S. W. 1071. And see *Braun v. Hess*, 187 Ill. 283, 79 Am. St. Rep. 221. The purchaser is bound in such a case to inquire into the agent's authority to give a discount from the list price. *Brown v. West*, 69 Vt. 440. Where the party dealing with the agent has knowledge of the fact that the price of property in the agent's hands for sale is to be fixed by the principal, such party cannot claim that the agent has been clothed with apparent authority to sell for a certain price. *Lucas v. Rader*, 29 Ind. App. 287.

<sup>237</sup> *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *United States School Furniture Co. v. Board of Education of Owensboro*, 18 Ky. L. R. 948, 38 S. W. 864. See *Byrne v. Massasoit Packing Co.*, 137 Mass. 313, Huffc. Cas. 211.

<sup>238</sup> *Thomas Roberts Stevenson Co. v. Fox*, 19 Misc. (N. Y.) 177.

<sup>239</sup> *Haubelt v. Rea & P. Mill Co.*, 77 Mo. App. 672.



But an agent cannot sell on credit unless authorized by his power of attorney, or by the fixed usage of trade in reference to the articles sold,<sup>240</sup> nor can he agree to receive payment for the goods in anything but money, in the absence of express authority or custom or usage to that effect.<sup>241</sup> In fixing the terms, in any case, the agent must exercise his power with reasonable prudence and care, whether in fixing the time, or mode of payment, or the price itself; and it is not believed that a sale would be binding on the principal if the price fixed was less than a reasonable one. So the purchaser must likewise act with reasonable prudence and care in endeavoring to find out if the principal has prescribed any terms on which the agent is to sell.

Where creditors, after receiving an offer of a bill of sale from their debtor, assign their claims to an agent for the purpose of conducting the transaction, with authority "to take the goods in full of the creditor's claims," the agent has authority to agree with the debtor that the sale shall be conditional, and that the goods will be surrendered to him when enough is realized from the sales to satisfy the claims.<sup>242</sup>

**§ 246. Authority to sell to one to the exclusion of another.**

An agent who has a general authority to sell has been held to have an implied power to enter into an agreement with a purchaser that his principal will not sell the same line of goods to another or others in the same town.<sup>243</sup>

**§ 247. Powers not included in authority to sell personal property.**

(a) **Power to barter or exchange.**—Where a simple power is given to an agent to sell the personalty of his principal, it gives him no authority to barter or exchange such goods for other goods or articles, or for anything but money.<sup>244</sup> The

<sup>240</sup> *State v. Chilton*, 49 W. Va. 453. See post, § 247 (b).

<sup>241</sup> *Fay v. Causey*, 131 N. C. 350.

<sup>242</sup> *Rothschild v. Swope*, 116 Cal. 670.

<sup>243</sup> *Keith v. Herschberg Optical Co.*, 48 Ark. 138; *Watkins v. Morley*, 19 Am. Law Rev. 962, 2 Tex. Civ. Cas. 634.

<sup>244</sup> *Guerreiro v. Pelle*, 3 Barn. & Ald. 616, Wamb. Cas. 282; *Harlan v. Ely*, 68 Cal. 522; *Sioux City Nursery & Seed Co. v. Magnus*,

power to sell is one thing and the power to barter or exchange is another and very different thing. "A sale of a chattel is an exchange thereof for money, but a sale is discriminated in many respects from an exchange in law, an exchange being the giving of one thing and the receiving of another thing, while a sale is the giving of one thing for that which is the representative of all things."<sup>245</sup> Thus commissioners empowered by special statute to act in behalf of a city in subscribing to stock of a railroad company and authorized to sell the stock, "and to do whatsoever else may seem necessary to secure and advance the interests of the city in the premises," have no power to exchange the stock for stock in another company; as the power to sell does not include the power to exchange, and the clause following does not enlarge the specific powers conferred, the phrase "in the premises" limiting the discretion therein granted to the manner of exercising the powers specifically granted.<sup>246</sup> So where the agent has received payment in cash, he has no authority to exchange the money so received for bills of a different denomination.<sup>247</sup> Nor can an agent to sell, in the absence of special authority, bind his principal by a contract to deliver goods in exchange for advertising.<sup>248</sup> If, however, the agent sold his own goods and those of his principal together and received part payment in goods and part in cash, the sale would be binding on the principal provided the amount of cash received by the agent was sufficient to

1 Colo. App. 45; *Drury v. Barnes*, 29 Ill. App. 166; *Kent v. Bornstein*, 12 Allen (Mass.) 342; *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795; *Buckwalter v. Craig*, 55 Mo. 71; *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89; *Taylor & F. Organ Co. v. Starkey*, 59 N. H. 142; *Hayes v. Colby*, 65 N. H. 192; *Brown v. Smith*, 67 N. C. 245; *City of Cleveland v. State Bank*, 16 Ohio St. 236, 88 Am. Dec. 445; *McCreary v. Gaines*, 55 Tex. 485, 40 Am. Rep. 818; *Hall v. Storrs*, 7 Wis. 253; *Victor Sew. Mach. Co. v. Heller*, 44 Wis. 265.

<sup>245</sup> 1 *Parsons*, Cont. 521; *City of Cleveland v. State Bank*, 16 Ohio St. 236, 88 Am. Dec. 445.

<sup>246</sup> *City of Cleveland v. State Bank*, 16 Ohio St. 236, 88 Am. Dec. 445.

<sup>247</sup> *Kent v. Bornstein*, 12 Allen (Mass.) 342.

<sup>248</sup> *Beck v. Donohue*, 27 Misc. (N. Y.) 230.

pay for the principal's goods.<sup>249</sup> The money, or enough of it to pay for the goods of the principal, is considered to have been received for him. This results, in the absence of proof to the contrary, from the presumption that an agent conducts his principal's business faithfully.<sup>250</sup>

Where, however, the nature of the agent's employment is such as clearly implies authority to exchange, an exchange of property made thereunder will be binding on the principal. Thus conditions in a contract of agency for the sale of pianos providing that all new and secondhand instruments taken in exchange or part payment for instruments were to be regarded the same as goods consigned by the principal to his agent, and credited at a fair cash value, to be determined by the principal, clearly imply an authority to exchange or trade pianos, as well as to sell them.<sup>251</sup>

(b) **Nor to sell on credit.**—When an agent is employed to sell personal property and receive payment therefor, the general presumption is that the sale is to be for cash, and he cannot sell on credit, unless there are special instructions or a general usage to that effect at that place and time.<sup>252</sup> Thus where an agent was authorized to sell his principal's property, with instructions that such property was to remain the principal's until paid for or amply secured, the agent has no authority to sell such property and deliver it to the purchaser, on credit, notwithstanding the latter agrees that a lien shall be retained upon it until paid for.<sup>253</sup> But where an agent was vested with power to sell personal property for the best price he could procure, a sale on credit

<sup>249</sup> *Moore v. Thompson*, 32 Me. 497.

<sup>250</sup> *Moore v. Thompson*, 32 Me. 497. See post, § 397.

<sup>251</sup> *Gaus v. Hathaway*, 66 Ill. App. 149.

<sup>252</sup> *Falls v. Gaither*, 9 Port. (Ala.) 605; *Burks v. Hubbard*, 69 Ala. 379; *Payne v. Potter*, 9 Iowa, 549; *Graul v. Strutzel*, 53 Iowa, 712; *School Dist. No. 6 v. Aetna Ins. Co.*, 62 Me. 330; *Norton v. Nevills*, 174 Mass. 243; *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 92; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Taylor & F. Organ Co. v. Starkey*, 59 N. H. 142; *State v. Delafield*, 8 Paige (N. Y.) 527; *White v. Fuller*, 67 Barb. (N. Y.) 267; *May v. Mitchell*, 24 Tenn. 365; *Cleveland v. Pearl*, 63 Vt. 127, 25 Am. St. Rep. 748; *Pelham v. Hilder*, 1 Younge & C. 3; *State v. Chilton*, 49 W. Va. 453.

<sup>253</sup> *Cowan v. Adams*, 10 Me. 374, 25 Am. Dec. 242.

was within the range of his discretion and if made in good faith, and in accordance with the course of trade at the place where the sale was made, would be valid.<sup>254</sup> And so where the principal has permitted one to hold himself out as agent, and has consummated sales on credit, made by him, such principal would be bound by other sales on credit by the agent, notwithstanding he had privately forbidden the agent to sell on credit.<sup>255</sup> And where an agent is authorized to sell on credit—he guarantying payment—he is not liable, in an action for conversion, for goods sold by him on credit and not paid for.<sup>256</sup> Especially does the above doctrine apply where there is a custom against an agent's selling on credit. Thus when there is a custom of trade that an agent for the sale of coal has no right, unless specially authorized, to make a time contract extending over a long period, persons dealing with such an agent are bound by such custom, and his principal will not be liable upon such a time contract, made by him without special authority.<sup>257</sup>

It has been held in Georgia, however, that a sale by an agent on credit, where there is authority to sell, though in violation of his principal's instructions, passes the title, and is not a conversion, where the purchaser has no notice of the limitation of the agent's authority;<sup>258</sup> and that trover cannot be maintained against the agent in such a case.<sup>259</sup> This holding would seem to imply that the rule in that state is directly opposite to one above stated; and that an agent may sell on credit unless there are special instructions or usage to the contrary.

Where, in any case, the agent has authority to sell on credit, it must be on a reasonable credit, and as to what is a reasonable credit is to be determined from the facts of each particular case.<sup>260</sup>

<sup>254</sup> *May v. Mitchell*, 5 Humph. (Tenn.) 365.

<sup>255</sup> *White v. Fuller*, 67 Barb. (N. Y.) 267.

<sup>256</sup> *Standard Fertilizer Co. v. Van Valkenburgh*, 21 Misc. (N. Y.) 559.

<sup>257</sup> *White v. Fuller*, 67 Barb. (N. Y.) 267.

<sup>258</sup> *Loveless v. Fowler*, 79 Ga. 134, 11 Am. St. Rep. 407.

<sup>259</sup> *Loveless v. Fowler*, 79 Ga. 134, 11 Am. St. Rep. 407.

<sup>260</sup> *Brown v. Central Land Co.*, 42 Cal. 257; *Payne v. Potter*, 9 Iowa, 549.

**(c) Nor to release principal's rights, nor pay his debts.—**

A mere authority in an agent to sell the goods of his principal gives him no power to exercise any control over the rights or liabilities of his principal, not included within his power to sell. Thus, the fact that he has power to sell his principal's goods gives him no authority to release a debt due to the principal,<sup>261</sup> nor to pay one due by him.<sup>262</sup> A salesman in a store has no authority, in the usual course of his business, to deliver goods, in the absence of his employer, in payment of, or as security for, a note signed by his employer;<sup>263</sup> nor to sell goods at wholesale prices in payment of a debt due by his principal.<sup>264</sup> So an agent, employed to solicit and send to his employer orders for goods and to collect outstanding accounts, has no authority to release one of his employer's customers from liability for the price of goods which he had purchased, and to accept in his place the customer's successor in business.<sup>265</sup> Nor has such an agent power to compromise or adjust a debt due to the principal,<sup>266</sup> nor to adjust damages which the purchaser may sustain by a breach of warranty.<sup>267</sup>

**(d) Nor to use goods for his own benefit.—**An agency, however comprehensive in its scope, nothing else appearing, contemplates the exercise of the powers conferred for the benefit of the principal only. It implies a trust and confidence that the delegated authority will be employed in the honest and faithful discharge of the duties appertaining to the fiduciary relation thus established; and when authority is delegated to an agent to sell the goods of his principal, it gives him no authority to use, dispose of, or in any way appropriate the goods for his own benefit. He cannot pledge or otherwise dispose of the goods in payment of or as a security

<sup>261</sup> *Smith v. Perry*, 29 N. J. Law, 74; *Ludwig v. Gorsuch*, 154 Pa. 413.

<sup>262</sup> *Nash v. Drew*, 5 Cush. (Mass.) 422; *Lee v. Tinges*, 7 Md. 215; *Hampton v. Matthews*, 14 Pa. 105; *Butts v. Newton*, 29 Wis. 632.

<sup>263</sup> *Nash v. Drew*, 5 Cush. (Mass.) 422.

<sup>264</sup> *Hampton v. Matthews*, 14 Pa. 105; *Lee v. Tinges*, 7 Md. 215.

<sup>265</sup> *Ludwig v. Gorsuch*, 154 Pa. 413.

<sup>266</sup> *Powell v. Henry*, 27 Ala. 612.

<sup>267</sup> *Bradford v. Bush*, 10 Ala. 386.

for his own debt, unless such power be expressly conferred, or results from the general usage of the business, or the habit or course of dealing between him and his principal.<sup>268</sup> Thus an agent, intrusted with a horse to sell for his principal, cannot dispose of him to his own creditor in payment of his own debt,<sup>269</sup> and if he does so, the owner may maintain replevin therefor, although in the hands of a bona fide purchaser.<sup>270</sup> So where the owner of certain "school land certificates," left them with one N., a real estate agent and dealer, to sell, and N. pledged them to a bank as security for his own private debt, such pledge was not binding on the owner.<sup>271</sup> So if one who is known to be an agent for the negotiation of his principal's draft, transfers the draft to a third person in payment of the agent's debt, that person will acquire no title to the draft, however honest his actual intention may be.<sup>272</sup> Where the plaintiffs were merchant tailors in New Hampshire, with a branch in Vermont, in charge of an agent, and the latter, owing a debt to the defendant, a physician residing

<sup>268</sup> *Paterson v. Tash*, 2 Strange, 1178, Wamb. Cas. 253; *De Bouchout v. Goldsmid*, 5 Ves. 211; *Sykes v. Giles*, 5 Mees. & W. 645; *Warner v. Martin*, 11 How. (U. S.) 209; *Burks v. Hubbard*, 69 Ala. 379; *Smith v. James*, 53 Ark. 135; *Hodgson v. Raphael*, 105 Ga. 480; *Parsons v. Webb*, 8 Me. 38, 22 Am. Dec. 220; *Rodick v. Coburn*, 68 Me. 170; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332; *Tallafarro v. Baltimore First Nat. Bank*, 71 Md. 200; *Hurley v. Watson*, 68 Mich. 531; *Talboys v. Boston*, 46 Minn. 144; *Stewart v. Cowles*, 67 Minn. 184; *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89; *Greenwood v. Burns*, 50 Mo. 52; *McCormick v. Keith*, 8 Neb. 143; *Ryan v. Stowell*, 31 Neb. 121; *Rice v. Lyndeborough Glass Co.*, 60 N. H. 195; *Holton v. Smith*, 7 N. H. 446; *Gould v. Blodgett*, 61 N. H. 115; *Hart v. Hudson*, 6 Duer (N. Y.) 294; *Easton v. Clark*, 35 N. Y. 225; *Williams v. Johnston*, 92 N. C. 532, 53 Am. Rep. 428; *Wilson v. Wilson*, 181 Pa. 80; *Stewart v. Woodward*, 50 Vt. 78, 28 Am. Rep. 488; *Belton Compress Co. v. Belton Brick Mfg. Co.*, 64 Tex. 337; *Whitney v. State Bank*, 7 Wis. 520. Nor to pay the owner's debts. *Butts v. Newton*, 29 Wis. 632; *Victor Sew. Mach. Co. v. Heller*, 44 Wis. 265.

<sup>269</sup> *Parsons v. Webb*, 8 Me. 38, 22 Am. Dec. 220.

<sup>270</sup> *Parsons v. Webb*, 8 Me. 38, 22 Am. Dec. 220. And see *Rodick v. Coburn*, 68 Me. 170; *Gould v. Blodgett*, 61 N. H. 115.

<sup>271</sup> *Whitney v. State Bank*, 7 Wis. 620.

<sup>272</sup> *Dowden v. Cryder*, 55 N. J. Law, 329.

there, delivered him a suit of clothes belonging to the plaintiffs, on account thereof, the defendants supposing that the agent had authority to do so, but knowing that the goods belonged to the plaintiffs, the plaintiffs having charged the goods to the defendant, it was held that they were entitled to recover therefor in an action of book account.<sup>273</sup> In some states where such an unauthorized pledge or transfer is made by the agent, the owner may maintain trover against the creditor without having made any previous demand for the goods.<sup>274</sup>

(e) **Nor to pledge or mortgage goods.**—An agent employed to sell goods has no implied authority to pledge the same,<sup>275</sup> nor to execute a chattel mortgage on it.<sup>276</sup> “It is manifest that when a man is dealing with other people’s goods, the difference between an authority to sell, and an authority to mortgage or pledge, is one which may go to the root of all the motives and purposes of the transaction. The object of a person who has goods to sell is to turn them into money, but when those goods are deposited by way of security for money borrowed it is a transaction of a totally different character. If the owner of the goods does not get the money, his object and purpose are simply defeated; and if, on the other hand, he does get the money, a different object and different purpose are substituted for the first, namely, that of borrowing money and contracting the relation of debtor with a creditor, while retaining a redeemable title to the goods, instead of exchanging the title to the goods for a title, unaccompanied by any indebtedness, to their full equivalent in money.”<sup>277</sup> A power of attorney authorizing the sale,

<sup>273</sup> *Stewart v. Woodward*, 50 Vt. 78, 28 Am. Rep. 488.

<sup>274</sup> *Rodick v. Coburn*, 68 Me. 170; *Gould v. Blodgett*, 61 N. H. 115.

<sup>275</sup> *City Bank v. Barrow*, 5 App. Cas. 664; *Paterson v. Tash*, 2 Strange, 1178, Wamb. Cas. 253; *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89; *Voss v. Robertson*, 46 Ala. 483; *Bott v. McCoy*, 20 Ala. 578; *McCreary v. Gaines*, 55 Tex. 485, 40 Am. Rep. 818.

<sup>276</sup> *Switzer v. Wilvers*, 24 Kan. 384, 36 Am. Rep. 259. A power of attorney to control and sell a horse does not authorize the attorney to mortgage him. *Reed v. Kimsey*, 98 Ill. App. 364.

<sup>277</sup> *By* *Ld. Selborne*, in *City Bank v. Barrow*, 5 App. Cas. 670.

transfer, or release of certain mortgages and the indorsement and transfer of notes secured thereby, and the receiving payment of such notes and the giving of acquittances therefor, does not authorize the borrowing of money or the pledging of the notes or mortgages for any purpose.<sup>278</sup>

(f) **Nor to sell at public auction.**—An agent, who is clothed with the usual powers to sell personal property, has no authority to sell it at public auction;<sup>279</sup> and a purchaser at such a sale, with notice of the agent's powers, or where the circumstances were such as to put him upon inquiry, which he fails to make, takes no title.<sup>280</sup> The converse of this rule is also true, that where the agent is directed to sell at public auction he has no implied power to sell privately,<sup>281</sup> although the price received thereby is greater than he could have obtained at a public sale.<sup>282</sup>

(g) **Nor to rescind the sale.**—It is a well settled rule that an agent, with authority to sell goods, has no authority, after the contract of sale has been completed or executed, to revoke or rescind the sale and receive back the goods which he had previously sold, or to alter his contract in any material point.<sup>283</sup> It has been held, however, that where a general agent sells a chattel, he is competent, with the assent of the other party, to rescind the sale, revest the title, and make a conditional sale to the same party.<sup>284</sup> An agent having authority to set up a machine and receive it back in the event it does not work properly, and he cannot remedy the

<sup>278</sup> *Hawxhurst v. Rathgeb*, 119 Cal. 531, 63 Am. St. Rep. 142.

<sup>279</sup> *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

<sup>280</sup> *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

<sup>281</sup> *Daniel v. Adams*, Amb. 495; *The G. H. Montague*, 4 Blatchf. 461, Fed. Cas. No. 5,377. See post, § 904.

<sup>282</sup> *Jaques v. Todd*, 3 Wend. (N. Y.) 91; *Daniel v. Adams*, Amb. 495.

<sup>283</sup> *Adrian v. Lane*, 13 S. C. 183; *Smith v. Rice*, 1 Bailey (S. C.) 648; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Bradford v. Bush*, 10 Ala. 386; *Andrews v. Himrod*, 37 Ill. App. 124. Nor enter into a new contract of sale with the original purchaser. *Fletcher v. Nelson*, 6 N. D. 94.

<sup>284</sup> *Scott v. Wells*, 6 Watts & S. (Pa.) 357, 40 Am. Dec. 571. And see *Bloomer v. Denman*, 12 Ill. 240.



defect, is authorized, on being notified of a defect, which he does not remedy, to return notes which the purchaser has given on account of the purchase money.<sup>285</sup>

(h) **Nor to promise commissions on subsale, nor insure against loss.**—An agent, employed to sell personalty, has no implied power to make a promise, binding on his principal, to a third person to pay him commissions for making sales for him.<sup>286</sup> Nor has such an agent implied authority to bind his principal by an agreement with a prospective purchaser that if the latter will reduce his competitive bid on another piece of work, the seller will see that the buyer loses no money on the contract.<sup>287</sup> Nor has a general agent of a corporation implied power, as a matter of law, to bind the corporation by a contract guaranteeing a purchaser against loss of rebates from another corporation on account of his handling goods of the first corporation.<sup>288</sup>

(i) **Nor to guaranty that principal will not sell for less.**—Nor has an agent to sell authority to guarantee that his principal will not sell the same goods to another purchaser for a less price.<sup>289</sup> Thus, where a principal wrote to his agent that he proposed to “place” his goods at a certain price, this gave the agent no authority to warrant that his principal would not sell for a less price.<sup>290</sup>

## II. OF AGENT'S AUTHORITY TO LEASE.

### § 248. In general—How given.

Where a lease is of such a nature that it is required to be under seal, authority to make it must also be under seal; but where the lease need only be written, and is not required to be under seal, the authority to make the same may be given by parol.<sup>291</sup> And where an agent is authorized to

<sup>285</sup> *Peterson v. Wood Mowing & Reaping Co.*, 97 Iowa, 148, 59 Am. St. Rep. 399.

<sup>286</sup> *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385; *Frank v. Ingalls*, 41 Ohio St. 560.

<sup>287</sup> *Kinser v. Calumet Fire-Clay Co.*, 165 Ill. 505.

<sup>288</sup> *Braun v. Hess*, 187 Ill. 283, 79 Am. St. Rep. 221.

<sup>289</sup> *Anderson v. Bruner*, 112 Mass. 14.

<sup>290</sup> *Anderson v. Bruner*, 112 Mass. 14.

<sup>291</sup> *Lake v. Campbell*, 18 Ill. 106.

lease, he may enter into an agreement to lease, which will be binding on the principal, whether such agreement be for the agent's own benefit or for the benefit of his principal, for in either case the principal would be entitled, as against the agent, to the benefit of the contract.<sup>292</sup>

§ 249. Implied power to lease or rent.

It is not necessary that an agent's authority to lease or rent should be given to him expressly; but it may be implied as reasonably necessary and proper for carrying out some other general power granted to him, or it may be implied from the acts of the principal in recognizing or holding the agent out as possessing such authority.<sup>293</sup> Thus, where an agent was engaged to carry on a mercantile business, to do which it was necessary to rent a house, the principal was bound for the rent thereof, whether he expressly authorized the agent to make the contract or not, since an agent, to conduct a given business, necessarily has authority to do everything which is essential to the performance of his duty.<sup>294</sup> So the powers of a general agent of the owner of a railroad are such as will warrant him in executing a lease of property to be used as a ticket office for the railroad.<sup>295</sup> But the general agent of a corporation cannot, by virtue of his general authority to manage the affairs of the corporation, make a lease for the purpose of trying title to land; and the fact that he has been accustomed to make leases of lands in the possession of the corporation, without objection by the latter, is not sufficient evidence of authority to make such lease to try a disputed title.<sup>296</sup> So an authority to make

<sup>292</sup> Taylor v. Salmon, 4 Mylne & C. 138.

<sup>293</sup> Hitchens v. Ricketts, 17 Ind. 625; Amory v. Kamnoffsky, 117 Mass. 351, 19 Am. Rep. 416; Ecker v. Chicago, B. & Q. R. Co., 8 Mo. App. 223; Gillis v. Bailey, 17 N. H. 18. But see Howard v. Carpenter, 11 Md. 259, where it is held that an attorney either at law or in fact has no authority to make a lease or confirm an imperfect one, or to perfect an inchoate agreement for a lease of property of his principal or client, unless authority for such purpose is expressly given.

<sup>294</sup> Baldwin v. Garrett, 111 Ga. 876.

<sup>295</sup> Ecker v. Chicago, B. & Q. R. Co., 8 Mo. App. 223.

<sup>296</sup> Gillis v. Bailey, 17 N. H. 18.

a new lease or to change one already made will not be implied from a power to collect rent,<sup>297</sup> or from the fact that the agent had previously rented the same property or has given his receipt for rent due.<sup>298</sup> Nor will the fact that an agent is a general one at the place where he resides and has general power to transact business relating to the principal's property, give such agent power to alter the terms of a sealed lease, accepting a less amount for the rent of the property and changing the time of payment thereof.<sup>299</sup>

**§ 250. Powers of an agent authorized to lease.**

The authority of an agent authorized to lease his principal's land extends not alone to what is necessary therefor, but to that which is "proper, usual, and reasonable," as well as necessary.<sup>300</sup> Thus, where an agent has authority to lease he also has implied power to accept a surrender of,<sup>301</sup> or to renew, a lease.<sup>302</sup> So such an agent may make representations or warranties as to the condition of the property which he is authorized to lease.<sup>303</sup> But such an authority carries no authority to cancel the lease,<sup>304</sup> nor to surrender it, where the agent's authority was to create, convey, or assign the lease.<sup>305</sup> Nor can such an agent enter into a covenant to repair or re-

<sup>297</sup> *Indianapolis Mfg. & Carpenters Union v. Cleveland, C., C. & I. R. Co.*, 45 Ind. 281; *Weil v. Zodiag*, 34 La. Ann. 982; *Davidson v. Blumor*, 7 Daly (N. Y.) 205; *Tryon v. Davis*, 8 Wash. 106.

<sup>298</sup> *Weil v. Zodiag*, 34 La. Ann. 982.

<sup>299</sup> *Halladay v. Underwood*, 90 Ill. App. 130.

<sup>300</sup> *Durkee v. Carr*, 38 Or. 189.

<sup>301</sup> *Amory v. Kamnoffsky*, 117 Mass. 351, 19 Am. Rep. 416.

<sup>302</sup> *Emerson v. Goodwin*, 9 Conn. 423.

<sup>303</sup> *Matteson v. Rice*, 116 Wis. 328, and the fact that the agent believed the representations to be true, and had no intention of deceiving the lessor, does not affect the principal's liability.

<sup>304</sup> *Faville v. Lundvall*, 106 Iowa, 135.

<sup>305</sup> *Ramsay v. Wilkie*, 36 N. Y. St. Rep. 864, where it is held that under the New York statute of frauds, declaring that no estate or interest in lands, other than a lease for a year, shall be created, assigned, surrendered, or declared unless by act or operation of law, or by deed subscribed by the party creating, etc., by his lawful agent thereunto authorized by writing, the lawful agent must be specially authorized in writing to surrender the lease.

build a house which he has leased.<sup>306</sup> Authority to lease farms and collect rents does not give the agent implied power to license telegraph companies to erect poles in the highway in front of such farms.<sup>307</sup> An agent to lease lands has no authority to subject the rents thereof to the lien of advancements of agricultural supplies made to the tenant, by one who believed the lands belonged to the agent, if the principal did nothing to produce such belief or otherwise mislead the parties to the transaction.<sup>308</sup>

**§ 251. Period for which agent may lease.**

As a general rule an agent must lease only for the period for which he is authorized,<sup>309</sup> and if he exceeds his authority in that respect the lease will be good only for the period for which he had the power to make it.<sup>310</sup> Thus a lease of land for years, given, during the absence of the landowner from the country, by an agent having authority only to "take charge of the land while he was gone, and make it pay the best way he could," is terminable by the landowner on his return.<sup>311</sup> So an agent, authorized to negotiate for or make a lease for three years, has no authority to make one for three years with the privilege to the lessee of a renewal for two years more.<sup>312</sup>

If, however, no limitation is put upon the time for which he may lease, he may use his discretion in the matter, and lease for such a time as all the circumstances of the particular case would seem to warrant. Thus, where such authority is given to him, without any restriction as to the period for which he is to lease, a lease for a year made by him will be binding on the principal.<sup>313</sup> Where a person seeks to es-

<sup>306</sup> *Halbut v. Forrest City*, 34 Ark. 246.

<sup>307</sup> *American Tel. & Tel. Co. v. Jones*, 78 Ill. App. 372.

<sup>308</sup> *Loftin v. Crossland*, 94 N. C. 76.

<sup>309</sup> *Antoni v. Belknap*, 102 Mass. 193; *Page v. Wight*, 96 Mass. 182.

<sup>310</sup> *Alexander v. Alexander*, 2 Ves. Sr. 644. Compare *Roe v. Prideaux*, 10 East, 158.

<sup>311</sup> *Antoni v. Belknap*, 102 Mass. 193.

<sup>312</sup> *Schumacher v. Pabst Brewing Co.*, 78 Minn. 50.

<sup>313</sup> *Babin v. Ensley*, 14 App. Div. 548, 43 N. Y. Supp. 849.

establish a lease to him by an agent, the burden of proof is on such person to show that the agent had authority to make a lease for the term which he seeks to establish.<sup>314</sup>

**§ 252. Cannot make representations as to title, etc.**

Where an agent is employed to lease property, he has no implied authority to make representations as to the title of the same;<sup>315</sup> nor can he make his nonconsenting principal a joint lessor with the agent of the latter's property.<sup>316</sup> Authority to make representations respecting the leased property, however, may be expressly given to an agent; and authority to make representations to any person bearing a letter from the landlord instructing him to show the premises to the bearer, also authorizes him to make such representations to one who presents himself, as a prospective purchaser, without such letter.<sup>317</sup>

**III. OF AGENT'S AUTHORITY TO MORTGAGE.**

**§ 253. May make it in usual form and insert usual provisions—Implied powers.**

Where a power is given in general terms to an agent to mortgage property, without specifying the provisions the deed shall contain, it includes the power to make it in the form and with the provisions customarily used in the state or country where the property is situated. Thus a power to mortgage authorizes the execution of a mortgage with a power of sale, where it is the custom of the country to include such powers in mortgages.<sup>318</sup> But the agent has not implied power to insert such provisions as are not usually inserted in mortgages.<sup>319</sup> Thus, a power to mortgage to secure the payment of a specific debt does not authorize the

<sup>314</sup> *Weil v. Zodiag*, 34 La. Ann. 982.

<sup>315</sup> *Tondro v. Cushman*, 5 Wis. 279.

<sup>316</sup> *La Point v. Scott*, 36 Vt. 604; *Loftin v. Crossland*, 94 N. C. 76.

<sup>317</sup> *Briggs v. Dunne*, 168 Ill. 226.

<sup>318</sup> *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; *In re Chawner's Will*, L. R. 8 Eq. 569; *Bridges v. Longman*, 24 Beav. 27; *Leigh v. Lloyd*, 35 Beav. 455.

<sup>319</sup> *Pacific Rolling Mill Co. v. Dayton, S. & G. R. R. Co.*, 7 Sawy. 61, 5 Fed. 852; *Jesup v. City Bank of Racine*, 14 Wis. 331.

insertion of a contract in such mortgage, binding the principal to pay the mortgagee an attorney's fee in case legal proceedings were taken to enforce the same.<sup>320</sup>

An agent with power to mortgage has not, by virtue thereof, implied power to give a second mortgage,<sup>321</sup> nor to give a mortgage for his own benefit or that of a third person,<sup>322</sup> nor does such a power authorize him to make an absolute sale of the property.<sup>323</sup> It has also been held that a power to mortgage does not include power to execute a note in the name of the principal for the amount of the mortgage debt, inasmuch as the principal cannot be presumed to have intended to give to the agent authority to bind him personally, but must be presumed to have authorized him to procure money on the security of the land only.<sup>324</sup>

**§ 254. When power not implied.**

A power to mortgage property may be implied when it is necessary or proper for carrying out the power originally granted, but unless it is so necessary it will not be implied from a general power. Thus, the authority of an agent to carry on the business of a manufacturing company does not extend to the right to pledge or mortgage its machinery and buildings.<sup>325</sup> So an agent has no authority to mortgage realty under a power "to buy and sell real and personal property;" to make "good and sufficient deeds \* \* \* in transferring and conveying the same;" and generally to make contracts for the profitable improvement and use of the principal's property for the enlargement of his estate, unless it appears that the making of such mortgage was necessary to the execution of the authority given.<sup>326</sup> Where an agent

<sup>320</sup> *Pacific Rolling Mill Co. v. Dayton, S. & G. R. R. Co.*, 7 Sawy. 61, 5 Fed. 852.

<sup>321</sup> *Skaggs v. Murchison*, 63 Tex. 348.

<sup>322</sup> *Nippel v. Hammond*, 4 Colo. 211; *Wolfley v. Rising*, 8 Kan. 297; *Greenwood v. Spring*, 54 Barb. (N. Y.) 375.

<sup>323</sup> *Coppage v. Barnett*, 34 Miss. 621.

<sup>324</sup> *Mylius v. Copes*, 23 Kan. 617. Compare *Taylor v. Hudgins*, 42 Tex. 244.

<sup>325</sup> *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203. And see post, § 265.

<sup>326</sup> *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771;

managed his principal's business as agent, and bought and paid for the stock, and who, on the principal's becoming sick, was told to do the best he could, and to make collections or take notes for outstanding accounts, and apply them on a certain claim, "to work things to the best advantage, and to do anything he [the agent] could to keep the business going," he had no authority to execute a chattel mortgage of the stock; that not being effective to keep the business going.<sup>327</sup> Nor is such authority given by a general mandate authorizing an agent to take charge of, adjust, manage, and control the interests of heirs in a succession, although such agent may be called upon, in the proper discharge of his functions, to manage a plantation which forms part of the inheritance of such heirs, and to obtain advances for that purpose.<sup>328</sup>

**§ 255. Power to cancel mortgage.**

When power is given to an agent to cancel a mortgage, such power must be executed strictly and the agent has no implied power to go beyond the terms prescribed therein. Thus under such a power he cannot surrender the mortgage without a consideration or payment of some kind;<sup>329</sup> nor, where authorized to cancel a mortgage and notes and take new ones therefor, can he cancel the same without taking renewals.<sup>330</sup> Nor can he, under such a power, extend the time of payment of the mortgage.<sup>331</sup>

**§ 256. Where agent is authorized to redeem from mortgage.**

Where an agent has been authorized to redeem from a mortgage, he may pay any expenses that are reasonably and necessarily incurred while carrying out such authority.<sup>332</sup>

*Jeffrey v. Hursh*, 49 Mich. 31; *Morris v. Watson*, 15 Minn. 212; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9.

<sup>327</sup> *Edgerly v. Cover*, 106 Iowa, 670; *First Nat. Bank v. Kirkby*, 43 Fla. 376.

<sup>328</sup> *In re Lafourche Transp. Co.*, 52 La. Ann. 1517.

<sup>329</sup> *Harrison v. Burlingame*, 48 Hun (N. Y.) 212.

<sup>330</sup> *Foster v. Paine*, 56 Iowa, 622.

<sup>331</sup> *Powell v. Henry*, 96 Ala. 412; *Karcher v. Gans*, 13 S. D. 383.

<sup>332</sup> *Shutes v. Woodard*, 57 Mich. 213.

## IV. OF AGENT'S AUTHORITY TO PURCHASE.

## § 257. Must act in compliance with authority.

As in the case of other agencies, an agent who is employed to purchase goods for his principal must act within the powers given to him in respect to such purchase, whether they are in regard to the terms of such purchase, or in regard to the amount or kind of goods to be purchased, or in regard to the party or parties from whom the purchase is to be made; and if he so acts the principal will be bound thereby.<sup>333</sup> Thus, where he is authorized to purchase a certain amount of goods at a certain price, he has no authority to purchase a greater amount at a greater price, or the authorized amount at a higher price.<sup>334</sup> Nor where he is authorized severally to purchase for two corporations can he bind them jointly by a purchase.<sup>335</sup> And where he is authorized to purchase goods at a certain place, of a designated person, the principal will not be liable for goods of equal value and quality purchased by him from other persons in a different locality.<sup>336</sup>

But where the agent acts within the apparent scope of his authority in making purchases for his principal, the latter cannot escape liability therefor by a secret limitation on his authority to purchase.<sup>337</sup> Authority to build a house necessarily implies authority to purchase the lumber.<sup>338</sup> Where an agent is employed to purchase goods for his principal and does so with moneys furnished by the latter for that purpose, the title passes direct from the vendor to the

<sup>333</sup> *Peckham v. Lyon*, 4 McLean, 45, Fed. Cas. No. 10,899; *Shrimpton v. Brice*, 102 Ala. 655; *McAtee v. Perrine*, 48 Ill. App. 548; *Baker v. Barnett Produce Co.*, 113 Mich. 533; *Robinson Mercantile Co. v. Thompson*, 74 Miss. 847; *Deering v. Starr*, 118 N. Y. 665; *Edwards v. Dooley*, 120 N. Y. 540; *Olyphant v. McNair*, 41 Barb. (N. Y.) 446; *Hopkins v. Blane*, 1 Call (Va.) 361.

<sup>334</sup> *Starbird v. Curtis*, 43 Me. 352.

<sup>335</sup> *Pacific Cable Construction Co. v. McNatt*, 2 Wash. St. 216.

<sup>336</sup> *Robinson Mercantile Co. v. Thompson*, 74 Miss. 847, 21 So. 794.

<sup>337</sup> *Hubbard v. Tenbrook*, 124 Pa. 291, 10 Am. St. Rep. 585; *Herrman Saw Mill Co. v. Bailey*, 22 Ky. L. R. 552, 58 S. W. 449.

<sup>338</sup> *John Spry Lumber Co. v. McMillan*, 77 Ill. App. 280.



principal; and this is so although the agent, instead of using the funds furnished by his principal, uses these for his own purposes and substitutes other funds therefor.<sup>339</sup>

**§ 258. Power to purchase on credit.**

(a) **In general.**—As a general rule, where one is authorized by another to make purchases for him, he has no implied power to purchase on the credit of the latter.<sup>340</sup> And the fact that the principal has bought personally, and on credit, goods which the agent selected, does not give the agent authority to subsequently make purchases alone on the principal's credit.<sup>341</sup> But such an agent may purchase on credit, if in so doing he acts within the apparent scope of his authority, as where the principal has permitted him to hold himself out as having authority to purchase on credit, or if the principal has done other acts from which such authority may be implied.<sup>342</sup> Thus, where an undisclosed principal permits an agent to make purchases for him on credit, he will not be allowed thereafter to deny such authority on the part of the agent, to the injury of those who have sold to the agent and given him credit for the price of the goods sold. Where a man conducting an apparently prosperous and profitable business obtains credit thereby, his creditors have a right to suppose that his profits go into his assets for their protection in case of a pinch or an unfavorable turn in the business. To allow an undisclosed principal to absorb the profits, and then, when the pinch comes, to escape

<sup>339</sup> *Edwards v. Dooley*, 120 N. Y. 540. And see *Littleton v. Loan, Mercantile & Stock Ass'n*, 97 Ga. 172.

<sup>340</sup> *Berry v. Barnes*, 23 Ark. 411; *Doan v. Duncan*, 18 Ill. 96; *Oberne v. Burke*, 30 Neb. 581. Nor to borrow money to purchase, upon the credit of his principal. *Indiana State Bank v. Bugbee*, 3 Keyes (N. Y.) 461.

<sup>341</sup> *Town's Adm'r v. Hendee*, 27 Vt. 258.

<sup>342</sup> *Fradley v. Hyland*, 37 Fed. 49, *Huff. Cas.* 240; *Spear & T. Supply Co. v. Van Riper*, 103 Fed. 689; *Liddell v. Sahline*, 55 Ark. 627; *Ruffin v. Mebane*, 41 N. C. (6 Ired. Eq.) 507; *Welch v. Clifton Mfg. Co.*, 55 S. C. 568; *Witcher v. Gibson*, 15 Colo. App. 163; *Buckley v. Silverberg*, 113 Cal. 673; *McKinney v. Stephens*, 17 Pa. Super. Ct. 125.

responsibility on the ground of orders to his agent not to buy on credit, would be a plain fraud on the public.<sup>343</sup>

As far as credit may be the necessary result of buying and selling, the credit of the principal may be pledged; for, in such case, it will be correspondent only to the advantage gained by them by such credit.<sup>344</sup> But the agent cannot pledge the principal's credit for his own purposes.<sup>345</sup>

A subagent appointed to purchase stock and sell goods for a company may buy on credit if not prohibited; and a promissory note given by such subagent, not being binding on the company, will not extinguish the implied promise of the company to pay for the articles so purchased.<sup>346</sup>

(b) **When supplied with funds.**—Where an agent has been authorized to purchase goods for his principal and has been supplied with funds to pay for the same, or the means of payment has been otherwise provided for, he cannot purchase such goods on the credit of the principal, unless there is a custom of trade to that effect, or unless the principal has done some act which estops him from denying the authority of the agent to make the purchase in that manner.<sup>347</sup> If goods are sold to such an agent on credit and by him delivered to the principal, the latter will not be liable to the vendor unless he received the goods knowing them to have been bought on credit, or unless he had no funds in the

<sup>343</sup> *Hubbard v. Tenbrook*, 124 Pa. 291, 10 Am. St. Rep. 585.

<sup>344</sup> *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 69.

<sup>345</sup> *Stephenson v. Grim*, 100 Pa. 70.

<sup>346</sup> *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66.

<sup>347</sup> *Parsons v. Armor*, 3 Pet. (U. S.) 413; *Wheeler v. McGuire*, 86 Ala. 398; *Americus Oil Co. v. Gurr*, 114 Ga. 624; *Adams v. Boles*, 24 Iowa, 96; *Proctor v. Tows*, 115 Ill. 138; *Bohart v. Oberne*, 36 Kan. 284; *Taft v. Baker*, 100 Mass. 68; *Temple v. Pomroy*, 4 Gray (Mass.) 128; *Taber v. Cannon*, 8 Metc. (Mass.) 456; *Boston Iron Co. v. Hale*, 8 N. H. 363; *Jaques v. Todd*, 3 Wend. (N. Y.) 83; *Patton v. Brittain*, 32 N. C. (10 Ired.) 8; *Fraser v. McPherson*, 3 Desaus. (S. C.) 393; *Stoddard v. McIlwain*, 7 Rich. Law (S. C.) 525; *First Nat. Bank v. Pennington*, 75 Tex. 272; *Cleveland v. Pearl*, 63 Vt. 127, 25 Am. St. Rep. 748; *Komorowski v. Krumdick*, 56 Wis. 23.

hands of the agent at the time sufficient to pay for the goods.<sup>348</sup> Thus, where a merchant in the country ships to his correspondent in town products which he has to sell and the town merchant ships to him such articles of merchandise as he requires for his business, filling out his orders by procuring from other merchants goods which he himself does not have, charging them to the country merchant, the latter is not liable to any of the sellers of such goods if he has funds in the hands of the town merchant and has never authorized him to make such purchases on his credit or never has recognized such act.<sup>349</sup> And as a bill of exchange is a substitute for the actual transmission of money by sea or land, power, therefore, to draw on a house in good credit, and to throw the bills on the market, is equivalent to deposits of cash in the vaults of the agent, and under such a power, the agent in purchasing had no authority to go further than to apply the funds deposited with him.<sup>350</sup> If the agent is provided with the means of payment by his principal, but instead of using such means, makes payment with his own individual check, which is accepted by the vendor, with knowledge of all the facts, and the check is dishonored, the vendor cannot recover from the principal the value of the goods without showing that he actually received them, and that he had not in fact paid for them by honoring the agent's draft, in pursuance of the contract of agency.<sup>351</sup>

Where an agent is furnished with money with which he is authorized to purchase, there is no such limitation on his authority to purchase on credit, as to require him to pay the instant or on the same day for property which he purchases without any understanding or agreement that credit is to be given therefor.<sup>352</sup>

(c) **When not supplied with funds.**—Where, however, no funds have been supplied to an agent who is authorized to purchase goods for his principal, he has implied authority

<sup>348</sup> *Komorowski v. Krumdick*, 56 Wis. 23.

<sup>349</sup> *Jaques v. Todd*, 3 Wend. (N. Y.) 83.

<sup>350</sup> *Parsons v. Armor*, 3 Pet. (U. S.) 413.

<sup>351</sup> *Littleton v. Loan, Mercantile & Stock Ass'n*, 97 Ga. 172.

<sup>352</sup> *Adams v. Boles*, 24 Iowa, 96.

to purchase the goods on the credit of the principal. The fact that no funds have been given to the agent rebuts the presumption that the purchase is to be for cash, for it cannot be presumed that the principal intended him to furnish the funds for the payment of the goods bought by him unless such was the course of dealing between them, or the agent agreed thereto. And as the purchase cannot be for cash unless funds have been supplied for that purpose, an agent will have the implied power, where funds are not supplied, to purchase on the credit of the principal.<sup>353</sup> Thus, where the owner of a pleasure launch, sent one of the crew to purchase supplies, in some instances not furnishing him with funds to pay for the same, but paying him money on his rendering an account thereafter, he must be held to have intended that his agent should buy on his credit, or that of his vessel, and is liable for supplies so furnished by a dealer, and which were delivered to and used on the vessel, but were not paid for by the agent.<sup>354</sup>

**§ 259. Implied powers of agent to purchase.**

(a) **In general.**—If an agent's authority to purchase is general, without any restrictions thereon, he has the implied power to do whatever is usual and necessary in carrying out his general authority. Thus, under a power to purchase, he has the implied power to pay or to agree to pay for the goods so purchased by him for his principal.<sup>355</sup> And where an agent is engaged in buying and shipping horses, he has authority to borrow money to purchase grain to feed the horses while awaiting shipment, since the exercise of such authority was necessary to the conduct of the business.<sup>356</sup>

<sup>353</sup> *Fradley v. Hyland*, 37 Fed. 49; *Willard v. Buckingham*, 36 Conn. 395; *Sprague v. Gellelt*, 9 Metc. (Mass.) 91; *Morris v. Bowen*, 52 N. H. 416; *Laing v. Butler*, 37 Hun (N. Y.) 144; *Ruffin v. Mebane*, 41 N. C. (6 Ired. Eq.) 507.

<sup>354</sup> *Spear & T. Supply Co. v. Van Riper*, 103 Fed. 689.

<sup>355</sup> *Johnson v. East Carolina, Land & R. Co.*, 116 N. C. 926. And see *Schley v. Fryer*, 100 N. Y. 71.

<sup>356</sup> *Rider v. Kirk*, 82 Mo. App. 120.

(b) **Where authorized to purchase on credit.**—Where the agent is authorized to purchase goods on credit, as a necessary incident to such power, he has power to make all necessary representations as to the solvency of the principal.<sup>357</sup> This is but an incident of his general power, for no seller would be willing to part with his goods on credit unless due assurance was made to him that the purchaser was solvent and able to pay for the goods. The agent, however, must not make such representations beyond what the facts of the case warrant; nor need he probably make any representations at all if the seller is fully acquainted with the purchaser's credit. So an authority to purchase articles on credit must imply a power in the agent to acknowledge the indebtedness in the name of the principal.<sup>358</sup>

(c) **To agree upon price and terms of purchase.**—In the absence of any facts or circumstances to the contrary, an agent employed generally to purchase goods for his principal may put into the contract of purchase all the terms usually put into such contracts. Such an agent may arrange all the details of the purchase, and may agree that the title to the goods shall remain in the seller until the purchase price thereof has been paid;<sup>359</sup> or he may decide upon the time and manner of delivering the goods;<sup>360</sup> or he may modify the contract of purchase after it has been made.<sup>361</sup> Thus the purchasers of cedar posts are held bound

<sup>357</sup> *Hunter v. Hudson River Co.*, 20 Barb. (N. Y.) 493.

A husband who manages a business belonging to his wife, purchasing goods on her credit, has implied authority to make representations as to her financial condition. *Morris v. Posner*, 111 Iowa, 335.

<sup>358</sup> *Stothard v. Aull*, 7 Mo. 318.

<sup>359</sup> *Wishard v. McNeill*, 85 Iowa, 474. And see *Porter v. Woods*, 138 Mo. 539, where an agent for a syndicate which was about to purchase land agreed with a disinterested party that he should take title and give notes for the purchase price, a stipulation by him with such third party that the members of the syndicate would each pay his proportionate share of the notes when due was within his general authority as agent.

<sup>360</sup> *Owen v. Brockschmidt*, 54 Mo. 285.

<sup>361</sup> *Spaulding Lumber Co. v. Stout*, 86 Wis. 89; *Anderson v. Coonley*, 21 Wend. (N. Y.) 279; *Nunnally v. Goodwin* (Tenn. Ch. App.) 39 S. W. 855.

by a modification of the original contract of purchase, made on their behalf by an agent having general authority to purchase posts for them, it appearing that such modification was necessary, and that the report of the purchaser's inspector, accepted and acted upon by them, was entirely inconsistent with the theory that the original, and not the modified, contract was in force.<sup>362</sup> So an agent with authority to buy logs has authority to agree that the measurement of the logs shall be ascertained by a scale to be made in the usual and ordinary way, and that they shall be paid for according to that scale.<sup>363</sup>

Of course, as in other agencies, the principal may expressly limit the agent's authority, and if such limitations are brought to the notice of the vendor before the purchase is made, the principal cannot be bound by a purchase in violation of such limitation.<sup>364</sup>

§ 260. Powers not implied.

(a) **To execute negotiable paper.**—An agent to purchase has no implied power to bind his principal by executing a negotiable note for the payment of goods purchased by him for the principal, unless the execution of such a note is necessary for him to carry out the power conferred upon him; or unless the principal has so acted as to estop himself from denying such authority,<sup>365</sup> or unless such power is expressly given.<sup>366</sup> Thus, where a clerk has the general agency of a store, and has been accustomed to purchase goods for the store and to give due-bills therefor, with the knowledge of his principal, he may on making a purchase of goods take up due-bills previously given by him for purchases previously made, and give a note for the whole of the purchase.<sup>367</sup>

<sup>362</sup> *Spaulding Lumber Co. v. Stout*, 86 Wis. 89.

<sup>363</sup> *Watts v. Howard*, 70 Minn. 122.

<sup>364</sup> *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 97; *Burks v. Stam*, 65 Mo. App. 455.

<sup>365</sup> *Temple v. Pomroy*, 4 Gray (Mass.) 128; *Chidsey v. Porter*, 21 Pa. 390; *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66.

<sup>366</sup> *Taber v. Cannon*, 8 Metc. (Mass.) 456; *Webber v. Williams College*, 23 Pick. (Mass.) 302.

<sup>367</sup> *Chidsey v. Porter*, 21 Pa. 390.

And where an agent had been acting for his principal in a locality for several months, buying cattle, and drafts drawn by him in payment thereof were honored and paid by his principal, and he had the apparent authority of a general agent, his act in purchasing cattle to be consigned to the principal, and giving a draft on him to one who had no knowledge of his limited authority, will bind the principal.<sup>368</sup>

A co-owner in, and agent for, a syndicate for the purchase of land has not implied authority to select a trustee to take title and to authorize the trustee to execute for the syndicate notes and deed of trust to secure the purchase price.<sup>369</sup>

(b) **Nor to exceed powers as to quality.**—Where an agent is employed to purchase goods of a certain class or quality, he is a special agent and as such must strictly pursue his authority, and cannot bind his principal by purchasing goods of a different class or quality.<sup>370</sup> Thus, where the agent is authorized to buy grain, the principal will not be bound if the agent buys tobacco instead.<sup>371</sup> If, however, his authority to purchase is general, he need exercise only a reasonable degree of discretion and prudence in purchasing such goods as his authority warrants; and if he purchases such goods, the principal will be bound thereby, although the purchase exceeds certain limitations on the agent's authority, of which the seller had no notice.<sup>372</sup>

(c) **Nor to exceed powers as to quantity.**—So where the agent has been expressly ordered to purchase only a specified quantity of goods, he cannot bind his principal by purchasing a different quantity, whether it be greater or less.<sup>373</sup> If, however, his authority in that respect is general, the same rule applies as in the previous section, that the agent may exercise a reasonable discretion as to how much or how little of the goods he shall buy; but if such authority is unreasonably exercised the purchase will not be binding on the prin-

<sup>368</sup> Greer v. First Nat. Bank (Tex. Civ. App.) 47 S. W. 1045.

<sup>369</sup> Ferguson v. Gooch, 94 Va. 1.

<sup>370</sup> Davies v. Lyon, 36 Minn. 427.

<sup>371</sup> Hopkins v. Blane, 1 Call (Va.) 361.

<sup>372</sup> Nunnally v. Goodwin (Tenn. Ch. App.) 39 S. W. 355.

<sup>373</sup> Olyphant v. McNair, 41 Barb. (N. Y.) 446; Starbird v. Curtis, 43 Me. 352.

cipal. Thus, the fact that an agent to purchase timber bought more trees than he was authorized to buy does not affect the principal's liability, where no limitation upon the agent's authority is made known to the seller, the contract made being within the apparent scope of his authority.<sup>374</sup> But an agent generally authorized by his principal to purchase grain cannot contract, in the name of his principal, to receive all the grain that the seller can deliver.<sup>375</sup> And though there may be cases where the purchase of a smaller quantity than that ordered would be deemed valid, as an execution of the authority *pro tanto*, yet such cases can only occur where an express or implied discretion was committed to the agent in the exercise of his authority.<sup>376</sup>

(d) **Nor to purchase from persons not authorized.**—For the same reason where the agent is authorized to purchase the goods only from a certain person or firm, his authority is special, and he must purchase from that person, and a purchase from any other will not be binding on the principal.<sup>377</sup> Thus where a letter of attorney authorizes an agent to purchase a steamship from W., and to draw bills on the principal for such amounts and payable at such times as shall be agreed upon between them, it does not authorize a purchase from other parties.<sup>378</sup>

#### V. OF AGENT'S AUTHORITY TO MANAGE PRINCIPAL'S BUSINESS.

### § 261. Power depends upon business and circumstances.

The authority of an agent who is employed generally to manage the business of his principal depends upon the nature of the business in which he is to act, and upon the facts and circumstances surrounding the particular case; for although the business may be of the same nature as in another case, yet the circumstances of the case may be such as to give to

<sup>374</sup> *Herrman Saw Mill Co. v. Bailey*, 22 Ky. L. R. 552, 58 S. W. 449.

<sup>375</sup> *Hartwell v. Walker*, 4 La. Ann. 457, 50 Am. Dec. 577.

<sup>376</sup> *Olyphant v. McNair*, 41 Barb. (N. Y.) 446.

<sup>377</sup> *Peckham v. Lyon*, 4 McLean, 45, Fed. Cas. No. 10,899; *Robinson Mercantile Co. v. Thompson*, 74 Miss. 847.

<sup>378</sup> *Peckham v. Lyon*, 4 McLean, 45, Fed. Cas. No. 10,899.



the agent a different authority. But independent of any peculiar circumstances, as a general rule, an agency to manage implies authority to do with the property or in the business what has previously been done by the principals, or by others with their express or implied consent; or further to do what is necessary or usual and customary to do with the property, or in business of the same kind in the same locality.<sup>379</sup> Thus farming land could be leased for terms and upon conditions usual for farms in the neighborhood. If there was an open mine on the land, the management of the property would include the working or leasing of it in any way usual for such mines; while the opening of a mine on land which had never been mined before would be a more doubtful act, and, except in a mining country, would not *prima facie* come within the terms of such an agency. An agreement granting to a person the sole right to quarry, take, and sell stone from a tract of land for a term of fifteen years is a lease of the land. But it is not *prima facie* such a lease of wild mountain land as is ordinarily given in the management of such land by an agent appointed for a single year.<sup>380</sup> But such a lease may be validated by showing a previous course of dealing with the land by the owners and the agent,<sup>381</sup> and the burden of proving the validity of the lease is on the lessee, and it is the province of the jury, though the evidence is undisputed, to determine therefrom whether he has

<sup>379</sup> *Duncan v. Hartman*, 143 Pa. 595, 24 Am. St. Rep. 570; *Goss v. Helbing*, 77 Cal. 190; *Bice v. Hover*, 2 Colo. App. 172; *German Fire Ins. Co. v. Grunert*, 112 Ill. 68; *Weston v. Alley*, 49 Me. 94; *Cummings v. Sargent*, 9 Metc. (Mass.) 172; *Shipman v. Byles*, 65 Mich. 690; *Badger Lumber Co. v. Ballentine*, 54 Mo. App. 172; *Burley v. Kitchell*, 20 N. J. Law, 305; *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9; *Baltimore & P. Steamboat Co. v. Brown*, 54 Pa. 77; *Balley v. Rawley*, 1 Swan (Tenn.) 295; *Collins v. Cooper*, 65 Tex. 460; *Shepherd v. Milwaukee Gas Light Co.*, 11 Wis. 234.

A tenant who has placed a manager in charge of his business on leased property is bound by his acts in retaining possession after the expiration of the term, so as to be chargeable with another term's rent. *Byxbee v. Blake*, 74 Conn. 607, 57 L. R. A. 222.

<sup>380</sup> *Duncan v. Hartman*, 143 Pa. 595, 24 Am. St. Rep. 570.

<sup>381</sup> *Duncan v. Hartman*, 143 Pa. 595, 24 Am. St. Rep. 570.

met this burden to their satisfaction.<sup>382</sup> The general manager of the affairs of a landlord has power to modify the terms of a lease, which he himself fixed originally, by agreeing that, in view of a fire which occurred on the premises during the term, the rent of the month in which the fire occurred should be apportioned and that no rent should be charged until the premises had been restored to their original condition.<sup>383</sup> Where it is necessary for an agent to rent a house, in order to conduct the business which he was employed to carry on, he may do so and the principal will be bound for the rent thereof.<sup>384</sup>

An agent to manage property may make such repairs as are rendered necessary by ordinary wear and tear, but he has no authority to make any permanent improvements, or to rebuild parts destroyed by fire.<sup>385</sup> Where a power of attorney is given by the owner of an insured canal boat, authorizing the agent to act in all matters, and do all necessary things pertaining to holding the survey under the policy and repairing the damage done to the boat, supplemented by a verbal statement to the agent to take care of the boat, and "do the best he could," such agent has authority to contract for extra repairs other than those specified by the surveyors.<sup>386</sup> So a general agent or manager in charge of a lumber yard and all the business connected therewith, selling for cash or on long or short credit, as he deemed best, has authority to waive a mechanic's lien.<sup>387</sup> A general contracting agent, having a general supervision of his principal's business in a particular territory, whose authority with respect thereto is

<sup>382</sup> *Duncan v. Hartman*, 143 Pa. 595, 24 Am. St. Rep. 570.

<sup>383</sup> *Ireland v. Hyde*, 34 Misc. (N. Y.) 546.

<sup>384</sup> *Baldwin v. Garrett*, 111 Ga. 876.

<sup>385</sup> *Beckman v. Willson*, 61 Cal. 335.

<sup>386</sup> *Murr v. Western Assur. Co.*, 24 App. Div. 390, 48 N. Y. Supp. 757. And see *Id.*, 50 App. Div. 4, 64 N. Y. Supp. 12.

<sup>387</sup> *Badger Lumber Co. v. Ballentine*, 54 Mo. App. 172.

And where an agent has authority to represent the principal in carrying on the business of manufacturing and selling lumber, and in filing mechanic's liens, the agent's waiver of a mechanic's lien for lumber sold by him for the principal is binding on the latter. *Hughes v. Lansing*, 34 Or. 118, 75 Am. St. Rep. 574.

not limited or restricted, may consent to a change and modification of a contract made by him with a third person, if such change or modification be in the line of his principal's business.<sup>388</sup> But where a valid sealed lease has been executed such an agent has no power to alter the terms thereof, accepting a less amount for the rent of the property and changing the time of the payment.<sup>389</sup> A railway station agent, authorized to receive and forward freight, has implied authority to contract to furnish a certain number of cattle cars at his station, on a specified day, the shipper being ignorant of any limitation of such power.<sup>390</sup> But an architect, acting as agent of the owner of a building in process of construction under such architect's supervision and direction, has no authority to waive an agreement by the owner as to the terms on which payment is to be made.<sup>391</sup>

**§ 262. May sell product of business.**

An agent having authority to manage the business of his principal, from which certain products result, may sell such products and receive the pay therefor.<sup>392</sup> The foreman of a sawmill has implied authority to enter into a written contract for the sale of staves.<sup>393</sup> If the principal desires to reject such a sale as unauthorized he must do so as soon as he is informed of the fact. As where an agent, under a general authority, sells property, the produce of the plantation under his charge, the principal must notify the purchaser, as soon as he is informed of the fact, that he rejects and repudiates the acts of his agent as unauthorized.<sup>394</sup>

**§ 263. When may pledge principal's credit.**

(a) **In general.**—Where the nature of a managing agent's business is such as to require him to keep up a stock of

<sup>388</sup> *Van Santvoord v. Smith*, 79 Minn. 316.

<sup>389</sup> *Halladay v. Underwood*, 90 Ill. App. 180.

<sup>390</sup> *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364, 41 Am. Rep. 318.

<sup>391</sup> *Leverone v. Arancio*, 179 Mass. 439.

For a good treatment of the authority of general managers or general agents of corporations, see *Clark & M. Corp.* § 700.

<sup>392</sup> *Sentell v. Kennedy*, 29 La. Ann. 679.

<sup>393</sup> *Richardson v. Cartwright*, 1 Car. & K. 328.

<sup>394</sup> *Ball v. Bender*, 22 La. Ann. 493.

goods, or to purchase supplies of any kind, he has the implied power to purchase goods necessary for that purpose upon the credit of the principal, and the fact that the principal has given the agent private instructions to buy and sell for cash only will not relieve the principal from liability for such purchases.<sup>395</sup> Thus, where an agent is employed to manage an hotel, he has implied power to bind the principal by the purchase of all supplies that are necessary and proper for carrying on the hotel, although the principal had given him instructions not to buy on credit, of which instructions the third party had no notice.<sup>396</sup> But such an agent does not have power to purchase supplies, on the principal's credit, which are not necessary or usually used in that business;<sup>397</sup> nor may he bind the principal for the safe keeping and return of carriages furnished by a livery-stable keeper for the guests of the hotel.<sup>398</sup>

<sup>395</sup> *Watteau v. Fenwick* [1893] 1 Q. B. 346, Wamb. Cas. 654, Huffc. Cas. 235; *Louisville Coffin Co. v. Stokes*, 78 Ala. 372; *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *Schmidt v. Sandel*, 30 La. Ann. 353; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459; *Pacific Biscuit Co. v. Dugger*, 40 Or. 362; *Hubbard v. Tenbrook*, 124 Pa. 291, 10 Am. St. Rep. 585.

The matron of a hospital has implied authority to pledge the credit of the managing committee, for meat supplied for the use of the hospital. *Real & Personal Advance Co. v. Phalempin*, 9 Times Law R. 569.

Where a stock of goods is transferred, under a written contract, by which the transferee is to pay the owner a certain sum from their proceeds, and to then become the owner of the remainder, but the title not to pass until such payment was made, the transferee has no authority, by reason thereof, to bind the seller for the price of new goods purchased by him and added to the stock. *Bentley v. Snyder*, 101 Iowa, 1.

<sup>396</sup> *Watteau v. Fenwick* [1893] 1 Q. B. 346, Wamb. Cas. 654, Huffc. Cas. 235; *Beecher v. Venn*, 35 Mich. 466; *Cummings v. Sargent*, 9 Metc. (Mass.) 172.

A general manager of a hotel, having general supervision of its conduct, employes, and departments, and in control except when the owner was there twice a day, has sufficient apparent authority to bind the owner for a two-line advertisement of the hotel for a year in a local newspaper. *Mullin v. Sire*, 34 Misc. (N. Y.) 540.

<sup>397</sup> *Wallis Tobacco Co. v. Jackson*, 99 Ala. 460. And see *Fisk v. Greeley Elae. L. Co.*, 3 Colo. App. 319.

<sup>398</sup> *Brockway v. Mullin*, 46 N. J. Law, 448, 50 Am. Rep. 442.

The general manager or general agent of a corporation has implied power to purchase, on the credit of the corporation, supplies and materials, necessary office furniture, machinery, etc., for the use of the corporation in its business, unless there are restrictions on his powers of management.<sup>399</sup> Thus a managing agent of a mining company has implied power to buy, on credit of the principal, all supplies that are usual and necessary for the working of the mines;<sup>400</sup> or he may sell the personal property of the company, as it is usual to purchase and sell the personalty for use about mining properties.<sup>401</sup> But he cannot bind the company for the debts of a third person;<sup>402</sup> nor can the manager of the milling establishment of a mining company, merely by virtue of his office, bind the company by contracts for the purchase of machinery.<sup>403</sup> An agent employed to operate a shingle mill, with authority to contract for and estimate shingle bolts, subject to the approval of the principal, has no implied authority to bind the principal for the construction of a logging road to timber purchased by the principal.<sup>404</sup> The master of a vessel may pledge the credit of the owners of the vessel for such supplies or things as are reasonably necessary for the usual or suitable employment of the vessel, or the completion of the voyage.<sup>405</sup>

<sup>399</sup> *Smith v. Hull Glass Co.*, 11 C. B. 897; *LaFayette Ry. Co. v. Tucker*, 124 Ala. 514. See *Clark & M. Corp.* § 700.

<sup>400</sup> *Stuart v. Adams*, 89 Cal. 367.

He may bind the principal for supplies purchased for the keeper of a boarding house necessary to the working of the mines. *Heald v. Hendy*, 89 Cal. 632; *Burley v. Kitchell*, 20 N. J. Law, 305.

<sup>401</sup> *Scudder v. Anderson*, 54 Mich. 122.

<sup>402</sup> *Ruppe v. Edwards*, 52 Mich. 411.

<sup>403</sup> *Victoria Gold Min. Co. v. Fraser*, 2 Colo. App. 14. But see *Crystal Ice Co. v. Martin*, 11 Ky. L. R. 581.

<sup>404</sup> *Gregory v. Loose*, 19 Wash. 599.

<sup>405</sup> *Stearns v. Doe*, 12 Gray (Mass.) 482, 74 Am. Dec. 608; *Negus v. Simpson*, 99 Mass. 393; *Warren v. Skolfield*, 104 Mass. 505; *McLellan v. Cox*, 36 Me. 95, 58 Am. Dec. 736; *Calef v. Steamer Bonaparte*, 1 Rob. (La.) 463, 38 Am. Dec. 190; *Duff v. Bayard*, 4 Watts & S. (Pa.) 240, 39 Am. Dec. 73; *The Huntsman* [1894] Prob. Div. 214, 70 Law T. (N. S.) 386; *Barker v. Highley*, 15 C. B. (N. S.) 27; *Spear & T. Supply Co. v. Van Riper*, 103 Fed. 689.

Where the agent's authority was merely to see that the work was done properly under the original plans and specifications, the principal will not be responsible for extras furnished at the instance of such agent.<sup>408</sup> But if the agent has himself prepared the plans for the work, and certain causes suggest modifications of the original plans after the work has commenced, the agent has authority to bind the principal for the extra work.<sup>407</sup>

(b) **Managing agent of a plantation.**—It has been held, however, that an agent authorized to manage a plantation has no implied power to contract for supplies on the credit of his principal;<sup>408</sup> nor to have charged to him medical services rendered on the plantation,<sup>409</sup> or supplies furnished to laborers thereon.<sup>410</sup> Thus, the overseer of a plantation, as such, has no right to bind his employer, by the purchase of articles which he may suppose necessary. Such authority is not necessary to enable him to perform the duties incident to his station, and therefore he cannot be presumed to be invested with it.<sup>411</sup> Nor may an agent, with authority to manage and superintend the principal's farm during his absence from the state, bind the principal by an agreement to permit a creditor having an attachment against the principal to cut, remove, and sell on execution, grass growing on the land.<sup>412</sup> But where the owner of a plantation carried on by slave labor is absent from the state and has made no provision for their maintenance, the overseer of the plantation may bind the principal by procuring necessary supplies for the slaves.<sup>413</sup>

<sup>406</sup> *Maass v. Jarvis*, 20 Misc. 687, 46 N. Y. Supp. 544; *Day v. Pickens County*, 53 S. C. 46. And see *Engleby v. Harvey*, 93 Va. 440, where an engineer of a bridge construction company was held not to have implied power to bind the company by a promise to pay for lumber furnished.

<sup>407</sup> *Carberry v. Farnsworth*, 177 Mass. 398.

<sup>408</sup> *Meyer v. Baldwin*, 52 Miss. 263.

<sup>409</sup> *Malone v. Robinson (Miss.)* 12 So. 709.

<sup>410</sup> *Carter v. Burnham*, 31 Ark. 212.

<sup>411</sup> *Fisher v. Campbell*, 9 Port. (Ala.) 210.

<sup>412</sup> *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384.

<sup>413</sup> *Fisher v. Campbell*, 9 Port. (Ala.) 210.

(c) **When for medical services.**—A general manager or superintendent of a railroad corporation may bind the corporation by employing a physician, surgeon, or other medical aid for persons injured on the company's railroad, or employees injured in the course of their business, where such services are necessary.<sup>414</sup> But it has been held that there is no such authority in a mere roadmaster, station agent, conductor, or other subordinate and special agent, not intrusted with the general management of the business of the corporation.<sup>415</sup> And even a general manager or superintendent has no authority to employ a physician, surgeon, or other medical aid or care, for an employe of the company who has been injured in a private brawl, or in some other manner not in the course of his employment.<sup>416</sup> Nor can such an agent bind

<sup>414</sup> *Swazey v. Union Mfg. Co.*, 42 Conn. 556; *Louisville, E. & St. L. R. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770; *Terre Haute & I. R. Co. v. Pierce*, 95 Ind. 496; *New Pittsburgh Coal & Coke Co. v. Shaley*, 25 Ind. App. 282; *Chaplin v. Freeland*, 7 Ind. App. 676; *Cincinnati, I., St. L. & C. R. Co. v. Davis*, 126 Ind. 99; *Toledo, W. & W. R. Co. v. Rodrigues*, 47 Ill. 188; *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Indianapolis & St. L. R. Co. v. Morris*, 67 Ill. 295; *Atlantic & Pac. R. Co. v. Reisner*, 18 Kan. 458; *Atchison & Neb. R. Co. v. Reeher*, 24 Kan. 228; *Mount Willson G. & S. Min. Co. v. Burbridge*, 11 Colo. App. 487; *Walker v. Great Western R. Co.*, L. R. 2 Exch. 228; *Hanscom v. Minneapolis St. R. Co.*, 53 Minn. 119; *Southern R. Co. v. Brister*, 79 Miss. 761; *McCarthy v. Missouri R. Co.*, 15 Mo. App. 385. See *Clark & M. Corp.* § 700. But see *Stephenson v. New York & H. R. Co.*, 2 Duer (N. Y.) 341; *Melsenbach v. Southern Cooperage Co.*, 45 Mo. App. 232.

<sup>415</sup> *Cox v. Midland Counties R. Co.*, 3 Exch. 268; *Sevier v. Birmingham, S. & T. R. Co.*, 92 Ala. 258; *St. Louis, A. & T. R. Co. v. Hoover*, 53 Ark. 377; *Peninsular R. Co. v. Gary*, 22 Fla. 356, 1 Am. St. Rep. 194; *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Louisville, E. & St. L. R. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770; *Godshaw v. Struck's Ex'r*, 22 Ky. L. R. 820, 58 S. W. 781, 51 L. R. A. 668; *Marquette & O. R. Co. v. Taft*, 28 Mich. 289; *Tucker v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 177; *Melsenbach v. Southern Cooperage Co.*, 45 Mo. App. 232; *Brown v. Missouri, K. & T. R. Co.*, 67 Mo. 122; *Mayberry v. Chicago, R. I. & P. R. Co.*, 75 Mo. 492; *Stephenson v. New York & H. R. Co.*, 2 Duer (N. Y.) 341; *Adams v. Southern R. Co.*, 125 N. C. 565; *Patterson v. Consolidated Traction Co.*, 9 Pa. Dist. R. 362, 31 Pittsb. Leg. J. (N. S.) 5. See *Clark & M. Corp.* § 700.

<sup>416</sup> *Dale v. Donaldson Lumber Co.*, 48 Ark. 188, 3 Am. St. Rep.

the principal for funeral expenses of one who did not die in its service or on its premises.<sup>417</sup> But an employment of a surgeon or other medical services by a conductor, or other minor officer of the company, is valid, where the conductor is the highest representative of the company on the ground, and there was an emergency requiring immediate action.<sup>418</sup> And this is also true where, under like circumstances, the company knew of such services being rendered, and of such employment, and failed to disaffirm it.<sup>419</sup>

It is generally held, however, that this doctrine does not extend to any other corporations than railroads.<sup>420</sup> Thus a forewoman of a laundry was held to have no authority to bind her principal by the employment of a physician to attend an employe of the laundry who had seriously injured her hand.<sup>421</sup>

The surgeon or physician who is thus employed by the managing agent has no authority to bind the principal to pay for the services or meals of those who were employed to attend to the injured persons.<sup>422</sup>

#### § 264. When such agent may sue or defend.

Where an agent is employed to manage a business, he may bring suits for the collection of debts arising out of

224; *Chase v. Swift & Co.*, 60 Neb. 696. See *Clark & M. Corp.* § 700.

<sup>417</sup> *Kipp v. East River Elec. L. Co.*, 46 N. Y. St. Rep. 397, 19 N. Y. Supp. 387.

<sup>418</sup> *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358; *Toledo, St. L. & K. C. R. Co. v. Mylott*, 6 Ind. App. 438; *Evansville & R. R. Co. v. Freeland*, 4 Ind. App. 207; *Cincinnati, I., St. L. & C. R. Co. v. Davis*, 126 Ind. 99.

<sup>419</sup> *Terre Haute & I. R. Co. v. Stockwell*, 118 Ind. 98; *Indianapolis & St. L. R. Co. v. Morris*, 67 Ill. 295.

<sup>420</sup> *Chaplin v. Freeland*, 7 Ind. App. 676; *New Pittsburg Coal & Coke Co. v. Shaley*, 25 Ind. App. 282; *Swazey v. Union Mfg. Co.*, 42 Conn. 556.

<sup>421</sup> *Holmes v. McAllister*, 123 Mich. 493. Nor may a foreman, engaged by a contractor to superintend workmen engaged in constructing a building, employ medical services for an injured employe, and bind his principal therefor. *Godshaw v. Struck's Ex'r*, 22 Ky. L. R. 820, 58 S. W. 781, 51 L. R. A. 668.

<sup>422</sup> *Bushnell v. Chicago & N. W. R. Co.*, 69 Iowa, 620.



such business;<sup>423</sup> or he may bring a suit to prevent a trespass on the property, under his management;<sup>424</sup> and he may employ counsel to bring or defend suits, necessary to protect the interests of his principal, in reference to such business.<sup>425</sup> A clerk in a country store has authority to employ an attorney for his absent employer, to defeat a fraudulent attachment of the goods of the latter's debtor, and such employment, when made in a proper case, will bind the employer.<sup>426</sup> So where a principal is absent, his general agent, having sole authority to manage his business, will necessarily have authority to bring suits to collect debts, and insurance in case of loss by fire, such power being essential to an efficient discharge of his duties.<sup>427</sup> But such an agent has no power to bring a suit, in his own name, to recover the possession of property which he is employed to manage;<sup>428</sup> nor to retain an attorney in suits for personal injuries to the principal's employes,<sup>429</sup> nor in a suit concerning another person's property.<sup>430</sup> Nor can such an agent, where the principal is a nonresident, confess a general judgment on an attachment against the property.<sup>431</sup> Nor can he transfer, to a third person demands which he is empowered to collect in the ordinary way or by suit, though such transfer is for the purpose only of qualifying such person to sue on the same.<sup>432</sup>

#### § 265. Powers not implied.

(a) **To borrow.**—An agent employed to manage a business or property for his principal has no implied power to borrow money for that purpose,<sup>433</sup> unless the transaction of such

<sup>423</sup> *German F. Ins. Co. v. Grunert*, 112 Ill. 68.

<sup>424</sup> *State v. Banks*, 48 Md. 513.

<sup>425</sup> *Mason v. Taylor*, 38 Minn. 32; *Davis v. Waterman*, 10 Vt. 526, 33 Am. Dec. 216.

<sup>426</sup> *Davis v. Waterman*, 10 Vt. 526, 33 Am. Dec. 216.

<sup>427</sup> *German F. Ins. Co. v. Grunert*, 112 Ill. 68.

<sup>428</sup> *McHenry v. Painter*, 58 Iowa, 365.

<sup>429</sup> *Cochran v. Newton*, 5 Denio (N. Y.) 482.

<sup>430</sup> *Perry v. Jones*, 18 Kan. 552.

<sup>431</sup> *Howell v. Gordon*, 40 Ga. 302.

<sup>432</sup> *Rigby v. Lowe*, 125 Cal. 613.

<sup>433</sup> *Jacobs v. Morris* [1901] 1 Ch. 261, 70 Law J. Ch. 183; *Hawtayne v. Bourne*, 7 Mees. & W. 595, Wamb. Cas. 301; *Perkins v.*

business absolutely requires that the agent have such a power in order to carry it on;<sup>434</sup> and the fact that the act proposed is more convenient or advantageous, or more effectual in the transaction of the business provided for, does not afford a sufficient ground for the inference of such a power, but it must be practically indispensable to the execution of the duties really delegated, in order to justify its inference from the original employment.<sup>435</sup> Thus where the principal placed an agent in charge of a stock of goods, with written authority to transact any business in reference thereto that might be necessary, in accordance with the desire of or by agreement of his principal, such instrument did not confer on the agent the power to borrow money to replenish the stock and sign defendant's name to a note therefor;<sup>436</sup> and in such a case, parties, to whom the agent may give such a note, are put on inquiry as to the agent's authority.<sup>437</sup> Where an agent had general charge of his principal's store, with authority to make checks and accept drafts for goods bought, and to pay store expenses, and had exercised all the authority of a principal in the business for many years, and had been allowed to incur debts at discretion, and there was a pressing necessity to pay some of such debts during the absence of the principal, it was held to be for the jury to determine whether he had authority to borrow money on his principal's credit.<sup>438</sup>

An agent who is the general business manager of a non-trading corporation has implied power to borrow money therefor in an amount not disproportionate to the volume of

Boothby, 71 Me. 94; *Stanley v. Sheffield Land, Iron & Coal Co.*, 83 Ala. 260; *Bickford v. Menier*, 107 N. Y. 490; *Tucker v. Woolsey*, 64 Barb. (N. Y.) 142; *Smith v. McGregor*, 96 N. C. 101; *Weekes v. Shapleigh Hardware Co.*, 23 Tex. Civ. App. 577; *Heath v. Paul*, 81 Wis. 532.

<sup>434</sup> *Bickford v. Menier*, 107 N. Y. 490; *Consolidated Nat. Bank v. Pacific Coast Steamship Co.*, 95 Cal. 1, 29 Am. St. Rep. 85; *Kelley v. Lindsey*, 7 Gray (Mass.) 287.

<sup>435</sup> *Consolidated Nat. Bank v. Pacific Coast Steamship Co.*, 95 Cal. 1, 29 Am. St. Rep. 85; *Bickford v. Menier*, 107 N. Y. 490.

<sup>436</sup> *Weekes v. Shapleigh Hardware Co.*, 23 Tex. Civ. App. 577.

<sup>437</sup> *Weekes v. Shapleigh Hardware Co.*, 23 Tex. Civ. App. 577.

<sup>438</sup> *McDermott v. Jackson*, 97 Wis. 64.

business transacted, when it appears that the principal had knowledge that the monthly receipts of the business were less than the expenses, and that it was necessary for the agent to maintain a bank account in the name of the principal.<sup>439</sup> A general manager of a corporation, intrusted with the entire management and control of its business, has implied power to borrow money for the legitimate purposes of the corporation in its current and usual business.<sup>440</sup> But there is no such authority in the case of a mere superintendent, or in the case of a manager who has not the entire charge of the business, but is intrusted with its management under the direct control of the directors or other superior officers or agents.<sup>441</sup> A mining superintendent or manager has not, by virtue of his employment merely, authority to borrow money on the credit of his principals, for the purpose of carrying on the business of the concern, in the absence of circumstances from which such authority may be inferred.<sup>442</sup>

In the case of a master of a ship, however, by reason of the peculiar necessities of such cases, when the circumstances are such as to require it, the master is justified in borrowing money to pay for the articles required; but in order to charge the owners in such case, the lender must ordinarily show that the money was not only borrowed for a proper purpose connected with the ship or her navigation, but that it was so applied.<sup>443</sup>

<sup>439</sup> *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628.

<sup>440</sup> See *Clark & M. Corp.* § 700, and cases cited.

<sup>441</sup> See *Clark & M. Corp.* § 700, and cases cited.

<sup>442</sup> *Ricketts v. Bennett*, 4 C. B. 686; *Hawtayne v. Bourne*, 7 Mees. & W. 595, Wamb. Cas. 301; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 531; *Id.*, 2 Colo. 565; *Breed v. First Nat. Bank*, 4 Colo. 481.

<sup>443</sup> *McCready v. Thorn*, 51 N. Y. 454; *Stearns v. Doe*, 12 Gray (Mass.) 482, 74 Am. Dec. 608. But see *Arey v. Hall*, 81 Me. 17, 10 Am. St. Rep. 232, where it is held that a ship's husband has no right to borrow money on the vessel's account, unless expressly authorized by her owners, and in the absence of such authority they cannot be held liable for money so borrowed by him.

In *McCready v. Thorn*, 51 N. Y. 454, Earl, C., discusses this doctrine as follows: "It is true," says he, "that it is said in general

So in the case of a cashier of a bank, he has authority to borrow money in the regular course of the business of the bank; and the usage to allow him to borrow is so universal

language, in some of the elementary treatises and in reported cases, that neither the ship's husband nor a part owner has power to borrow money on account of the owners (3 Kent's Com., 157; Story, Part., 446), and that the master has such power only in case of necessity when the owner cannot be communicated with. In *Rocher v. Busher*, 1 Starkie, 27, the plaintiff supplied money to the master of a vessel at Oporto, and Lord Ellenborough said: 'In strictness, a claim of this kind is limited to articles supplied through necessity. But when the necessity exists, money may be supplied as well as goods and the amount recovered; this, however, must not be understood of an indefinite supply of cash, which the master may dissipate, but only such as is warranted by the exigency of the case, or for the payment of duties or other necessary purposes.' In *Palmer v. Gooch*, 2 Starkie, 428, a case where money was advanced to a master in a foreign port, it was held that it was essential to prove the advance of a specific sum, that it was necessary for the use of the ship and that it was so applied in fact. In *John v. Simons*, 42 E. C. L. 743, it was held that, in a home port as well as a foreign one, the master has implied authority to borrow money for the necessary use of the ship, if the owner is absent, and no communication with him can be had without great prejudice and delay. In *Edwards v. Havill*, 78 E. C. L. 106, \* \* \* it was held that the jury were justified in inferring that there was such a reasonable necessity for borrowing the money as to render the owner liable for it, though there was no proof that the goods might not have been obtained by the master on credit. \* \* \* It will thus be seen how carefully, by these authorities, the master's authority to borrow money on the credit of the owners is hedged in. He can borrow money in a foreign port in case of necessity, but it must be a specific sum for a specific purpose. He can also borrow money in the home port in a case of necessity, but not if the owner be at such port, so that he can be communicated with. Why should there be any difference in the authority of the master, part owner or ship's husband, as to obtaining money for the use of the ship or obtaining any other necessary and proper article? Either of them may, since the decision of *Provost v. Patchin*, 9 N. Y. 235, even in a home port in which the owners are present. and without consulting or communicating with them, purchase necessary and proper supplies for the vessel upon the credit of the owners. This they can do by virtue of their implied authority as agents of the owners. If they can do this, why may they not when there is the same necessity and propriety. obtain money for the use

that notice of the deprivation thereof must be brought home to any person who is to be affected by it. But such authority is only for the purpose of borrowing money for banking purposes.<sup>444</sup>

(b) **Nor to pledge or mortgage principal's property.**—An agent having authority to manage the business of his principal has not, by virtue of such authority, implied power to pledge or mortgage the property of his principal.<sup>445</sup> Thus authority of an agent to carry on the business of a manufacturing company does not extend to the right to pledge or mortgage its machinery or buildings.<sup>446</sup> Nor where authorized to carry on his principal's business, "to work things to

of the vessel? \* \* \* The only reason suggested for the difference in the authorities above cited, and also in *Corey v. White*, 5 Brown Parl. Cas. 325, *Arthur v. Barton*, 6 Mees. & W. 138, and *Webster v. Seekamp*, 4 Barn. & Ald. 352, is that the agent may dissipate and misappropriate the money. But so he could purchase supplies and divert them (but with less facility) from the use of the vessel. I think the true rule, founded upon principle, sustained by analogies and in conflict with no authority in this state is, that when the circumstances are such as will justify the master, ship's husband or part owner to purchase upon the credit of the owners an anchor, a sail or other necessary supplies, the same circumstances will justify them to borrow the money, even in a home port, upon the credit of the owners to pay cash for the same articles. But the rule should have this qualification, that where money is borrowed, the lender, to entitle him to recover of the owners, should show not only that the money was borrowed for a proper purpose connected with the ship or her navigation, but that it was actually applied to such purpose. There may be cases where this qualification should not be applied. But the rule as thus qualified can work no mischief, and is safe, simple, practicable and just."

<sup>444</sup> *Crain v. First Nat. Bank*, 114 Ill. 516; *Barnes v. Ontario Bank*, 19 N. Y. 152; *Sturges v. Bank of Circleville*, 11 Ohio St. 153; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

<sup>445</sup> *In re Lafourche Transp. Co.*, 52 La. Ann. 1517; *First Nat. Bank v. Hicks*, 24 Tex. Civ. App. 269; *Henson v. Keet & Rountree Mercantile Co.*, 48 Mo. App. 214; *First Nat. Bank v. Kirkby*, 43 Fla. 376. See ante, § 254.

<sup>446</sup> *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203. See *Life & F. Ins. Co. v. Mechanic F. Ins. Co.*, 7 Wend. (N. Y.) 31; *Taylor v. Lebeaume*, 17 Mo. 338.

the best advantage, and to do anything the agent could to keep the business going," had he authority to execute a chattel mortgage of the stock; that not being effective to keep the business going.<sup>447</sup> But the general manager of a lumber company, the members of which live abroad, may transfer lumber in trust, to raise money to pay off the employees of the company.<sup>448</sup>

(c) **Nor to make accommodation paper.**—An agent having authority to manage his principal's business has no implied power to make, indorse, or sign accommodation paper, in his principal's name, either for his own or another's benefit. "Authority to sign accommodation paper, or as security for a third person, must be specially given, unless the authority of the agent is one of universal agency, and will not flow from any general authority to transact business for the principal. The making of accommodation paper, or the loan of one's name as security for another, does not fall within the ordinary business in which persons engage. The authority to use a principal's name for that purpose is not established by proof of an agency, however general, in the transaction of the principal's business, even though in connection with such business it be shown that the agent was authorized to make notes in the name of his principal."<sup>449</sup> Thus an agent having the general control and supervision over all the principal's lands and property, including choses in action, and authority to bring and conduct suits in relation thereto, is not authorized to execute in the name of his principal a note to secure the debt of a third person.<sup>450</sup> Nor is such a power to be implied from a general power authorizing the making of notes, and the drawing, accepting, and indorsing of drafts.<sup>451</sup>

<sup>447</sup> *Edgerly v. Cover*, 106 Iowa, 670; *Henson v. Keet & Rountree Mercantile Co.*, 48 Mo. App. 214.

<sup>448</sup> *Taylor v. Labeaume*, 17 Mo. 338.

<sup>449</sup> *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728; *Myers v. Walker*, 104 Ga. 316. See *Bank of Hamburg v. Johnson*, 3 Rich. Law (S. C.) 42.

<sup>450</sup> *Boord v. M. Ferst's Sons & Co.*, 39 Fla. 381.

<sup>451</sup> *Myers v. Walker*, 104 Ga. 316.

(d) **Not to execute a negotiable instrument.**—An agent with general authority to manage the business of his principal has not, by reason thereof, an implied power to execute, indorse, or accept negotiable paper binding on his principal. Such authority must be expressly conferred upon him, or be necessarily implied from the exigencies and the general course of the particular employment. And this rule is applicable to the managing agent or general manager of a non-trading corporation, as well as to the agent of a natural person.<sup>452</sup> The fact that an agent is general business manager for his principal, and that he drew checks against the funds of the latter, does not tend to establish his authority to execute negotiable instruments in the name of his principal.<sup>453</sup> And the fact that the agent has on different occasions executed notes in the name of his principal does not show authority so to do, especially when it appears that the principal had no knowledge of such transactions until after the agency had ceased.<sup>454</sup> A superintendent of a corporation, who is

<sup>452</sup> *Brown v. Byers*, 16 Mees. & W. 252; *Geyer v. King*, 61 Ark. 631; *Golinsky v. Allison*, 114 Cal. 458; *Breed v. First Nat. Bank*, 4 Colo. 481; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113; *Smith v. Gibson*, 6 Blackf. (Ind.) 369; *Culver v. Leovy*, 19 La. Ann. 202; *In re Lafourche Transp. Co.*, 52 La. Ann. 1517; *Perkins v. Boothby*, 71 Me. 91; *White v. Westport Cotton Mfg. Co.*, 1 Pick. (Mass.) 215, 11 Am. Dec. 168; *Merchants' Nat. Bank v. Detroit K. & Corset Works*, 68 Mich. 620; *New York Iron Mine v. Negaunee First Nat. Bank*, 39 Mich. 644; *Fairly v. Nash*, 70 Miss. 193; *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628; *Edwards v. Carson*, 21 Nev. 469; *Oak Grove & S. V. Cattle Co. v. Foster*, 7 N. M. 650; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *McCullough v. Moss*, 5 Denio (N. Y.) 567; *Terry v. Fargo*, 10 Johns. (N. Y.) 114; *Witz v. Gray*, 116 N. C. 418; *Stock Exch. Bank v. Williamson*, 6 Okl. 348; *Hamburg Bank v. Johnson*, 3 Rich. Law (S. C.) 42; *Sewanee Min. Co. v. McCall*, 40 Tenn. 619; *Grommes v. Sullivan*, 81 Fed. 45; *Glidden & J. Varnish Co. v. Interstate Nat. Bank*, 69 Fed. 912; *Davis v. Rockingham Inv. Co.*, 89 Va. 290; *Elwell v. Puget Sound & C. R. Co.*, 7 Wash. 487. See *Clark & M. Corp.* § 700.

<sup>453</sup> *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628.

<sup>454</sup> *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628.

under the direction of its treasurer, and who as superintendent has charge of the buying of material, and the hiring of men and looking after the manufacture and sale of goods, has no implied authority to indorse a check delivered to him in payment of a debt due his principal.<sup>455</sup> But where the agent has authority to transact all the business of his principal, to transfer notes, etc., he has authority to assign and transfer negotiable paper belonging to the principal.<sup>456</sup>

Even where such an agent may execute a negotiable note in the name of his principal, he has not, by virtue of such authority, implied power to waive his principal's right of exemptions in such note. If it be conceded that one may, by power of attorney, authorize another to make and sign a note for him, waiving his right of exemption as to personal property, the intention to waive the exemption should be as explicit or clearly expressed in the power for this purpose, as it is required to be when signed by the waivor himself. Thus where a statute provides that one may waive his right of exemption as to personal property by an instrument executed by him, an agent of such a person, acting under a power of attorney, to manage all his principal's business, cannot execute a promissory note in the name of his principal, and in it waive his principal's right of exemptions, where the power of attorney does not expressly confer such a power, though the note itself is a binding obligation.<sup>457</sup>

(e) **Nor to engage in a different business.**—An agent employed by a principal to manage a particular kind of business for him is authorized to carry on that kind of business only; and he has no implied power to act for his principal in a business of a different kind.<sup>458</sup>

(f) **Nor to sell or lease principal's property.**—An agent employed to manage property has no implied authority to

<sup>455</sup> *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113.

<sup>456</sup> *Bailey v. Rawley*, 31 Tenn. 295; *Presnall v. McLeary* (Tex. Civ. App.) 50 S. W. 1066. See *Whitten v. Fincastle*, 100 Va. 546.

<sup>457</sup> *Lippman v. First Nat. Bank*, 120 Ala. 123, 74 Am. St. Rep. 28.

<sup>458</sup> *Campbell v. Hastings*, 29 Ark. 512; *Hazeltine v. Miller*, 44 Me. 177.



dispose of it;<sup>459</sup> nor to lease it, unless it was usual to do so, in the locality in which the property is situated.<sup>460</sup> Thus authority given by a principal to an agent to invest his money, and look after his business generally, will not enable the agent to sell his principal's property, even such as may be acquired as a result of the investment.<sup>461</sup> And a power of attorney to care for and conserve the principal's property interests, though broad and general in terms, does not authorize the agent to deliver deeds executed by his principal, intending that they should take effect only as a testamentary disposition of his property.<sup>462</sup> But the manager of a foreign corporation, who is its sole representative and through whom another has become its creditor, has *prima facie* authority to sell the property of the corporation to pay its debts.<sup>463</sup>

(g) **Nor to dispose of the business.**—Nor may an agent employed to manage a business sell or dispose of it in any manner.<sup>464</sup> And one, who is the general agent to conduct a retail store for another, has no implied authority to make a transfer the effect of which is to close the business, such as a chattel mortgage of the stock.<sup>465</sup>

#### VI. OF AGENT'S AUTHORITY TO MAKE, INDORSE, OR ACCEPT COMMERCIAL PAPER.

#### § 266. Express authority will be strictly construed.

Power to draw and indorse negotiable paper, like all other powers of attorney, will always be strictly construed, and

<sup>459</sup> *Smith v. Stephenson*, 45 Iowa, 645; *Watson v. Hopkins*, 27 Tex. 687; *Ashley v. Bird*, 1 Mo. 640, 14 Am. Dec. 313. See *Brisbane v. Adams*, 3 N. Y. 129.

<sup>460</sup> *Ward v. Thurstin*, 40 Ohio St. 347; *Duncan v. Hartman*, 148 Pa. 595, 24 Am. St. Rep. 570; *Peers v. Sneyd*, 17 Beav. 151; *Owens v. Swanton*, 25 Wash. 112.

<sup>461</sup> *Smith v. Stephenson*, 45 Iowa, 645.

<sup>462</sup> *McClun v. McClun*, 176 Ill. 376.

<sup>463</sup> *Carey-Halliday Lumber Co. v. Cain*, 70 Miss. 628.

<sup>464</sup> *Vescelius v. Martin*, 11 Colo. 391; *Holbrook v. Oberne*, 56 Iowa, 324; *Henson v. Keet & Rountree Mercantile Co.*, 48 Mo. App. 214; *Claffin v. Continental Jersey Works*, 85 Ga. 27.

<sup>465</sup> *Henson v. Keet & Rountree Mercantile Co.*, 48 Mo. App. 214.

will not be held to have been conferred upon an agent unless the intention to give such authority plainly appears; and where it has been given it must be strictly pursued and will not be extended beyond the limits specified in the power.<sup>466</sup> And it is the duty of one dealing with an agent, having authority to draw or indorse negotiable instruments, to fully satisfy himself that the agent has the power which he represents himself to have. "Whoever proposes to deal with a security of any kind, appearing on its face to be given by one man for another, is bound to inquire whether it has been given by due authority, and if he omits that inquiry, he deals at his peril."<sup>467</sup> Thus, where the principal places the agent in charge of a stock of goods, with written authority to transact any business in reference thereto that may be necessary, in accordance with a desire of or by agreement with his principal, parties, to whom the agent may give a note in the principal's name for money borrowed to replenish the stock, are put on inquiry as to the agent's authority.<sup>468</sup>

<sup>466</sup> *Attwood v. Munnings*, 7 Barn. & C. 278, Wamb. Cas. 286; *Lanusse v. Barker*, 3 Wheat. (U. S.) 101; *Brantley v. Southern L. Ins. Co.*, 53 Ala. 554; *Lazarus v. Shearer*, 2 Ala. 718; *White v. Westport Mfg. Co.*, 1 Pick. (Mass.) 215, 11 Am. Dec. 168; *First Nat. Bank v. Gay*, 63 Mo. 33, 21 Am. Rep. 430; *Farmington Sav. Bank v. Buzzell*, 61 N. H. 612; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Batty v. Carswell*, 2 Johns. (N. Y.) 48; *Sims v. United States Trust Co.*, 103 N. Y. 472; *Hortons v. Townes*, 6 Leigh (Va.) 47; *Sewanee Min. Co. v. McCall*, 3 Head (Tenn.) 619.

But power to sign and acknowledge bonds includes power to sign the bonds of a county officer in the name of the principal. *Jernegan v. Gray*, 16 Lea (Tenn.) 536.

Power of attorney given to an agent to indorse checks of the principal for deposit in a certain bank authorizes the indorsement of such checks only as are the property of the principal, and not those acquired by the agent in an unlawful or unauthorized manner. *Fay v. Slaughter*, 194 Ill. 157, 88 Am. St. Rep. 148.

<sup>467</sup> *Comstock, J., in Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 631; *Blum v. Robertson*, 24 Cal. 127; *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458; *Stainback v. Read*, 11 Grat. (Va.) 281, 62 Am. Dec. 648.

<sup>468</sup> *Weekes v. Shapleigh Hardware Co.*, 23 Tex. Civ. App. 577.

## § 267. Illustrations.

Thus an agent who is authorized to draw and indorse bills of exchange in the name of his principal has no power to draw and indorse them in his own name, or in the joint name of himself and principal,<sup>469</sup> or of his principal and third parties;<sup>470</sup> nor can he draw or indorse them in the name of his principal when authorized to draw them in his own name,<sup>471</sup> and the fact that the principal has paid a previous similar bill does not estop him from refusing payment of a bill so indorsed.<sup>472</sup> So where the power is conferred upon him for one purpose, he cannot exercise it for another or different purpose.<sup>473</sup> And where the agent is authorized to sign his principal's name for a specified amount, he has no power to bind him for a greater amount;<sup>474</sup> nor can he, where authorized to draw and indorse against his principal's funds, draw beyond the amount of funds the principal has in bank;<sup>475</sup> nor can he, under such an authority, borrow money.<sup>476</sup> And again where the agent's authority is to act for his principal at a particular bank, it gives him no power

<sup>469</sup> *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458; *Stainback v. Read*, 11 Grat. (Va.) 281, 62 Am. Dec. 648.

<sup>470</sup> *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Harris v. Johnston*, 54 Minn. 177, 40 Am. St. Rep. 312.

<sup>471</sup> *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458.

<sup>472</sup> *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458.

And a part payment by the drawee of a bill of exchange is not such a recognition of his obligation as will, as a matter of law, bind him to pay the remainder. *Cook v. Baldwin*, 120 Mass. 317, 21 Am. Rep. 517.

<sup>473</sup> *Callender v. Golsan*, 27 La. Ann. 311; *Hortons v. Townes*, 6 Leigh (Va.) 47; *Nixon v. Palmer*, 8 N. Y. 398; *Blaine v. Proudft*, 3 Call (Va.) 207, 2 Am. Dec. 546.

<sup>474</sup> *King v. Sparks*, 77 Ga. 285, 4 Am. St. Rep. 35; *Blackwell v. Ketcham*, 53 Ind. 184; *Nixon v. Palmer*, 8 N. Y. 398. And the same is true of power to execute a bond for a specified amount. *Dugan v. Champion Coal & Towboat Co.*, 20 Ky. L. R. 1641.

<sup>475</sup> *Breed v. Central City First Nat. Bank*, 4 Colo. 481; *Union Bank v. Mott*, 39 Barb. (N. Y.) 180. Compare *Tripp v. Swanzy Paper Co.*, 13 Pick. (Mass.) 291.

<sup>476</sup> *Mordhurst v. Boles*, 24 Iowa, 99.

to draw his principal's money from another bank, to which his authority did not extend,<sup>477</sup> as an authority given to an agent to draw and indorse promissory notes, "on any bank in the city of New York in which I may have an account," does not give such agent authority to execute, in the name of the principal, two promissory notes payable at a bank where the principal had no account.<sup>478</sup>

So where the agent is authorized to draw or indorse negotiable paper for a specified time, he cannot draw or indorse it for another length of time;<sup>479</sup> unless the difference in time is immaterial, in which case the agent's authority may not be restricted to the exact time specified.<sup>480</sup> So power to draw a bill does not include a power to indorse or accept one,<sup>481</sup> nor to contract to indemnify the acceptor against his acceptance.<sup>482</sup> A power to execute notes gives the agent no power to renew them,<sup>483</sup> to pay them when due,<sup>484</sup> to insert a provision in the note, "to pay an additional sum of ten per cent. as attorney's fees" if the note is not paid at maturity and is placed in the hands of an attorney for collection,<sup>485</sup> nor to execute a bond.<sup>486</sup> Nor does a power to indorse a note give the agent power to make the principal a

<sup>477</sup> *Sims v. United States Trust Co.*, 103 N. Y. 472.

<sup>478</sup> *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150.

<sup>479</sup> *Tate v. Evans*, 7 Mo. 419; *New York Iron Mine v. Citizens' Bank*, 44 Mich. 344; *Batty v. Carswell*, 2 Johns. (N. Y.) 48; *Forster v. Mackreth*, L. R. 2 Exch. 163.

<sup>480</sup> *Adams v. Flanagan*, 36 Vt. 400; *State Bank v. Herbert*, 4 McCord (S. C.) 89. Or any other immaterial alteration. *Bank v. McWillie*, 4 McCord (S. C.) 438.

<sup>481</sup> *Robinson v. Yarrow*, 7 Taunt. 455; *Murray v. East India Co.*, 5 Barn. & Ald. 204; *Attwood v. Munnings*, 7 Barn. & C. 278, Wamb. Cas. 286; *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458; *Sewanee Min. Co. v. McCall*, 3 Head (Tenn.) 621.

<sup>482</sup> *Stainback v. Read*, 11 Grat. (Va.) 281, 62 Am. Dec. 648.

<sup>483</sup> *Ward v. Bank*, 7 T. B. Mon. (Ky.) 93. And see *State Bank v. Herbert*, 4 McCord (S. C.) 89.

<sup>484</sup> *Luning v. Wise*, 64 Cal. 410.

<sup>485</sup> *First Nat. Bank v. Gay*, 63 Mo. 33, 21 Am. Rep. 430.

<sup>486</sup> *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458; *City of Little Rock v. State Bank*, 8 Ark. 227. Nor does power to execute a bond give authority to execute a note. *School Directors v. Sippy*, 54 Ill. 287.

joint maker of such note,<sup>487</sup> or to receive notice of dishonor thereof.<sup>488</sup>

§ 268. Implied authority.

As a general rule, the power of an agent to bind his principal by the drawing or indorsing of negotiable instruments will not be implied unless it is necessary to carry out some other power that has been given to him. The business of making or indorsing notes or other commercial instruments is not within the object and intent of the law in regulating the common duties of principal and agent; neither is the power to be implied because occasionally an instance occurs in which a note so made should in equity be paid. But, as a general rule, such a power will be the subject of strict interpretation, and the agent will not be held to have such authority unless it is expressly conferred upon him, or unless it is strictly necessary or a usual incident to the power originally conferred.<sup>489</sup> As has been said: "Authority to indorse commercial paper can only be implied, where the agent is unable to perform the duties of his agency without the exercise of such authority. In other words, the power of an agent to indorse commercial paper for his prin-

<sup>487</sup> *Cuyler v. Merrifield*, 5 Hun (N. Y.) 559.

<sup>488</sup> *Planters' & M. Bank v. King*, 9 Ala. 279.

<sup>489</sup> *Brantley v. Southern L. Ins. Co.*, 53 Ala. 554; *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98; *Chicago Elec. L. Renting Co. v. Hutchinson*, 25 Ill. App. 476; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113; *Avery v. Lauve*, 1 La. Ann. 457; *Folger v. Peterkin*, 39 La. Ann. 815; *Robertson v. Levy*, 19 La. Ann. 327; *Hills v. Upton*, 24 La. Ann. 427; *Paige v. Stone*, 10 Metc. (Mass.) 160, 43 Am. Dec. 420; *Webber v. Williams College*, 40 Mass. 302; *Harris v. Johnston*, 54 Minn. 177, 40 Am. St. Rep. 312; *Woodbury v. Woodbury*, 47 N. H. 11, 90 Am. Dec. 555; *Eaton v. Berlin*, 49 N. H. 219; *Savage v. Rix*, 9 N. H. 263; *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628; *Lawrence v. Gebhard*, 41 Barb. (N. Y.) 575; *Turner v. Keller*, 66 N. Y. 66; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150; *Stock Exchange Bank v. Williamson*, 6 Okl. 348; *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81; *Stainback v. Read*, 11 Grat. (Va.) 281, 62 Am. Dec. 648; *Blane v. Proudft*, 3 Call (Va.) 207, 2 Am. Dec. 546.

principal must be a necessary implication from an express authority conferred upon such agent. Wherever such power is implied from the acts of the agent, the acts, subject to such implication, must be acts of a kind like those from which the implication is drawn."<sup>490</sup> Authority, therefore, to draw or indorse negotiable paper will be implied only when it is necessary or customary in carrying out the power originally conferred, or where it can be shown from the habit and course of dealing between the agent and his principal, or where the principal has otherwise so acted as to estop himself from denying that the agent has such authority.<sup>491</sup> Thus, authority in an agent to indorse and collect unindorsed checks in his hands is not established by the fact that he has indorsed and collected other checks previously in like manner unless there is proof his principal knew this course of conduct.<sup>492</sup>

But though authority to draw, accept, and indorse commercial paper may be presumed from acts of recognition in former instances, yet those acts must be known to the party setting them up.<sup>493</sup> That is, where a party, accepting a check or note or bill indorsed by an agent and shown upon its face to be indorsed by an agent, maintains that the agent

<sup>490</sup> *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113.

<sup>491</sup> *Lytle v. Bank*, 121 Ala. 215; *Brantley v. Southern L. Ins. Co.*, 53 Ala. 554; *Bank of Ukiah v. Mohr*, 130 Cal. 268; *Allin v. Williams*, 97 Cal. 403; *Witcher v. McPhee* (Colo. App.) 65 Pac. 806; *Marsh v. French*, 82 Ill. App. 76; *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113; *Best v. Krey*, 83 Minn. 32; *Turner v. Keller*, 66 N. Y. 66; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Layet v. Gano*, 17 Ohio, 466; *Stock Exchange Bank v. Williamson*, 6 Okl. 348; *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81; *Flewellen v. Mittenthal* (Tex. Civ. App.) 38 S. W. 234; *Hooe v. Oxley*, 1 Wash. (Va.) 19, 1 Am. Dec. 425; *Whitten v. Bank of Fincastle*, 100 Va. 546; *Davidson v. Stanley*, 2 Man. & G. 721.

<sup>492</sup> *Sinclair v. Goodell*, 93 Ill. App. 592.

<sup>493</sup> *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113, citing *Rawson v. Curtiss*, 19 Ill. 456; *Maxey v. Heckethorn*, 44 Ill. 437; *St. John v. Redmond*, 9 Port. (Ala.) 432; *Cash v. Taylor*, 8 Law J. K. B. (O. S.) 262.

had apparent authority to make such indorsement, he must prove that the facts, giving color of authority to the agent, were known to him. If such person has no knowledge of such facts, he does not act upon them, or part with anything on the faith of any apparent authority, and, therefore, is not in a position to claim anything.<sup>494</sup>

§ 269. Illustrations—Authority implied.

Thus if, in consequence of a notorious agency, the agent is in the habit of drawing bills, and the principal in the habit of paying them, this is such an affirmance of his power to draw that a purchaser of his bills has a right to expect payment of them by the principal, and if refused he may enforce it.<sup>495</sup> But if it appears that the principal had no knowledge of the transactions until after the agency had ceased, the fact that an agent has on different occasions executed notes in the name of his principal does not show authority to do so.<sup>496</sup> So where the power to discount bills is given to an agent, the power to indorse them is necessarily implied,<sup>497</sup> and especially can the principal not question such authority when he has knowingly received the proceeds thereof.<sup>498</sup> And where authority is given to an agent to sell a negotiable note, he may indorse such note, "without recourse," in the name of the principal.<sup>499</sup> Likewise, authority to make or indorse negotiable instruments will be implied where it is necessary in order to pay for supplies required in carrying on the principal's business, of which the agent is general manager,<sup>500</sup> or where the agent has authority to transact all

<sup>494</sup> *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113.

<sup>495</sup> *Hooe v. Oxley*, 1 Wash. (Va.) 19, 1 Am. Dec. 425; *Bank of Ukiah v. Mohr*, 130 Cal. 268.

<sup>496</sup> *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628; *Elwell v. Puget Sound & C. R. Co.*, 7 Wash. 487. See *Stock Exch. Bank v. Williamson*, 6 Okl. 348.

<sup>497</sup> *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665.

<sup>498</sup> *Wells, Fargo & Co. v. Simpson Nat. Bank*, 19 Tex. Civ. App. 636.

<sup>499</sup> *Yale v. Eames*, 1 Metc. (Mass.) 486.

<sup>500</sup> *White v. Westport Mfg. Co.*, 1 Pick. (Mass.) 215, 11 Am. Dec.

the business of the principal.<sup>501</sup> If an agency is established and an express authority shown to draw upon the principal for amounts needed to carry on the business, it carries along with it an authority to procure an indorser of the drafts drawn by the agent for the purpose of the agency.<sup>502</sup>

— **Authority not implied.** But where a power to make, draw, accept, or indorse commercial paper is not expressly conferred upon an agent, by the instrument by which he is appointed, general words, at the conclusion thereof, authorizing him "to do all other acts and things for and in behalf of the" principal "that he may deem proper to further and protect" his interests, cannot have that effect.<sup>503</sup> Nor, in the absence of circumstances from which it might be implied, will such authority be given, by implication, to an agent employed in the manufacture of carriages;<sup>504</sup> to one acting as clerk to a merchant;<sup>505</sup> to an agent managing a grocery and provision store;<sup>506</sup> nor will such authority be implied from the mere fact that the agent is general business manager of his principal,<sup>507</sup> and that he had power to draw checks

168; *Odiorne v. Maxcy*, 13 Mass. 182; *Graton & K. Mfg. Co. v. Redelsheimer*, 28 Wash. 370.

<sup>501</sup> *Gildden & J. Varnish Co. v. Interstate Nat. Bank*, 69 Fed. 912; *Auldjo v. McDougall*, 3 U. C. Q. B. (O. S.) 199; *Whitten v. Bank of Fincastle*, 100 Va. 546. Compare *Lawrence v. Gebhard*, 41 Barb. (N. Y.) 575. An agent having authority to transact all the business of his principal, transfer notes, etc., may assign and transfer negotiable paper belonging to his principal. *Bailey v. Rawley*, 1 Swan (Tenn.) 295.

<sup>502</sup> *Marsh v. French*, 82 Ill. App. 76.

<sup>503</sup> *Lawrence v. Gebhard*, 41 Barb. (N. Y.) 575, *Sutherland, J.*, dissenting.

<sup>504</sup> *Paige v. Stone*, 10 Metc. (Mass.) 160, 43 Am. Dec. 420.

<sup>505</sup> *Terry v. Fargo*, 10 Johns. (N. Y.) 114; *Kerns v. Piper*, 4 Watts (Pa.) 222; *Heathfield v. Van Allen*, 7 U. C. C. P. 346.

<sup>506</sup> *Smith v. Gibson*, 6 Blackf. (Ind.) 369; *Perkins v. Boothby*, 71 Me. 91. And see *Weekes v. Shapleigh Hardware Co.*, 23 Tex. Civ. App. 577.

<sup>507</sup> *In re Lafourche Transp. Co.*, 52 La. Ann. 1517; *Perkins v. Boothby*, 71 Me. 91; *New York Iron Mine v. Negaunee First Nat. Bank*, 39 Mich. 644; *Edwards v. Carson Water Co.*, 21 Nev. 469; *McCullough v. Mass*, 5 Denio (N. Y.) 567; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Stock Exch. Bank v. William*



against the funds of the latter.<sup>508</sup> And the fact that the agent has been employed to purchase goods for his principal and to pay for them, does not give him authority to execute or accept negotiable paper, in the name of his principal, in paying for the same.<sup>509</sup> Nor will authority to execute a note for the purchase price of real estate be implied from a power of attorney to settle up a mercantile business, which had been conducted in the name of the principal.<sup>510</sup> Nor is authority to bind principals by a promissory note proved by evidence that the agent had previously made a note, to which one principal assented, and also another note, for a small amount, which was compromised after suit brought, without showing whether or not their previous assent thereto had been obtained.<sup>511</sup> The mere fact that one, claiming to be the agent of the payee, has possession of a negotiable instrument, does not give him authority to indorse and collect the same.<sup>512</sup> So the fact that one is seen opening the mail of a corporation, giving orders to its employes, and countersigning some of its checks, does not justify the inference that he has authority to indorse checks drawn in its favor.<sup>513</sup>

**§ 270. Where power is given by or to several.**

Where several and separate powers of attorney executed by each of several principals are given to an agent, authorizing him "to sell and indorse promissory notes" he cannot

son, 6 Okl. 348; *Sewanee Min. Co. v. McCall*, 3 Head (Tenn.) 619. See ante, 265 (d).

<sup>508</sup> *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628; *Oak Grove & S. V. Cattle Co. v. Foster*, 7 N. M. 650. See ante, § 265 (d).

<sup>509</sup> *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 67; *Webber v. Williams College*, 23 Pick. (Mass.) 302; *Gould v. Norfolk Lead Co.*, 9 Cush. (Mass.) 338; *Brown v. Parker*, 7 Allen (Mass.) 339; *Taber v. Cannon*, 8 Metc. (Mass.) 456.

<sup>510</sup> *Fisher v. Salmon*, 1 Cal. 413, 54 Am. Dec. 297.

<sup>511</sup> *Paige v. Stone*, 10 Metc. (Mass.) 160, 43 Am. Dec. 420. And see *Stock Exch. Bank v. Williamson*, 6 Okl. 348.

<sup>512</sup> *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81; *Sinclair v. Goodell*, 93 Ill. App. 592. See post, § 274.

<sup>513</sup> *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113.

join either of his principals as indorser, jointly with the other principals, of a note payable jointly to them all.<sup>514</sup> So where several persons unite in the same power to authorize another to indorse their names upon a bill, the agent is not empowered to make several and successive indorsements, but only a joint indorsement of and for them all;<sup>515</sup> and where the power to use the principal's name as indorser is given to two, it must be exercised by them jointly.<sup>516</sup>

**§ 271. Authority must be exercised on principal's behalf only  
—Accommodation paper.**

Where authority is given to an agent to make or indorse negotiable paper, it will be construed as giving authority to make or indorse in behalf of or for the benefit of the principal only, in his separate individual business, and in the particular business which the principal had in mind when he appointed the agent, and will not be extended, in the absence of circumstances to that effect, so as to give the agent power to make or indorse in any other business of the principal, or for his own or a third person's benefit.<sup>517</sup> Thus, the making of accommodation paper, or the loaning of one's name as security for another, does not fall within the ordinary business in which persons engage, and authority to use a principal's name for that purpose is not established by showing merely that in connection with such business the agent had authority

<sup>514</sup> *Harris v. Johnston*, 54 Minn. 177, 40 Am. St. Rep. 312.

<sup>515</sup> *Bank of United States v. Beirne*, 1 Grat. (Va.) 234, 42 Am. Dec. 551; *Bank of United States v. Beirne*, 1 Grat. (Va.) 553.

<sup>516</sup> *Union Bank of Maryland v. Beirne*, 1 Grat. (Va.) 226. See post, § 291.

<sup>517</sup> *Brantley v. Southern Life Ins. Co.*, 53 Ala. 554; *Wallace v. Mobile Branch Bank*, 1 Ala. 565; *Citizens' Sav. Bank v. Hart*, 32 La. Ann. 22; *Odiorne v. Maxcy*, 13 Mass. 178; *Humphrey v. Havens*, 12 Minn. 298; *Harris v. Johnston*, 54 Minn. 177, 40 Am. St. Rep. 312; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *German Nat. Bank v. Studley*, 1 Mo. App. 260; *Englehart v. Peoria Plow Co.*, 21 Neb. 41; *Camden Safe Deposit & Trust Co. v. Abbott*, 44 N. J. Law, 257; *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728; *Stainer v. Tysen*, 3 Hill (N. Y.) 279; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262, Wamb. Cas. 303; *Suckley v. Tunno*, 1 Brev. (S. C.) 257; *Holden v. Durant*, 29 Vt. 184; *Stainback v. Read*, 11 Grat. (Va.) 281, 62 Am. Dec. 648.

to make or indorse notes in the name of the principal;<sup>518</sup> but if this is done with the assent of the principal, for the purpose of taking up paper upon which the principal is already liable as accommodation maker or indorser, the principal will be bound.<sup>519</sup> If, however, an agent, who is duly authorized to sign "all notes and business paper" of a corporation, gives accommodation notes in the name of the company, the corporation, notwithstanding any want of authority of the agent to execute them for the purposes for which they were given, is liable on them to a holder in good faith, for value, before maturity.<sup>520</sup>

**§ 272. Authority of agent to fill up commercial paper.**

It is a well settled principle that where a principal signs his name to a blank bill or note, either as drawer, maker, or indorser, and delivers it to his agent, he thereby gives the latter authority to fill it up in any manner he pleases, not inconsistent with the character of such paper as the writing imports; and that a party taking such paper from the agent for value and without notice of any restrictions upon his authority, will be protected although the agent violated his actual authority.<sup>521</sup> "The principle running through all the

<sup>518</sup> *Wallace v. Mobile Branch Bank*, 1 Ala. 565; *Aetna Nat. Bank v. Winchester*, 43 Conn. 391; *Myers v. Walker*, 104 Ga. 316; *German Nat. Bank v. Studley*, 1 Mo. App. 260; *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728; *Stainer v. Tysen*, 3 Hill (N. Y.) 279.

<sup>519</sup> *German Nat. Bank v. Studley*, 1 Mo. App. 260.

<sup>520</sup> *Bird v. Daggett*, 97 Mass. 494.

<sup>521</sup> *Bank of Pittsburgh v. Neal*, 22 How. (U. S.) 107; *Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank*, 97 Fed. 181; *Roberts v. Adams*, 8 Port. (Ala.) 297, 33 Am. Dec. 291; *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120; *Holland v. Hatch*, 11 Ind. 497, 71 Am. Dec. 363; *Elchelberger v. Old Nat. Bank*, 103 Ind. 401; *Gillasple v. Kelley*, 41 Ind. 161, 13 Am. Rep. 318; *Blackwell v. Ketcham*, 53 Ind. 186; *Cronkhite v. Nebeker*, 81 Ind. 319; *Rainbolt v. Eddy*, 34 Iowa, 440, 11 Am. Rep. 152; *Hall v. Bank of Commonwealth*, 5 Dana (Ky.) 258, 30 Am. Dec. 685; *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427; *Breckenridge v. Lewis*, 84 Me. 349, 30 Am. St. Rep. 353; *Putnam v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206; *Weidman v. Symes*, 120 Mich. 657, 77 Am. St. Rep. 603; *Davis v. Lee*, 26 Miss. 505, 59 Am. Dec. 267; *Johnson v. Blasdale*, 1 Smedes & M. (Miss.) 17, 40 Am. Dec. 85; *Goad v. Hart's Adm'rs*, 8 Smedes

cases is that where a party signs blank paper he makes the holder his agent, as upon a general letter of credit, to fill up the paper as he thinks proper. If it is signed in blank in any material respect, whether as maker or indorser, it makes no difference. The principle seems to be that if anything is necessary to be done in order to give validity to the paper, the blank signature carries with it authority to the holder to render it perfect and effectual. If that act can be done in several ways, the blank signature gives to the bearer the authority to use his discretion, so far as the rights of parties taking it without notice are concerned; and if a loss occurs, the familiar principle applies that where one of two innocent parties must suffer, he who has been the cause of the loss must bear it.<sup>522</sup> It is immaterial whether or not the agent was expressly authorized to fill the blanks in such paper. If the maker, drawer, or indorser of such an instrument delivers it in blank to another, he thereby presumptively constitutes the latter his agent for the purpose of filling such blanks as will make the instrument complete, and in such a way as is consistent with the character of the instrument.<sup>523</sup> Thus one who signs a paper in blank, and intrusts it to his agent for commercial purposes, gives him apparent authority to use it, and is therefore bound by a promissory note which the agent writes over such signature,

& M. (Miss.) 787; *Mitchell v. Culver*, 7 Cow. (N. Y.) 337; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Dean v. Hall*, 17 Wend. (N. Y.) 214; *Ledwich v. McKim*, 53 N. Y. 307; *Hepler v. Mt. Carmel Sav. Bank*, 97 Pa. 420, 39 Am. Rep. 813; *Orrick v. Colston*, 7 Grat. (Va.) 189; *Brummel v. Enders*, 18 Grat. (Va.) 873; *Snyder v. Van Doren*, 46 Wis. 610.

<sup>522</sup> By the Court in *Davis v. Lee*, 26 Miss. 505, 59 Am. Dec. 268.

<sup>523</sup> *Violett v. Patton*, 5 Cranch (U. S.) 142; *Bank of Pittsburgh v. Neal*, 22 How. (U. S.) 96; *Gibbs v. Frost*, 4 Ala. 720; *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231; *Norwich Bank v. Hyde*, 13 Conn. 279; *White v. Alward*, 35 Ill. App. 195; *Marshall v. Drescher*, 68 Ind. 359; *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427; *White v. Duggan*, 140 Mass. 18, 54 Am. Rep. 437; *Boyd v. Brotherson*, 10 Wend. (N. Y.) 93; *Mechanics' & Farmers' Bank v. Schuyler*, 7 Cow. (N. Y.) 337; *Fullerton v. Sturges*, 4 Ohio St. 529; *Holland v. Hatch*, 15 Ohio St. 464; *Bechtel's Estate*, 133 Pa. 367; *Gary v. State*, 11 Tex. App. 527.

though what the principal intended should be written was an order on a savings bank in which he had funds.<sup>524</sup> If, however, the party dealing with the agent has notice of the limitations upon the agent's authority, and notwithstanding such notice he takes the paper from the agent, he will not be protected if the latter has exceeded his authority.<sup>525</sup>

This presumption, however, applies only to the filling of such blanks as are contemplated and necessary to complete the instrument, otherwise the filling or alteration will be considered a forgery.<sup>526</sup> Thus, where the payee of a promissory note drawn upon a printed form, added, after its delivery and without the knowledge or consent of the maker, the words "10 per cent" in the blank after "interest at," it was held that the note was void as to the maker, in the hands of a bona fide holder, before maturity.<sup>527</sup>

#### VII. OF AGENT'S AUTHORITY TO COLLECT.

##### § 273. In general.

An agent's authority to collect or receive payment of money due to his principal, may be conferred upon him either expressly or impliedly. When given in the former manner, the agent's powers will, of course, be determined therefrom, and from any other circumstances that may surround the case. But, in perhaps the majority of cases, such authority is given to the agent by implication in aiding him to carry out some other power conferred upon him, or implied from the habit or course of dealing between the agent and his principal; or it may be implied from other circumstances, as will be seen hereafter.

Whether the circumstances in any particular case show

<sup>524</sup> Breckenridge v. Lewis, 84 Me. 349, 30 Am. St. Rep. 353.

<sup>525</sup> Johnson v. Blasdale, 1 Smedes & M. (Miss.) 20, 40 Am. Dec. 85. And the note will be void as to the excess. Goad v. Hart's Adm'rs, 8 Smedes & M. (Miss.) 787; Mills v. Williams, 16 S. C. 593; Davidson v. Lanier, 4 Wall. (U. S.) 456.

<sup>526</sup> Luellen v. Hare, 32 Ind. 211; White v. Alward, 35 Ill. App. 195.

<sup>527</sup> Holmes v. Trumper, 22 Mich. 427, 7 Am. Rep. 661.

that the agent has authority to collect is a question for the jury to determine.<sup>528</sup>

§ 274. When authority to collect is implied.

(a) **In general.**—An agent has implied authority to make collections for his principal where it has been the habit or course of dealing between the parties for the agent to make collections, or where the principal, by his conduct, has led others to believe that the agent had such authority.<sup>529</sup> Thus, a principal is estopped to assert that his agent has not authority to receive deferred payments on land sales, though he originally had no authority therefor, he having on several occasions collected and remitted them without objection of the principal, having in some instances been asked by the principal to collect some small balances, and it having been known that payment by other persons had been made to him before those in question, and had been recognized by the principal.<sup>530</sup> And the fact that an agent had managed the rental of his principal's property for several years, and collected the rent, is sufficient to show his authority to collect the purchase money of the property when sold by him as agent.<sup>531</sup> So where an agent has been authorized to collect certain claims for his principal, and the latter knowingly permits him to continue exercising such authority after it has in fact been taken from him, a third person making payment to the agent under such circumstances will be protected.<sup>532</sup> But the mere naming in commercial paper of a place for the payment thereof does not make the proper custodian of money at such place the agent of the owner of such paper to receive such

<sup>528</sup> *Luckie v. Johnston*, 89 Ga. 321; *Townsend v. Studer*, 109 Iowa, 103.

<sup>529</sup> See *Birmingham M. R. Co. v. Tennessee C., I. & R. Co.*, 127 Ala. 137; *Edinburgh-American L. Mortg. Co. v. Noonan*, 11 S. D. 141; *Bissell v. Dowling*, 117 Mich. 646; *First Nat. Bank v. Mutual Ben. L. Ins. Co.*, 145 Mo. 127; *Harrison v. Legore*, 109 Iowa, 618; *Harrison Nat. Bank v. Austin*, 65 Neb. 632.

<sup>530</sup> *Little Rock & Ft. S. R. Co. v. Wiggins*, 65 Ark. 385. Compare *Walton Guano Co. v. McCall*, 111 Ga. 114.

<sup>531</sup> *McCarty v. Stanfill*, 19 Ky. L. R. 612, 41 S. W. 278.

<sup>532</sup> *Heinz v. American Nat. Bank*, 9 Colo. App. 31. And see *Edinburgh-American L. Mortg. Co. v. Noonan*, 11 S. D. 141.

payment.<sup>533</sup> Thus, the fact that a negotiable promissory note is made payable at a particular office does not make the party in charge of such office the agent of the holder of the note, to receive payment, unless the note be actually in the possession of such party or he has otherwise been held out as having such authority.<sup>534</sup> Nor has an agent implied authority to collect, from the fact that he is employed to take orders for goods, which he is required to submit to his employer for acceptance or rejection.<sup>535</sup>

(b) **Mere possession of a bill or account not sufficient.**—The mere fact that an agent has possession of a bill or account, and that he presents it for payment, does not show that the agent has authority to receive payment thereof, nor is it any evidence of authority to collect; and the debtor will not be protected in making payment to the agent under those circumstances only;<sup>536</sup> and this is true although the bill or account is made out in the principal's handwriting and on one of his billheads.<sup>537</sup> Where a bill is sent through the mail to a party, other than the debtor, this does not constitute such party the agent of the creditor for the collection of the debt, nor is it any evidence of authority to collect.<sup>538</sup> A debtor

<sup>533</sup> *Bartel v. Brown*, 104 Wis. 493; *Caldwell v. Evans*, 5 Bush (Ky.) 380, 96 Am. Dec. 358; *Wood v. Merchants' Sav., Loan & Trust Co.*, 41 Ill. 267; *Bloomer v. Dau*, 122 Mich. 522; *Pease v. Warren*, 29 Mich. 9, 18 Am. Rep. 58; *Trowbridge v. Ross*, 105 Mich. 598; *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95, 24 Am. St. Rep. 189; *Cummings v. Hurd*, 49 Mo. App. 139; *White v. Kehlor*, 85 Mo. App. 557; *Hollinshead v. John Stuart & Co.*, 8 N. D. 35; *Stolzman v. Wyman*, 8 N. D. 108; *Cheney v. Libby*, 134 U. S. 68.

<sup>534</sup> *Stolzman v. Wyman*, 8 N. D. 108; *Hollinshead v. John Stuart & Co.*, 8 N. D. 35; *White v. Kehlor*, 85 Mo. App. 557.

<sup>535</sup> *Fabian Mfg. Co. v. Newman* (Tenn. Ch. App.) 62 S. W. 218.

<sup>536</sup> *Dutcher v. Beckwith*, 45 Ill. 460, 92 Am. Dec. 232; *Hirshfield v. Waldron*, 54 Mich. 649; *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *Willard v. Buckingham*, 36 Conn. 395; *Hill v. Helton*, 80 Ala. 528. Compare *Adams v. Humphreys*, 54 Ga. 496, where it was held that where A orders goods for B, and they are shipped direct to the latter, but the bill, though made out against B, is sent to A, who forwards the order, A has, at least prima facie, a right to collect as agent of the vendor of the goods.

<sup>537</sup> *Hirshfield v. Waldron*, 54 Mich. 649.

<sup>538</sup> *Dutcher v. Beckwith*, 45 Ill. 460, 92 Am. Dec. 232.

dealing with an alleged agent holding a claim against him for collection is bound to take notice of the agent's authority, and if he pays the agent without making due inquiry as to such authority, he does so at his own risk.<sup>539</sup> It has been sought to give an agent authority to collect in such cases by applying the rule applicable to securities for the payment of money, but there is a vast difference between the two classes as will be seen hereafter.<sup>540</sup>

(c) **Where the agent has made the contract.**—Nor will authority to collect be implied from the fact that the demand which the agent seeks to collect has been created through his instrumentality, in acting for his principal.<sup>541</sup> Thus, the agency of a person to collect money is not to be inferred from the fact of his loaning money of his principal and taking a note, a power of attorney to confess judgment, and a deed of trust as security.<sup>542</sup> Where, however, the agent has been held out by the principal as having authority to receive payments on the principal sum loaned, or where the circumstances are such as to estop him from denying the agent's authority, the latter may receive such payments and they will be binding on the principal, although the agent misappropriates the funds.<sup>543</sup> So the mere fact that the agent has contracted for a lease of property does not give him authority to receive the rent when due, and he cannot do so unless he is specially authorized to collect.<sup>544</sup> The authority of an agent

<sup>539</sup> *Cram v. Sickel*, 51 Neb. 828, 66 Am. St. Rep. 478; *Dutcher v. Beckwith*, 45 Ill. 460, 92 Am. Dec. 232; *Cooley v. Willard*, 34 Ill. 68, 85 Am. Dec. 296.

<sup>540</sup> Post (d) this section.

<sup>541</sup> *Cooley v. Willard*, 34 Ill. 68, 85 Am. Dec. 296; *Smith v. Hall*, 19 Ill. App. 17; *Thompson v. Elliott*, 73 Ill. 221; *Greenhood v. Keator*, 9 Ill. App. 183; *Austin v. Thorp*, 30 Iowa, 376; *Tew v. Labiche*, 4 La. Ann. 526; *Barstow v. Stone*, 10 Colo. App. 396; *Frank v. Tuozzo*, 26 App. Div. (N. Y.) 447, 50 N. Y. Supp. 71; *Heflin v. Campbell*, 5 Tex. Civ. App. 106.

<sup>542</sup> *Cooley v. Willard*, 34 Ill. 68, 85 Am. Dec. 296; *Fortune v. Stockton*, 182 Ill. 454; *Evans-Snyder-Buel Co. v. Holder*, 16 Tex. Civ. App. 300; *Madison v. Cabalek*, 86 Ill. App. 450; *Austin v. Thorp*, 30 Iowa, 376; *Heffernan v. Boteler*, 87 Mo. App. 316.

<sup>543</sup> *Doyle v. Corey*, 170 Mass. 337; *Meserve v. Hanford*, 59 Kan. 777, 53 Pac. 835.

<sup>544</sup> *Heflin v. Campbell*, 5 Tex. Civ. App. 106. Ante, § 250.



to receive payment when he has sold the goods of his principal has been discussed elsewhere.<sup>545</sup>

(d) **Possession of securities.**—We have seen above that the mere possession, by an agent, of a bill or account, did not give such agent authority to collect or receive payment of the same;<sup>546</sup> but by reason of the peculiar character of securities for the payment of money a different rule prevails, and in the latter case, the mere possession of the securities by the agent may give him authority to collect them. "According to commercial usage, such instruments are bought and sold by mere delivery, so as to vest in such a holder the beneficial interest. Hence, the mere possession of such instruments is evidence of ownership of the beneficial interest. It therefore follows that payment to any holder, without notice that it is wrongful, will protect the maker. But it is not so with mere accounts. The fact that a person has the copy of an account against another person is no evidence that he is the owner, nor is it any evidence of authority to collect it."<sup>547</sup> Thus authority to receive payment in the absence of direct proof, may be inferred from the agent having possession of a bond, or bonds and mortgage, upon which he is employed to negotiate a loan.<sup>548</sup> So the possession of a promissory note

<sup>545</sup> Ante, §§ 239, 240.

<sup>546</sup> See ante (b) this section.

<sup>547</sup> By the Court in *Dutcher v. Beckwith*, 45 Ill. 460, 92 Am. Dec. 233.

<sup>548</sup> *Central Trust Co. v. Folsom*, 167 N. Y. 285, reversing 38 App. Div. 295; *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325; *Hatfield v. Reynolds*, 34 Barb. (N. Y.) 612; *Crane v. Gruenewald*, 120 N. Y. 274, 17 Am. St. Rep. 643; *Van Keuren v. Corkins*, 4 Hun (N. Y.) 129; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Haines v. Pohlmann*, 25 N. J. Eq. 179; *Whitlock v. Waltham*, 1 Salk. 157; *Thomas v. Swanke*, 75 Minn. 326; *Dexter v. Morrow*, 76 Minn. 413; *Schenk v. Dexter*, 77 Minn. 15; *Whelan v. Reilly*, 61 Mo. 565; *Brecht v. McParland*, 187 Pa. 620.

If the agent was intrusted with the mortgage deed only and not the bond, he would have authority to receive the interest, but not the principal; because giving up the deed is not sufficient to restore the estate, whereas, the giving up a bond is, in law, an extinguishment of the debt. *Whitlock v. Waltham*, 1 Salk. 157. And see *Shane v. Palmer*, 43 Kan. 481, where an agent was au-

by an agent, indorsed in blank or to his order, by the payee, is sufficient to constitute apparent authority to collect such note after it is due.<sup>549</sup> But where the note is unindorsed, the mere possession, by the agent, of the note, is not, of itself, sufficient to authorize the agent to receive payment thereof.<sup>550</sup>

But the mere fact that the agent has not the possession of the securities, which he seeks to collect, is not of itself conclusive evidence of his lack of authority to collect, nor is the fact that he has such possession conclusive that he may collect, although in either case his possession or want of possession is *prima facie* evidence of his authority or lack of authority. Although he may have the securities in his possession, yet he may be expressly or impliedly precluded from collecting the same, and if the third party has notice thereof a payment to the agent would not be binding on the principal. And although the agent has not possession of the securities, authority to collect the same may have been given to him expressly or impliedly. It is safer for the debtor, however, to always see that the agent has the evidence of indebtedness in his possession before making payment thereon. In the absence of an express authority to collect, given to the agent by his principal, or in the absence of any circumstances from which such authority may be inferred, it is incumbent upon the debtor, who makes payment to the agent, to show that the latter has possession of the securities at the time the payment is made, for if the securities are withdrawn or if for any other reason he has not the possession thereof, the agent cannot collect payment therefor; and a payment, where the agent has not possession of the securities, in the

thorized to receive payment of a note and mortgage, although they were not at the time in his possession, where he was expressly authorized to do so.

<sup>549</sup> *Kohl v. Beach*, 107 Wis. 409, 81 Am. St. Rep. 849; *Bartel v. Brown*, 104 Wis. 493; *Deweese v. Muff*, 57 Neb. 17; *Drinkall v. Movius State Bank*, 11 N. D. 10; *Rhodes v. Belchee*, 36 Or. 141; *Smith v. Landeckl*, 101 Ill. App. 248.

<sup>550</sup> *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502; *Wardrop v. Dunlop*, 1 Hun (N. Y.) 325; *Sinclair v. Goodell*, 93 Ill. App. 592; *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81; *Woodbury v. Larned*, 5 Minn. 339.

absence of any of the above circumstances, is made at the risk of the debtor, and the burden is on him to show that such agent had power to collect the money.<sup>551</sup> Thus the payment

<sup>551</sup> *Whitlock v. Waltham*, 1 Salk. 157; *Ilggenfritz v. Mutual Ben. L. Ins. Co.*, 81 Fed. 27; *Quinn v. Dresbach*, 75 Cal. 159, 7 Am. St. Rep. 138; *Barstow v. Stone*, 10 Colo. App. 396; *Guliford v. Stacer*, 53 Ga. 618; *Madison v. Cabalek*, 86 Ill. App. 450; *Viskocil v. Doktor*, 27 Ill. App. 232; *Cooley v. Willard*, 34 Ill. 68, 85 Am. Dec. 296; *Stockton v. Fortune*, 82 Ill. App. 272; *Security Co. v. Graybeal*, 85 Iowa, 543, 39 Am. St. Rep. 311; *Tappan v. Morseman*, 18 Iowa, 499; *U. S. Bank v. Burson*, 90 Iowa, 191; *Harrison v. Legore*, 109 Iowa, 618; *Shane v. Palmer*, 43 Kan. 481; *Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. Rep. 340; *Bloomer v. Dau*, 122 Mich. 522; *Bacon v. Pomeroy*, 118 Mich. 145; *Hare v. Bailey*, 73 Minn. 409; *Schenk v. Dexter*, 77 Minn. 15; *Dexter v. Morrow*, 76 Minn. 413; *Thomas v. Swanke*, 75 Minn. 326; *Budd v. Broen*, 75 Minn. 316; *Dwight v. Lenz*, 75 Minn. 78; *Congregational Ministers & Churches v. Torkelson*, 73 Minn. 401; *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123; *May v. Jarvis-Conklin Mortg. Trust Co.*, 138 Mo. 275, 39 S. W. 782; *Cummings v. Hurd*, 49 Mo. App. 139; *White v. Kehlor*, 85 Mo. App. 557; *Chandler v. Pyott*, 53 Neb. 786; *Phoenix Ins. Co. v. Walter*, 51 Neb. 182; *Richards v. Waller*, 49 Neb. 639; *Thomson v. Shelton*, 49 Neb. 644; *Haines v. Pohlmann*, 25 N. J. Eq. 179; *Crane v. Gruenewald*, 120 N. Y. 274, 17 Am. St. Rep. 643; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Brown v. Blydenburgh*, 7 N. Y. 141, 57 Am. Dec. 506; *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325; *Frank v. Tuozzo*, 26 App. Div. (N. Y.) 447; *Brewster v. Carnes*, 103 N. Y. 556; *Second Nat. Bank v. Spottswood*, 10 N. D. 114; *Hollinshead v. John Stuart & Co.*, 8 N. D. 35; *Hitchcock v. Kelley*, 18 Ohio Circ. R. 808, 4 Ohio Circ. Dec. 180; *Rhodes v. Belchee*, 36 Or. 141; *Corbet v. Waller*, 27 Wash. 242; *Western Security Co. v. Douglass*, 14 Wash. 215; *Bartel v. Brown*, 104 Wis. 493; *Kohl v. Beach*, 107 Wis. 409, 81 Am. St. Rep. 849.

*Parker, J.*, in *Crane v. Gruenewald*, 120 N. Y. 274, 17 Am. St. Rep. 643, says: "This rule comprises two elements: 1. Possession of the securities by the attorney with the consent of the mortgagee; and 2. Knowledge of such possession on the part of the mortgagor. The mere possession of the securities by the attorney is not sufficient. The mortgagor must have knowledge of the fact. It would not avail him to prove that, subsequent to a payment, he discovered that the securities were in the actual custody of the attorney when it was made. For he could not have been misled or deceived by a fact the existence of which was unknown to him. It is the information which he acquires of the possession which apprises him that the attorney has apparent authority to act for the

of money due on written security, to an agent who has not either possession of the security or express authority to receive such money, is not good, and the principal may compel the debtor to pay it again.<sup>552</sup> But where an agent is expressly authorized to remit principal and interest after a loan is due, he is authorized to receive payment on the note and mortgage, although they were not at the time in his possession.<sup>553</sup> So where an agent is expressly authorized to receive payment of notes, a payment to him is good, although he did not have actual possession of the notes, and his authority to receive payment was unknown to the payer.<sup>554</sup>

If an attorney is given apparent authority to receive payment of a bond and mortgage by the fact that he negotiated the loan, and they are by the mortgagee left in his possession, there is no presumption that this authority or possession continues: and every time the mortgagee makes a payment to such attorney, he must ascertain that the bond and mortgage remain in his possession.<sup>555</sup> It is not necessary, however, that the debtor should have actually seen the securities, if he has made due inquiry and has been informed that they were still in the possession of the agent, and such information was true.<sup>556</sup> So where a loan has been made by one as agent, who had collected and remitted to the principal various

principal. It is the appearance to collect, furnished by the custody of the securities, which justifies him in making payment. And it is because the mortgagor acts in reliance upon such appearance—an appearance made possible only by the act of the mortgagee in leaving the securities in the hands of an attorney—that estops the owner from denying the existence of the authority in the attorney which such possession indicates."

<sup>552</sup> *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Security Co. v. Graybeal*, 85 Iowa, 543, 39 Am. St. Rep. 311; *Draper v. Rice*, 56 Iowa, 114, 41 Am. Rep. 88; *Dickson v. Wright*, 52 Miss. 585, 24 Am. Rep. 677; *Madison v. Cabalek*, 86 Ill. App. 450, and cases above cited.

<sup>553</sup> *Shane v. Palmer*, 43 Kan. 481.

<sup>554</sup> *Bonner v. Lisenby*, 86 Mo. App. 666.

<sup>555</sup> *Crane v. Gruenewald*, 120 N. Y. 274, 17 Am. St. Rep. 643; *Bloomer v. Dau*, 12 Mich. 522.

<sup>556</sup> *Crane v. Gruenewald*, 120 N. Y. 274, 17 Am. St. Rep. 643; *Brown v. Blydenburgh*, 7 N. Y. 141, 57 Am. Dec. 506. See *Hatfield v. Reynolds*, 34 Barb. (N. Y.) 612.

installments of interest paid to him on the debt, and for several years the agent had made and collected loans for the principal, though sometimes the mortgages and notes for which the loans were given were not sent to the agent by the principal for cancellation until after the amount due had been collected and remitted, and where there was evidence of an express contract of agency, the agent was authorized to receive money paid in settlement of such loan, though at the time of the payment the note and mortgage were in the possession of the principal.<sup>557</sup>

Collections made by an agent authorized to collect certain notes are binding on the principal, though the payments were in form made on substituted notes which the agent had obtained from the debtor on a representation that the originals were lost.<sup>558</sup>

(e) **Not implied from the receipt of interest.**—The mere fact that an agent is authorized to receive the interest, when due, on a demand of his principal, does not give him implied power to collect or receive payment of the principal sum when due, where the evidence of the indebtedness or securities are not or have not been in his possession, or where he has possession but unindorsed.<sup>559</sup> Thus, where the payee of a promissory note, payable to her order, delivered it, unindorsed, to an agent, with authority to receive the interest

<sup>557</sup> *Hare v. Bailey*, 73 Minn. 409.

<sup>558</sup> *Hill v. Bess* (Tex. Civ. App.) 40 S. W. 202.

<sup>559</sup> *Bagnell v. Walker*, 65 Ark. 325; *Barstow v. Stone*, 10 Colo. App. 396; *Cooley v. Willard*, 34 Ill. 68, 85 Am. Dec. 296; *Madison v. Cabalek*, 86 Ill. App. 450; *Bromley v. Lathrop*, 105 Mich. 492; *Bacon v. Pomeroy*, 118 Mich. 145; *Wilson v. Campbell*, 110 Mich. 580; *Terry v. Durand Land Co.*, 112 Mich. 665; *Trull v. Hammond*, 71 Minn. 172; *Burchard v. Hull*, 71 Minn. 430; *Dexter v. Morrow*, 76 Minn. 413; *White v. Madigan*, 78 Minn. 286; *Heffernan v. Boteler*, 87 Mo. App. 316; *Richards v. Waller*, 49 Neb. 639; *Chandler v. Pyatt*, 53 Neb. 786; *Campbell v. O'Connor*, 55 Neb. 638; *Thompson v. Kyner*, 53 Neb. 625, 74 N. W. 52; *Walsh v. Peterson*, 59 Neb. 645; *Dewey v. Bradford* (Neb.) 89 N. W. 249; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Brewster v. Carnes*, 103 N. Y. 556; *Double-day v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502; *Harrison v. Burlingame*, 17 N. Y. St. Rep. 909; *Corey v. Hunter*, 10 N. D. 5; *Hitchcock v. Kelley*, 18 Ohio Circ. R. 808, 4 Ohio Circ. Dec. 180.

thereon, and to take a new note in renewal, with an indorser; and the maker paid the principal and interest to the agent, who absconded with the principal, it was held that the agent was not authorized to receive the principal, and the payment thereof to him did not prevent a recovery upon the note for the amount of the principal.<sup>560</sup> A custom on the part of a mortgagee to send the interest coupons to a mortgage company for collection does not constitute such company agent to receive payment of the principal debt.<sup>561</sup> But where an agent, who invests for his principal in an outstanding bond and mortgage, is permitted to collect the interest thereon and to retain possession and control of the security, he has apparent authority after maturity to receive payment thereof, and his principal is estopped from denying that he possessed such authority.<sup>562</sup> So where it has been the course of business for an agent to receive interest on a note without production of the coupons, to the knowledge of the owner of the note, and such agent has held himself out as the owner of the note, and the holder of the note knows that at maturity of the note such agent will, without revealing the facts as to ownership, receive the amount of the principal, and he fails to notify those who are bound to pay it that future payments must not be made to such agent, he will be bound by a payment in good faith to such agent.<sup>563</sup>

§ 275. What agent may receive in payment.

(a) **In general—Money only.**—As a general rule, where an agent is authorized to collect or receive payment of a debt or demand due to his principal, such authority is limited by general law to receiving for such debt or demand that only which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par; and unless specially authorized so to do, the agent cannot take in payment, horses, wheat, or property of

<sup>560</sup> Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502.

<sup>561</sup> Wilson v. Campbell, 110 Mich. 580. And see cases cited *supra*.

<sup>562</sup> Central Trust Co. v. Folsom, 167 N. Y. 285, reversing 38 App. Div. 295.

<sup>563</sup> Fowle v. Outcalt, 64 Kan. 352.

any kind except money.<sup>564</sup> Thus if a master sends his servant to receive money, and the servant, instead of money, takes a bill, and the master, as soon as told thereof, disagrees, he is not bound by the payment.<sup>565</sup> If the principal instructs his agent to receive payment only in a particular kind of currency, he has no authority to receive any other kind, and he will be responsible for any loss resulting from his receiving another kind, although the latter was the only currency cir-

<sup>564</sup> Ward v. Smith, 7 Wall. (U. S.) 447, Wamb. Cas. 339; Ward v. Evans, 2 Ld. Raym. 928, Wamb. Cas. 87; Bridges v. Garrett, L. R. 5 C. P. 454; Powell's Adm'r v. Henry, 27 Ala. 612; Taylor v. Robinson, 14 Cal. 396; Rodgers v. Peckham, 120 Cal. 238; Mudgett v. Day, 12 Cal. 139; Padfield v. Green, 85 Ill. 529; Mathews v. Hamilton, 23 Ill. 470; Cooney v. United States Wringer Co., 101 Ill. App. 468; Kirk v. Hlatt, 2 Ind. 322; Corning v. Strong, 1 Ind. 197; Robinson v. Anderson, 106 Ind. 152; McCormick v. Walter A. Wood M. & R. Mach. Co., 72 Ind. 518; Carver v. Carver, 53 Ind. 241; Graydon v. Patterson, 13 Iowa, 256, 81 Am. Dec. 432; Aultman v. Lee, 43 Iowa, 404; British & Am. Mortg. Co. v. Tibballs, 63 Iowa, 468; McCarver v. Nealey, 1 Iowa, 360; Martin v. United States, 2 T. B. Mon. (Ky.) 89, 15 Am. Dec. 129; Waterhouse v. Citizens' Bank, 25 La. Ann. 77; Kendall v. Wade, 5 La. Ann. 157; Kent v. Ricards, 3 Md. Ch. 392; Pitkin v. Harris, 69 Mich. 133; Hurley v. Watson, 68 Mich. 531; Woodbury v. Larned, 5 Minn. 339; Gilbert v. Garber, 62 Neb. 464; Cram v. Sickel, 51 Neb. 828, 66 Am. St. Rep. 478; Moore v. Pollock, 50 Neb. 900; Dixon v. Guay, 70 N. H. 161; Fellows v. Northrup, 39 N. Y. 122; Williams v. Johnston, 92 N. C. 532, 53 Am. Rep. 428; McCulloch v. McKee, 16 Pa. 289; Fifth Nat. Bank v. Ashworth, 123 Pa. 212, 2 L. R. A. 491; Tankersley v. Anderson, 4 Desaus. (S. C.) 44; Baldwin v. Merrill, 8 Humph. (Tenn.) 132; Cooney v. Wade, 4 Humph. (Tenn.) 444, 40 Am. Dec. 657; Rodgers v. Bass, 46 Tex. 505; Rhine v. Blake, 59 Tex. 240; Wright v. Daily, 26 Tex. 730; Robson v. Watts, 11 Tex. 764; Harper v. Harvey, 4 W. Va. 539; Mann v. Robinson, 19 W. Va. 49, 42 Am. Rep. 740. Compare Knowles v. Street, 87 Ala. 357; Griffin v. McKnight, 116 Mich. 468 (where evidence was held sufficient to go to the jury on the question of the agent's authority to accept a mortgage in payment of the contract in suit). Where an agent, with express authority to collect, and apparent authority to manage the manner of collection, receives money in payment in lieu of a royalty payable in pulp, his principal is bound by the payment. Cushman v. Somers, 62 Vt. 132, 22 Am. St. Rep. 92.

<sup>565</sup> Ward v. Evans, 2 Salk. 442, Wamb. Cas. 87.

culating at the time and place he received it.<sup>566</sup> Nor can such an agent set off, or allow the debtor to set off against the principal's demand, a debt due by the agent to the debtor, unless specially authorized to do so.<sup>567</sup> Thus an agent with authority only to collect rents cannot bind his principal by accepting as payment a credit on a personal indebtedness of the agent to the tenant.<sup>568</sup>

Where bank notes or other forms of paper currency, not a legal tender, are in general circulation as money, and are commonly received and paid out in business transactions as such, on a par with coin, or are not materially depreciated, and the fact is known to the principal when he places the claim in the agent's hands for collection, an authority to receive such notes or currency in payment of the demand may be implied, unless the principal expressly forbids it.<sup>569</sup> But if such fact is not known to the principal or he does not authorize it, a payment in such currency is not binding on him.<sup>570</sup> Questions of this sort especially arose during and after the late Civil War, in reference to the receipt of Confederate notes in payment of debts or demands. Some of the cases on this subject hold that if, at the time and place of payment, such notes were in common circulation as money, and were received in business transactions on a par with money, the agent's authority to receive them, unless expressly forbidden, may be implied, although the principal resided in

<sup>566</sup> *Mangum v. Ball*, 43 Miss. 288.

<sup>567</sup> *Bridges v. Garrett*, L. R. 5 C. P. 454; *Coupe v. Collyer*, 62 Law T. (N. S.) 927; *Wilkinson v. Holloway*, 7 Leigh (Va.) 277; *Scott v. Irving*, 1 Barn. & Adol. 605; *Sykes v. Giles*, 5 Mees. & W. 645; *Gullett v. Lewis*, 3 Stew. (Ala.) 23; *Cooney v. United States Wringer Co.*, 101 Ill. App. 468; *Hurley v. Watson*, 68 Mich. 531; *Greenwood v. Burns*, 50 Mo. 52; *McCormick v. Keith*, 8 Neb. 143; *Western White Bronze Co. v. Portrey*, 50 Neb. 801; *Coffman v. Hampton*, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511; *Irwin v. Workman*, 3 Watts (Pa.) 357; *Union School Furniture Co. v. Mason*, 3 S. D. 147; *Stewart v. Woodward*, 50 Vt. 78, 28 Am. Rep. 488.

<sup>568</sup> *Stetson v. Briggs*, 114 Cal. 511.

<sup>569</sup> *Governor v. Carter*, 10 N. C. (3 Hawks) 328, 14 Am. Dec. 588; *Robinson v. International L. Assur. Soc.*, 42 N. Y. 54; *Rodgers v. Bass*, 46 Tex. 505.

<sup>570</sup> *Graydon v. Patterson*, 13 Iowa, 256, 81 Am. Dec. 432.



a state or country without the Confederacy.<sup>571</sup> Other cases, however, hold that the agent has not such authority, unless it is expressly given to him.<sup>572</sup>

(b) **When may receive certificates of deposit.**—Where the agent, having authority to receive payment, is a bank of deposit, it is held that it may receive in payment its own certificates of deposit.<sup>573</sup> But a collecting agent has no authority to accept a savings bank deposit book in payment of a debt; and the principal may return it in a reasonable time.<sup>574</sup>

(c) **Cannot receive payment in notes and checks.**—So, in the absence of authority, or custom or usage, to that effect, an agent has no implied power to receive, in payment of a debt of his principal, a note of the debtor to himself<sup>575</sup> or to his principal;<sup>576</sup> nor a note or bond of a third person;<sup>577</sup> nor a

<sup>571</sup> *Robinson v. International L. Assur. Soc.*, 42 N. Y. 54; *Hale v. Wall*, 22 Grat. (Va.) 424; *Pidgeon v. Williams*, 21 Grat. (Va.) 251; *Atkin v. Mooney*, 61 N. C. (Phil.) 31; *Rodgers v. Bass*, 46 Tex. 505; *Westbrook v. Davis*, 48 Ga. 471; *Hendry v. Benlisa*, 37 Fla. 609, (where it was held that if at the time and place of payment in Confederate money, it was generally received in business transactions, and was in fact the current money of the country, an agent's authority to receive it, in the absence of directions to the contrary from a resident principal, will be presumed).

<sup>572</sup> *Harper v. Harvey*, 4 W. Va. 539; *Alley v. Rogers*, 19 Grat. (Va.) 366; *Fretz v. Stover*, 22 Wall. (U. S.) 198; *Waterhouse v. Citizens' Bank*, 25 La. Ann. 77; *Mangum v. Ball*, 43 Miss. 288; *Webster v. Whitworth*, 49 Ala. 201.

<sup>573</sup> *British & American Mortg. Co. v. Tibballs*, 63 Iowa, 468. And see *Poorman v. Woodward*, 21 How. (U. S.) 266.

<sup>574</sup> *Dixon v. Guay*, 70 N. H. 161.

<sup>575</sup> *Corning v. Strong*, 1 Ind. 197; *McCulloch v. McKee*, 16 Pa. 289; *Baldwin v. Tucker*, 23 Ky. L. R. 1538, 57 L. R. A. 451.

<sup>576</sup> *Miller v. Edmonston*, 8 Blackf. (Ind.) 291; *Holt v. Schneider*, 57 Neb. 523.

<sup>577</sup> *Langdon v. Potter*, 13 Mass. 319; *Smock v. Dade*, 5 Rand. (Va.) 639, 16 Am. Dec. 780; *Wilkinson v. Holloway*, 7 Leigh (Va.) 277; *Smith v. Lamberts*, 7 Grat. (Va.) 138; *Wiley v. Mahood*, 10 W. Va. 206; *Scully v. Dodge*, 40 Kan. 395; *Runyon v. Snell*, 116 Ind. 164, 9 Am. St. Rep. 839; *Robinson v. Anderson*, 106 Ind. 152. Compare *Nichols & Shepard Co. v. Hackney*, 78 Minn. 461, where an agreement by a general agent, with power to collect, with a debtor of the principal, to accept and receive the promissory note of a third person in payment of an indebtedness due the principal by

draft or order on a stranger,<sup>578</sup> or on himself.<sup>579</sup> Where an agent has, in a particular case, taken notes for rent, but it does not appear whether they were taken as security or as payment, the taking of such notes, with the knowledge of the principal, does not establish that the agent had authority to accept a note from another tenant in payment of rents.<sup>580</sup>

In the absence of express authority, or custom or usage, to the contrary, an agent to collect receives a check in payment at his own risk, and if it is for any reason dishonored he must bear the loss; but such a payment would be good if the check is duly honored, as that is equivalent to a cash payment.<sup>581</sup>

**§ 276. Implied powers of agent to collect.**

(a) **To receive part payment.**—An agent having authority to collect or receive payment of money due to his principal has also authority to receive part of such money to be applied on the whole amount due;<sup>582</sup> but not to receive part in satisfaction of the whole, as we shall see in a subsequent section.<sup>583</sup> He has not, however, authority to receive part payment in cash and part in merchandise, and a payment so

such debtor, was held valid and binding on the principal, if founded on a valuable consideration.

<sup>578</sup> *Drain v. Doggett*, 41 Iowa, 682; *McCarver v. Nealey*, 1 Iowa, 360; *Goldsborough v. Turner*, 67 N. C. 403.

<sup>579</sup> *Runyon v. Snell*, 116 Ind. 164, 9 Am. St. Rep. 839; *Robinson v. Anderson*, 106 Ind. 152; *Wilcox & W. Organ Co. v. Lasley*, 40 Kan. 521; *Farmers' & Drovers' Bank v. Bennett*, 20 Ky. L. R. 852.

<sup>580</sup> *Scully v. Dodge*, 40 Kan. 395. Compare *Robinson v. Nevada Bank*, 81 Cal. 106.

<sup>581</sup> *Bridges v. Garrett*, L. R. 5 C. P. 454; *Pape v. Westacott* [1894] 1 Q. B. 272, 63 Law J. Q. B. 222; *Broughton v. Silloway*, 114 Mass. 71, 19 Am. Rep. 312; *Taylor v. Wilson*, 11 Metc. (Mass.) 44; *Cooney v. United States Wringer Co.*, 101 Ill. App. 468. Such an agent cannot receive a check in lieu of cash. *Blumberg v. Life Interests & R. S. Corp.* [1897] 1 Ch. Div. 171, 66 Law J. Ch. 127. Or a check payable next day after the sale. *Hall v. Storrs*, 7 Wis. 253. Or a time check contrary to usual customs of merchants. *Harlan v. Ely*, 68 Cal. 522.

<sup>582</sup> *Pickett v. Bates*, 3 La. Ann. 627; *Whelan v. Reilly*, 61 Mo. 565; *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325.

<sup>583</sup> Post, § 277 (b).

made will be good as to the cash, but not as to the amount paid in merchandise.<sup>584</sup>

(b) **To give a discharge or receipt.**—An agent having authority to receive payment for his principal has authority, upon receipt of the money, to give to the debtor a receipt, release, or acquittance, whichever he may be entitled to in the particular case. A receipt in full from a general agent having authority to receive payment will be good in the absence of proof to the contrary.<sup>585</sup> Thus upon receipt of the amount due, he may give an acquittance therefor,<sup>586</sup> and where the debt is evidenced by notes or other written securities, upon the receipt of the money due thereon, he may surrender the securities to the debtor.<sup>587</sup> So he may give a discharge from a mortgage where the mortgagor has made due satisfaction thereof, according to authority given to the agent by the mortgagee.<sup>588</sup> Where a mortgagee wrote numerous letters to his alleged agents, in which he urged them to make collection of mortgage debts due him, and requested them to foreclose mortgages owned by him; and he knew that the mortgage in question was being foreclosed, and was expecting the proceeds to be remitted to him by the alleged agents, the latter were authorized to receipt for the amount due on the mortgage.<sup>589</sup>

(c) **To sue—Employ counsel.**—As a power to do a thing carries with it an implied power to do all other acts that may be necessary in carrying out the power originally granted, so where an agent is authorized to collect a debt due to his principal, if it becomes necessary he may institute a suit for that purpose and in connection therewith do all other acts that may be necessary in carrying on the suit and executing the judg-

<sup>584</sup> *Rhine v. Blake*, 59 Tex. 240.

<sup>585</sup> *Patterson v. Ackerson*, 2 Edw. Ch. (N. Y.) 427.

<sup>586</sup> *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311; *Gentry v. Connecticut Mut. L. Ins. Co.*, 15 Mo. App. 215; *Chilton v. Willford*, 2 Wis. 1, 60 Am. Dec. 399; *Hoster v. Lange*, 80 Mo. App. 234.

<sup>587</sup> *Padfield v. Green*, 85 Ill. 529; *Feldman v. Beier*, 78 N. Y. 293; *Harrison v. Burlingame*, 17 N. Y. St. Rep. 905.

<sup>588</sup> *Lindley v. Lupton*, 118 Mich. 466.

<sup>589</sup> *Alexander v. Alexander*, 8 Kan. App. 571.

ment.<sup>590</sup> Thus an agent having such authority may cause an attachment to issue to make effective the judgment which he has obtained, and to sign the necessary bond in his principal's name for that purpose,<sup>591</sup> or when necessary he has implied authority to indemnify the officer making a levy.<sup>592</sup> Authority to an agent to collect a certificate of deposit when due vests the agent with authority to procure a confession of judgment for his principal.<sup>593</sup> But he has no authority to direct what particular property shall be sold under his principal's execution.<sup>594</sup> Nor does the fact that the agent has collected on certain interest coupons give him authority to foreclose the mortgage which secures the principal debt.<sup>595</sup>

So as a necessary incident to his power to institute a suit for effecting the collection, or when otherwise necessary, he may employ counsel to bring and conduct it.<sup>596</sup> Thus the cashier of a bank, authorized by the directors to collect a claim, consulted an attorney. Subsequently he wrote him

<sup>590</sup> *Welle's Case*, 7 Ct. Cl. 535; *Joyce v. Duplessis*, 15 La. Ann. 242, 77 Am. Dec. 185; *Moore v. Hall*, 48 Mich. 145; *Scott v. Elmendorf*, 12 Johns. (N. Y.) 317; *Bush v. Miller*, 13 Barb. (N. Y.) 481; *McMinn v. Richtmyer*, 3 Hill (N. Y.) 236; *Davis v. Waterman*, 10 Vt. 526, 33 Am. Dec. 216. And see *Curtis v. Cutler*, 76 Fed. 16.

<sup>591</sup> *Merrick v. Wagner*, 44 Ill. 266; *Alexander v. Burns*, 6 La. Ann. 704; *Trowbridge v. Welr*, 6 La. Ann. 706; *Fulton v. Brown*, 10 La. Ann. 350; *De Poret v. Gusman*, 30 La. Ann. 930.

<sup>592</sup> *Clark v. Randall*, 9 Wis. 135, 76 Am. Dec. 252; *Swartz v. Morgan*, 163 Pa. 195, 43 Am. St. Rep. 786; *Schoregge v. Gordon*, 29 Minn. 367; *Snow v. Hix*, 54 Vt. 478.

<sup>593</sup> *Briggs v. Yetzer*, 103 Iowa, 342, and the fact that the principal had instructed the agent to invest the proceeds of the certificate, when collected, in the stock of a building association of which the agent was secretary, and that the agent had mailed the stock to the principal before he had collected the certificate, and shortly before the bank issuing it went into the hands of a receiver, does not defeat the agent's right to procure a confession of judgment.

<sup>594</sup> *Averill v. Williams*, 4 Denio (N. Y.) 295, 47 Am. Dec. 252; *Welsh v. Cochran*, 63 N. Y. 185; *Oestrich v. Gilbert*, 9 Hun (N. Y.) 244.

<sup>595</sup> *Corey v. Hunter*, 10 N. D. 5.

<sup>596</sup> *Ryan v. Tudor*, 31 Kan. 366; *Woerman v. Baas*, 35 N. Y. St. Rep. 276; *Davis v. Waterman*, 10 Vt. 526, 33 Am. Dec. 216; *Swartz v. Morgan*, 163 Pa. 195, 43 Am. St. Rep. 786; *Jones' Adm'r v. Jones*, 19 Ky. L. R. 129, 39 S. W. 251; *Strong v. West*, 110 Ga. 382.

that acting under the opinion of the directors, he had ordered the papers turned over to him, and requested that he act without consulting the bank further. It was held that such attorney became the special agent of the bank, with general power for the collection of the claim, and not merely the agent of the cashier.<sup>597</sup>

(d) **To sue in his own name—When.**—Where an agent is employed to collect a negotiable bill or note indorsed in blank or to him or payable to bearer, and it becomes necessary to bring a suit for the collection of the same, he may bring such suit in his own name.<sup>598</sup> The indorsement for such a purpose passes the legal title in trust, and the agent's authority to collect continues notwithstanding the death of the owner of the bill or note.<sup>599</sup> The above rule is based upon the peculiar character of negotiable instruments; when payable to bearer or indorsed in blank they pass from hand to hand as freely as currency, and one who has such an instrument in his possession, in the absence of proof to the contrary, is considered the owner thereof, and hence may sue thereon as if he were such.

If, however, the negotiable instrument is not payable to bearer or order, and is not indorsed, the agent has no authority to bring a suit in his own name for its collection.<sup>600</sup>

(e) **To receive declarations.**—An agent authorized to receive payment of a debt due to his principal has also implied authority to receive such declarations as may accompany the payment.<sup>601</sup>

#### § 277. Powers not implied.

(a) **To receive payment before due.**—An agent having authority to collect or receive payment of a debt due to his prin-

<sup>597</sup> *Dingley v. McDonald*, 124 Cal. 682.

<sup>598</sup> *Nisbet v. Lawson*, 1 Ga. 275; *Hickok v. Labussier*, *Morris* (Iowa) 156; *Moore v. Hall*, 48 Mich. 143; *Boyd v. Corbitt*, 37 Mich. 52; *Brigham v. Gurney*, 1 Mich. 349; *Hazewell v. Coursen*, 13 Jones & S. (N. Y.) 22; *Orr v. Lacy*, 4 McLean, 248, Fed. Cas. No. 10,589.

<sup>599</sup> *Moore v. Hall*, 48 Mich. 143; *Boyd v. Corbitt*, 37 Mich. 52; *Brigham v. Gurney*, 1 Mich. 349.

<sup>600</sup> *Padfield v. Green*, 85 Ill. 529.

<sup>601</sup> *Davis v. Amy*, 2 Grant, Cas. (Pa.) 412; *Peters v. Stewart*, 2 Misc. (N. Y.) 357.

principal has no implied authority to receive either the interest or the principal before it is due, and payment made to him by the debtor before that time is at the latter's risk,<sup>602</sup> unless there is a known usage of trade or course of business in a particular employment, or habit of dealing between the parties, giving the agent such authority.<sup>603</sup> Thus an agent employed to collect loans has no authority to contract with a borrower, before the debt is due, for the release by the principal of a portion of the land mortgaged to secure the debt.<sup>604</sup> Nor has the agent implied power to receive payment, on behalf of his principal, of an amount which at the time the debtor has no right under his contract to pay.<sup>605</sup> But where an agent is empowered to collect a note which matured in five years, with a privilege to the maker to pay after three years if he chose, he does not exceed his authority by receiving payment after three years.<sup>606</sup> And so where on a prior occasion, the principal authorized the agent to accept part of a

<sup>602</sup> *Parnther v. Gaitskell*, 13 East, 432; *Campbell v. Hassel*, 1 Starkie, 233; *Little Rock & Ft. S. R. Co. v. Wiggins*, 65 Ark. 385; *Lester v. Snyder*, 12 Colo. App. 351; *Madison v. Cabalek*, 86 Ill. App. 450; *Williams v. Pelley*, 96 Ill. App. 346; *Martin v. United States*, 2 T. B. Mon. (Ky.) 89, 15 Am. Dec. 129; *Schenk v. Dexter*, 77 Minn. 15; *Park v. Cross*, 76 Minn. 187, 77 Am. St. Rep. 630; *City Nat. Bank v. Goodloe-McClelland Com. Co.*, 93 Mo. App. 123; *Chandler v. Pyott*, 53 Neb. 786; *Walsh v. Peterson*, 59 Neb. 645; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502; *Fellows v. Northrup*, 39 N. Y. 121; *Schermerhorn v. Farley*, 58 Hun (N. Y.) 66; *Mann v. Robinson*, 19 W. Va. 49, 42 Am. Rep. 740. But see *Thornton v. Lawther*, 169 Ill. 228 (where it appeared that the agent had charge of the principal's business, and had full authority to receive payment on mortgage loans when they matured, or to extend the time of payment; and the scope of his authority was not limited by any definite writing or language; it was held that the agent had implied power to receive payment of a mortgage before maturity); *Springfield Sav. Bank v. Kjaer*, 82 Minn. 180.

<sup>603</sup> *Thompson v. Elliott*, 73 Ill. 221 (the note in this case was payable on or before); *Smith v. Hall*, 19 Ill. App. 17; *Bliss v. Cutter*, 19 Barb. (N. Y.) 9.

<sup>604</sup> *Sweedlund v. Hutchinson*, 5 Kan. App. 880.

<sup>605</sup> *Dilenbeck v. Rehse*, 105 Iowa, 749.

<sup>606</sup> *Frost v. Fisher*, 13 Colo. App. 322.

debt before it was due, and it was paid, and credited by the principal, the debtor was warranted in believing that the agent was authorized to accept the balance before it was due.<sup>607</sup>

In a late Illinois case, it is held that as a general rule, in the payment before maturity of a debt secured or evidenced by a written instrument, the possession of such instrument by the alleged agent of the owner is indispensable evidence of his authority to receive payment thereon in order to enable the debtor paying to rely upon appearances of authority in the absence of an actual authority established.<sup>608</sup>

(b) **Nor to release or compound debt.**—We have seen in previous sections that an agent to collect or receive payment has no authority to receive such payment in anything but money, and that upon payment the agent may give receipts, etc.; from this it follows that such an agent has no authority, unless by special authority, to release or compound the debt except upon the receipt of payment in full, or some other authorized satisfaction of the debt.<sup>609</sup> Thus, a power of attorney does not authorize security to be discharged or postponed, except upon the collection of the debt, or in the fulfillment of some arrangement for its satisfaction, where the power was “to collect the debt due, arising from certain notes secured by a mortgage” upon certain lands, “to compromise and settle and arrange them, either in law or otherwise, as to

<sup>607</sup> *Harrison v. Legore*, 109 Iowa, 618.

<sup>608</sup> *Stockton v. Fortune*, 82 Ill. App. 272. And see *Thornton v. Lawther*, 169 Ill. 228.

<sup>609</sup> *Parrot v. Wells*, 2 Vern. 127; *Padfield v. Green*, 85 Ill. 529; *McHany v. Schenk*, 88 Ill. 357; *Nolan v. Jackson*, 16 Ill. 272; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199; *Martin v. United States*, 2 T. B. Mon. (Ky.) 89, 15 Am. Dec. 129; *Eaton v. Knowles*, 61 Mich. 625; *Baird v. Randall*, 58 Mich. 175; *Lindley v. Lupton*, 118 Mich. 466; *Hoster v. Lange*, 80 Mo. App. 234; *Brown v. Massachusetts Mut. L. Ins. Co.*, 59 N. H. 298, 47 Am. Rep. 205; *Sier v. Bache*, 7 Misc. (N. Y.) 165; *De Mets v. Dagron*, 53 N. Y. 635; *Herring v. Hottendorf*, 74 N. C. 588; *First Nat. Bank v. Prior*, 10 N. D. 146; *Deacon v. Greenfield*, 141 Pa. 467; *Tompkins Machinery & Imp. Co. v. Peter*, 84 Tex. 627; *McAlpin v. Cassidy*, 17 Tex. 449; *Corbet v. Waller*, 27 Wash. 242; *Chilton v. Willford*, 2 Wis. 1, 60 Am. Dec. 399.

said attorney should seem fit," and "upon the receipt of such debts, dues, or sums of money, acquittances and other sufficient discharges to make and give."<sup>610</sup> Nor can such an agent exchange the debt for a debt due by himself to the debtor.<sup>611</sup> Nor can an agent who holds a note for collection, without authority from the holder, agree to discharge one of the joint makers, upon payment by him of a part of the sum due.<sup>612</sup> Nor has such an agent power to release one of two joint debtors in consideration of the other giving security for the debt.<sup>613</sup>

(c) **Nor to indorse check or note.**—An agent having authority to collect accounts and receive checks and commercial paper payable to his principal, in payment, has no implied power to indorse such checks or paper in the name of the principal, as such indorsement is not a necessary incident of the collection of accounts.<sup>614</sup> Thus a drummer or commercial traveler, employed to sell and take orders for goods, to collect accounts, and receive money and checks payable to the

<sup>610</sup> *Chilton v. Willford*, 2 Wis. 1, 60 Am. Dec. 399.

<sup>611</sup> *Cooney v. Wade*, 4 Humph. (Tenn.) 444, 40 Am. Dec. 657; *Miles v. Richwine*, 2 Rawle (Pa.) 199, 19 Am. Dec. 638; *Chambers v. Miller*, 7 Watts (Pa.) 63; *Gullett v. Lewis*, 3 Stew. (Ala.) 23; *Craig v. Ely*, 5 Stew. & P. (Ala.) 354; *Cost v. Genette*, 1 Port. (Ala.) 212; *Cooney v. United States Wringer Co.*, 101 Ill. App. 468; *McCarver v. Nealey*, 1 Iowa, 360; *Hurley v. Watson*, 68 Mich. 531; *Merchants' Mut. Life Ins. Co. v. Excelsior Ins. Co.*, 4 Mo. App. 578; *Greenwood v. Burns*, 50 Mo. 52; *McAlpin v. Cassidy*, 17 Tex. 449; *Wilkinson v. Holloway*, 7 Leigh (Va.) 277; *Wiley v. Mahood*, 10 W. Va. 206.

<sup>612</sup> *Torbit v. Heath*, 11 Colo. App. 492.

<sup>613</sup> *Cram v. Sickel*, 51 Neb. 828, 66 Am. St. Rep. 478; *Smith v. Jones*, 47 Neb. 108, 53 Am. St. Rep. 519; *Moore v. Pollock*, 50 Neb. 900.

<sup>614</sup> *Deering v. Kelso*, 74 Minn. 41, 73 Am. St. Rep. 324; *Graham v. United States Sav. Inst.*, 46 Mo. 186; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113; *Sinclair v. Goodell*, 93 Ill. App. 592; *Millard v. Nat. Bank of the Republic*, 10 McArthur (D. C.) 54; *Ames v. Drew*, 31 N. H. 475; *Holtsinger v. National Corn Exch. Bank*, 6 Abb. Pr. (N. S., N. Y.) 292; *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404; *Pickle v. Muse*, 88 Tenn. 380, 17 Am. St. Rep. 900; *McClure v. Evartson*, 82 Tenn. 495; *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81; *Hogg v. Snaith*, 1 Taunt. 347, Wamb. Cas. 269.



order of his principal, is not, by implication, authorized to indorse his principal's name to such checks.<sup>615</sup> But if the agent is employed to collect such check or negotiable paper, the power to indorse it would necessarily follow.<sup>616</sup>

And where the agent is authorized to take a note in payment in the name of the principal, he has no implied authority to dispose of it,<sup>617</sup> or having delivered it to his principal to receive payment thereof.<sup>618</sup>

(d) **Nor to make a warranty.**—An agent to collect moneys is not impliedly authorized to make a warranty in consideration of a payment on a former contract.<sup>619</sup>

(e) **Nor to extend time of payment.**—So an agent authorized to collect or receive payment has no authority to extend the time of payment, unless he is specially authorized to do so.<sup>620</sup> Thus, where a person is employed merely as an agent to collect a promissory note, he cannot, without the consent of his principal, make a contract with the principal maker of the note extending the time of its payment.<sup>621</sup>

(f) **Nor to sell or transfer the claim.**—An agent employed to collect a note or other claim cannot sell or otherwise transfer the same, without the owner's consent.<sup>622</sup> Thus if the agent holds a note for collection, he cannot transfer title

<sup>615</sup> *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81.

<sup>616</sup> *Gate City Bldg. & Loan Ass'n v. National Bank of Commerce*, 126 Mo. 82, 27 L. R. A. 401.

<sup>617</sup> *Hays v. Lynn*, 7 Watts (Pa.) 524.

<sup>618</sup> *Draper v. Rice*, 56 Iowa, 114, 41 Am. Rep. 88.

<sup>619</sup> *Russell v. Newdigate*, 19 Ky. L. R. 1965, 44 S. W. 973.

<sup>620</sup> *Lockhart v. Wyatt*, 10 Ala. 231, 44 Am. Dec. 481; *Low v. Warden*, 77 Cal. 94; *Lawrence v. Johnson*, 64 Ill. 351; *Gerrish v. Maher*, 70 Ill. 470; *Chappel v. Raymond*, 20 La. Ann. 277; *Wheeler v. Benton*, 67 Minn. 293; *Hutchings v. Munger*, 41 N. Y. 155; *Ritch v. Smith*, 82 N. Y. 627; *Behrns v. Rogers* (Tex. Civ. App.) 40 S. W. 419; *Mallory v. Mariner*, 15 Wis. 177. Compare *Hurd v. Marple*, 2 Ill. App. 402; *Kane v. Cortesy*, 100 N. Y. 132.

<sup>621</sup> *Lawrence v. Johnson*, 64 Ill. 351.

<sup>622</sup> *Texada v. Beaman*, 6 La. 84, 25 Am. Dec. 204; *Hardesty v. Newby*, 28 Mo. 567, 75 Am. Dec. 137; *Quigley v. Mexico Southern Bank*, 80 Mo. 289, 50 Am. Rep. 503; *Smith v. Johnson*, 71 Mo. 382; *Goodfellow v. Landis*, 36 Mo. 168; *Stonington Sav. Bank v. Davis*, 14 N. J. Eq. 286; *Garrigue v. Loescher*, 3 Bosw. (N. Y.) 578; *Rodgers v. Bass*, 46 Tex. 505.

thereto by indorsement in the owner's name and delivery without the owner's consent, even to an innocent purchaser.<sup>623</sup> Nor can he exchange, sell, or assign the security for the debt which he is employed to collect.<sup>624</sup> Where a matured negotiable promissory note is delivered by the payee without indorsement to an agent for collection, the possession of the note by the latter will not raise a presumption that he has authority to assign the same, and the burden of proving an assignment by authority of the payee rests upon the party claiming under the alleged assignment.<sup>625</sup> Where one to whom a note is made payable as agent has authority merely to collect the note and distribute the money, he cannot exchange it for his note held by one who has notice of the extent of his authority, though he represents that he has settled with his principal, and is in fact the owner of the note.<sup>626</sup>

**(g) Nor to convert the proceeds collected.**—Where an agent is authorized to collect and deliver money to his principal, it is his duty upon receiving the same to transmit it to his principal without dealing with it in any way not authorized by the principal; and if he enters into any contract concerning it or exchanges it for other money with third persons, the principal may treat his act as a conversion and bring suit against him to recover the amount so converted.<sup>627</sup> And in such a case the burden is on the agent to show that there was no breach of duty on his part, and this is ordinarily a question of mixed law and fact.<sup>628</sup> An agent cannot sell bonds, which he has taken in payment, for his principal.<sup>629</sup> Nor does a mere agency to collect a particular claim authorize

<sup>623</sup> *Quigley v. Mexico Southern Bank*, 80 Mo. 289, 50 Am. Rep. 503. See *Goodfellow v. Landis*, 36 Mo. 168; *Smith v. Johnson*, 71 Mo. 382.

<sup>624</sup> *Hakes v. Myrick*, 69 Iowa, 189; *Ames v. Drew*, 31 N. H. 475; *McHany v. Schenk*, 88 Ill. 357.

<sup>625</sup> *Hardesty v. Newby*, 28 Mo. 567, 75 Am. Dec. 137.

<sup>626</sup> *Farmers' & Drovers' Bank v. Bennett*, 20 Ky. L. R. 852, 47 S. W. 623.

<sup>627</sup> *Darling v. Younker*, 37 Ohio St. 487, 41 Am. Rep. 532; *Kent v. Bornstein*, 94 Mass. 342; *Hill v. Van Duzer*, 111 Ga. 867; *Greenwald v. Metcalf*, 28 Iowa, 363.

<sup>628</sup> *Darling v. Younker*, 37 Ohio St. 487, 41 Am. Rep. 532.

<sup>629</sup> *Hussey v. Crass* (Tenn. Ch. App.) 53 S. W. 986.

the agent to agree that the proceeds thereof shall be applied to a debt due by his principal.<sup>630</sup> Nor does a power to collect imply a power to reloan the money after it has been collected, and such reloaning may be considered as a conversion by the agent.<sup>631</sup>

#### VIII. OF AGENT'S AUTHORITY TO SETTLE.

##### § 278. In general—Implied power.

An agent having authority to settle must necessarily have rather wide powers in exercising his discretion in the matter; and for this reason, in the absence of instructions or authority to the contrary, he has implied power to do all things that are necessary for effecting the settlement.<sup>632</sup> Thus, where an agent is employed to effect a settlement of an attachment suit, he is authorized to execute a note and make his principal liable to the indorsers, in order to raise money for that purpose;<sup>633</sup> or where the debt is due to his principal, he may agree with the debtor to accept, and receive in payment thereof, the promissory note of a third person, if such agreement is given for a valuable consideration.<sup>634</sup> But he cannot accept a note in settlement and indorse it so as to make his principal liable thereon.<sup>635</sup>

So he may receive personal property in effecting the settlement,<sup>636</sup> but not more than is necessary to satisfy the debt.<sup>637</sup> And where his authority is "to finish all the principal's unsettled business," he has power to take possession, in the name

<sup>630</sup> Hill v. Van Duzer, 111 Ga. 367.

<sup>631</sup> Haynes v. Carpenter, 86 Mo. App. 30.

<sup>632</sup> Hagerman v. Bates, 24 Colo. 71; New York P. & N. R. Co. v. Bates, 68 Md. 184; Hawkins v. Avery, 32 Barb. (N. Y.) 551; Smith v. Cantrel (Tex. Civ. App.) 50 S. W. 1081; Nickles v. Wells, 2 Utah, 167. But a power to settle does not include a power to sell slaves. Dearing v. Lightfoot, 16 Ala. 28. Nor to pledge the principal's property as a security for a debt. Swett v. Brown, 5 Pick. (Mass.) 178.

<sup>633</sup> Tanner v. Hastings, 2 Ill. App. 283.

<sup>634</sup> Nichols & Shepard Co. v. Hackney, 78 Minn. 461.

<sup>635</sup> Essick v. Buckwalter (Pa.) 16 Atl. 849.

<sup>636</sup> Oliver v. Sterling, 20 Ohio St. 391.

<sup>637</sup> Pollock v. Cohen, 32 Ohio St. 514.

of the principal, of lands to which the latter has a claim.<sup>638</sup> He may likewise allow credits where it is necessary to bring about a settlement.<sup>639</sup> And where he has power "to acknowledge or contest any claim," and "to defend, compromise, or settle any suit," it includes power to appeal from a judgment in the suit.<sup>640</sup>

But the agent can in no case extend his powers beyond the limits authorized and include the settlement of matters not placed in his hands for that purpose;<sup>641</sup> nor can he agree upon a method of settlement which is unreasonable and unusual in its terms, and unfair.<sup>642</sup> Where a settlement is made by a special agent, which is not within the scope of his authority, it is not binding on the principal.<sup>643</sup>

#### § 279. Cannot assign claim.

Although the agent may use his discretion in effecting the settlement, yet it does not authorize him to exercise those powers with any one but the person with whom the settlement is to be made; the words "for settlement" restrict the authority of such an agent to a power to settle these demands with the persons from whom they are due, and he cannot assign them to another for that purpose, or to a surety of the principal for indemnity;<sup>644</sup> nor can he relinquish them.<sup>645</sup> Nor can an agent authorized to effect a settlement sell the bonds which he has taken in settlement.<sup>646</sup>

#### § 280. Cannot submit to arbitration.

Nor can such an agent, in the absence of express or implied authority, submit his principal's claim to arbitration.

<sup>638</sup> *Chiles v. Stephens*, 3 A. K. Marsh. (Ky.) 340.

<sup>639</sup> *Anderson v. Coonley*, 21 Wend. (N. Y.) 279.

<sup>640</sup> *Lowrey v. Bates*, 26 Misc. 407, 56 N. Y. Supp. 197.

<sup>641</sup> *Hartford F. Ins. Co. v. Smith*, 3 Colo. 422; *Chilton v. Willford*, 2 Wis. 1, 60 Am. Dec. 399; *Melcher v. Exchange Bank*, 85 Mo. 362; *Congar v. Galena & C. U. R. Co.*, 17 Wis. 477.

<sup>642</sup> *City of New York v. Du Bois*, 86 Fed. 889.

<sup>643</sup> *Baldwin Fertilizer Co. v. Thompson*, 106 Ga. 480.

<sup>644</sup> *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612; *Hannon v. Houston*, 18 Kan. 561.

<sup>645</sup> *Welch v. McKenzie*, 66 Ark. 251.

<sup>646</sup> *Hussey v. Crass* (Tenn. Ch. App.) 53 S. W. 986.

His position in such cases is one of personal trust, and he is employed only by reason of the faith the principal has in his ability to bring about a settlement of the matter; for this reason he cannot delegate his powers to another or others, and if he does so such award of arbitration will not be binding on his principal.<sup>647</sup> Thus, where a power of attorney is given by a plaintiff in a pending suit, which empowered the agent to carry on and conduct to final consummation or to compromise the case, and all damages or demands therein claimed in such manner and on such terms as to him might seem expedient, it does not authorize the agent to withdraw the litigation from the court in which it is pending, and by agreement with the defendants to create a special tribunal to determine the rights of the parties.<sup>648</sup> A factor cannot bind his principal by submitting to arbitration a claim for damages arising out of an alleged breach of an implied warranty of the quality of the thing sold.<sup>649</sup> But it has been held that although an authority "to settle" does not imply a power to submit to arbitration, yet if an agent of an underwriter, empowered to settle losses, has been in the habit of settling them by arbitration, and losses so settled have been paid by his principal without objection, it will be presumed that an authority to submit to arbitration was intended.<sup>650</sup>

If, however, the award is not taken as final, but merely as an opinion, the agent may thus refer the matters to third parties. Where a power is given to settle a claim, the mode is discretionary, and "taking the opinion of men who are presumed to be intelligent and impartial is only a mode of settling and adjusting" the claim. The agent adopts the decision as his own judgment and the terms become his.<sup>651</sup>

<sup>647</sup> *Huber v. Zimmerman*, 21 Ala. 488, 56 Am. Dec. 255; *Scarborough v. Reynolds*, 12 Ala. 252; *Michigan Cent. R. Co. v. Gougar*, 55 Ill. 503; *McPherson v. Cox*, 86 N. Y. 472; *O'Regan v. Quebec & Gulf Ports S. S. Co.*, 19 New Br. 528.

<sup>648</sup> *New York v. Du Bois*, 86 Fed. 889.

<sup>649</sup> *Carnochan v. Gould*, 1 Bailey (S. C.) 179, 19 Am. Dec. 668.

<sup>650</sup> *Goodson v. Brooke*, 4 Camp. 163.

<sup>651</sup> *Hine v. Stephens*, 33 Conn. 504. The court seemed inclined to the opinion that the selectmen of a town may submit to arbitration a claim for damages against the town.

**§ 281. Must settle on the principal's behalf.**

Whatever settlement is made by the agent must be made on behalf of, and for the benefit of, the principal. Although he may exercise his discretion it must be exercised for the best interests of his principal, and he cannot enter into a settlement that will enure to his own or another's benefit alone.<sup>652</sup> Nor can he effect a settlement that would discharge his principal's claim without receiving any or full consideration therefor.<sup>653</sup>

**IX. OF AGENT'S AUTHORITY TO BORROW OR LEND MONEY.****§ 282. In general.**

Authority to borrow money for his principal may be expressly conferred upon the agent, or it may be given to him by implication as an incident to some other business which he is authorized to transact for his principal. If such authority is expressly given to him, the nature and extent of such power will be determined from the instrument conferring it; and when a power to borrow money has been conferred, it will also include, in the absence of instructions to the contrary, such other powers as are necessary and incidental to its exercise.<sup>654</sup> Thus, where a general power to borrow money has been given to an agent, it also includes authority to give to the lender such securities as are ordinarily given for a loan, such as bonds, notes, or other collaterals.<sup>655</sup> So where a principal executed a bond and mortgage, and gave therewith a certificate of no defense, and placed them in the hands of an agent to raise money thereon, he cannot deny the agent's authority to repledge the mortgage for a loan to pay the

<sup>652</sup> *Williams v. Johnston*, 94 N. C. 633; *McCormick v. Keith*, 8 Neb. 142.

<sup>653</sup> *Patterson v. Moore*, 34 Pa. 69; *Corr v. Greenfield*, 134 Pa. 503; *Scales v. Mount*, 93 Ala. 82. Compare *Baird v. Randall*, 58 Mich. 175; *Middlebury College v. Loomis*, 1 Vt. 189.

<sup>654</sup> *Humphrey v. Patrons' Mercantile Ass'n*, 50 Iowa, 607; *Spooner v. Thompson*, 48 Vt. 259.

<sup>655</sup> *Hatch v. Coddington*, 95 U. S. 48; *Burnet v. Boyd*, 60 Miss. 627; *Security Sav. Bank v. Smith*, 38 Or. 72, 84 Am. St. Rep. 756; *Richmond v. Voorhees*, 10 Wash. 316.

first loan, or defeat it because the agent misappropriated the funds.<sup>656</sup> And where an agent to obtain a loan, and give the security required, offers separately two bonds, which the lender considers insufficient, because the bondsmen are not good enough, he may deliver both, the lender being satisfied with the two.<sup>657</sup> But the agent cannot make use of any unusual or extraordinary means in borrowing the money for his principal;<sup>658</sup> nor can he make use of the power given to him to borrow money for himself;<sup>659</sup> nor, where authorized to procure a loan for his principal, can he pay it to one other than principal.<sup>660</sup> But it is of no consequence to the lender, in such cases, what becomes of the proceeds of the negotiations, where they are paid to the agent authorized to receive them.<sup>661</sup>

### § 283. When implied.

As the power to borrow money is one of which great abuse can be made, it will not be implied, in any case, unless the transaction of the business intrusted to him absolutely requires it. It does not afford a sufficient ground for the inference of such a power, to say the act proposed was convenient or advantageous, or more effectual in the transaction of the business provided for, but it must be practically indispensable to the execution of the duties really delegated, in order to justify its inference from the original employment.<sup>662</sup> No matter how general may be the powers given to the agent, unless the power to borrow is necessary or incidental in carrying out the original power it will not be in-

<sup>656</sup> *Hayes' Appeal*, 195 Pa. 177.

<sup>657</sup> *Young v. Union Sav. Bank & Trust Co.*, 23 Wash. 360.

<sup>658</sup> *Shaw v. Stone*, 1 Cush. (Mass.) 228.

<sup>659</sup> *Hubback v. Ross*, 96 Cal. 426.

<sup>660</sup> *Land Mortg. Inv. Ag. Co. v. Preston*, 119 Ala. 290.

<sup>661</sup> *Hamll v. American Freehold L. Mortg. Co.*, 127 Ala. 90.

<sup>662</sup> *Bryant v. Bank* [1893] App. Cas. 170; *Consolidated Nat. Bank v. Pacific Coast S. S. Co.*, 95 Cal. 1, 29 Am. St. Rep. 85; *Hurley v. Watson*, 68 Mich. 531; *New York Iron Mine v. First Nat. Bank*, 39 Mich. 644; *Bickford v. Menier*, 107 N. Y. 490; *Hearne v. Keene*, 5 Bosw. (N. Y.) 579; *Bank v. Bugbee*, 3 Keyes (N. Y.) 461; *Tucker v. Woolsey*, 64 Barb. (N. Y.) 142; *Collins v. Cooper*, 65 Tex. 460; *Heath v. Paul*, 81 Wis. 532.

ferred. And where it is proved that there was no necessity for an agent to borrow money to effect any purpose of the agency, it will not be presumed, without evidence, that it was proper or usual, in the ordinary course of the business in which he was employed, to borrow money without express authority.<sup>663</sup> Thus, where an agent is engaged in buying and shipping horses, he has authority to borrow money to purchase grain to feed the horses while awaiting shipment, since the exercise of such authority is necessary to the conduct of the business.<sup>664</sup> But "the facts that the agent had the management of defendant's store, kept the accounts thereof, was authorized to draw checks on the bank for the price of goods and expense of the store, to make over-drafts on that bank, and that the defendant sanctioned his mode of dealing with the bank, so far as he was apprised of it, were insufficient to prove that the agent had power to borrow money generally or of the plaintiff."<sup>665</sup> So a power of attorney authorizing the sale, transfer, or release of certain mortgages and indorsement and transfer of notes secured thereby, and the receiving payment of such notes and the giving acquittances therefor, does not authorize the borrowing of money.<sup>666</sup>

An agent who is the general business manager of a non-trading corporation has implied power to borrow money therefor in an amount not disproportionate to the volume of business transacted, when it appears that the principal had knowledge that the monthly receipts of the business were less than the expenses, and that it was necessary for the agent to maintain a bank account in the name of the corporation.<sup>667</sup>

<sup>663</sup> Consolidated Nat. Bank v. Pacific Coast S. S. Co., 95 Cal. 1, 29 Am. St. Rep. 85.

<sup>664</sup> Rider v. Kirk, 82 Mo. App. 120.

<sup>665</sup> Heath v. Paul, 81 Wis. 532; Consolidated Nat. Bank v. Pacific Coast S. S. Co., 95 Cal. 1, 29 Am. St. Rep. 85. And see Union Bank v. Mott, 39 Barb. (N. Y.) 180.

<sup>666</sup> Hawxhurst v. Rathgeb, 119 Cal. 531, 63 Am. St. Rep. 142. See Martin v. Great Falls Mfg. Co., 9 N. H. 51, Wamb. Cas. 290.

<sup>667</sup> Helena Nat. Bank v. Rocky Mountain Tel. Co., 20 Mont. 379, 63 Am. St. Rep. 628.



## § 284. Application of rules.

(a) **To cashiers of banks.**—In the case of the cashiers of banks, however, it is quite evident that they must have money in order to carry on the business of banking, and ordinarily such a cashier has power to borrow what money is necessary for that purpose; but such money can be borrowed for banking purposes only. The usage to allow him to borrow money has become so universal that he is presumed to have that authority unless notice to the contrary has been given to the person with whom he deals for the purpose of borrowing.<sup>668</sup>

(b) **To masters of ships.**—In the case of masters of ships, they have implied power to borrow money when it is absolutely necessary to do so in order to equip the vessel properly or to carry on the voyage. But such authority will be implied only in cases of imperative necessity; and in order to charge the owner for the money borrowed, the lender must ordinarily show that not only was the money borrowed for a proper purpose connected with the ship or her navigation, but that it was also so applied.<sup>669</sup> Thus the master of a vessel in a foreign port, where there is no consignee, if he have no other means, may pledge the credit of the owners of the vessel for money needed to pay the officers and crew, and the money so lent may be recovered of the owner, if the loan has been made in good faith and after due diligence to ascertain the necessity; and the questions of the necessity, good faith, and diligence are for the jury.<sup>670</sup> But in a late Maine case it has been held that a ship's husband has no right to borrow money on the vessel's account, unless expressly authorized by her owners, and

<sup>668</sup> *Crain v. First Nat. Bank*, 114 Ill. 516; *Barnes v. Ontario Bank*, 19 N. Y. 152; *Sturges v. Bank of Circleville*, 11 Ohio St. 153, 167; *Ridgway v. Farmers' Bank*, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

<sup>669</sup> *Stearns v. Doe*, 12 Gray (Mass.) 482, 74 Am. Dec. 608; *McCready v. Thorn*, 51 N. Y. 454; *Arthur v. Barton*, 6 Mees. & W. 138; *Thacker v. Moates*, 1 Moody & R. 79; *Bogle v. Atty. Gow*, 50.

<sup>670</sup> *Stearns v. Doe*, 12 Gray (Mass.) 482, 74 Am. Dec. 608; *Johns v. Simons*, 2 Q. B. 425; *Arthur v. Barton*, 6 Mees. & W. 138.

in the absence of such authority, they cannot be held liable for money so borrowed by him.<sup>671</sup>

(c) **To mining superintendents.**—A mining superintendent has no authority to borrow money, by virtue of his employment, in carrying on the business in which he is employed however pressing may be the necessity therefor.<sup>672</sup> It is otherwise, however, where the agent is the general manager of a corporation, intrusted with the entire management and control of its business, as he has implied power to borrow money for the legitimate purposes of the corporation in its current and usual business.<sup>673</sup>

### § 285. Authority of agent to lend money.

Where an agent is employed to lend money for his principal, he must act within his authority, and has no authority to do any acts which are not expressly authorized, or which are not implied either from the usual course of dealing in that line of business, or as an incident to the power to lend, or from the habit or course of dealing between the parties. But he may do any acts that are usual, necessary, or incidental to the effecting of the loan.<sup>674</sup> An agent authorized to lend money has an implied power to agree to an extension of the time of payment.<sup>675</sup> The agent of a building and loan association, having authority to solicit applications for stock and to effect loans, has implied power to bind the association by an agreement that the money advanced to a borrower shall be used in improving the mortgaged premises.<sup>676</sup> But an agent to lend has no implied power to lend the

<sup>671</sup> *Arey v. Hall*, 81 Me. 17, 10 Am. St. Rep. 232.

<sup>672</sup> *Hawtayne v. Bourne*, 7 Mees. & W. 595, Wamb. Cas. 301; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 531, 2 Colo. 565; *Breed v. First Nat. Bank*, 4 Colo. 481; *Ricketts v. Bennett*, 4 C. B. 686; *Alabama Nat. Bank v. O'Neill*, 128 Ala. 192; *Adriance v. Roome*, 52 Barb. (N. Y.) 399. Ante, § 265 (a). *Clark & M. Corp.* § 700.

<sup>673</sup> Ante, § 265 (a). *Clark & M. Corp.* § 700.

<sup>674</sup> *Wayne International Bldg. & Loan Ass'n v. Moats*, 149 Ind. 123; *Gross v. Milligan*, 176 Mass. 566.

<sup>675</sup> *Hurd v. Marple*, 2 Ill. App. 402.

<sup>676</sup> *Wayne International Bldg. & Loan Ass'n v. Moats*, 149 Ind. 123.

money at an illegal interest, as by lending it at usurious rates.<sup>677</sup> The existence of a corrupt and unlawful intent on the part of the lender to take illegal interest is essential in order to make a transaction usurious. And where an agent intrusted with money to invest at a legal interest exacts, without the authority or knowledge of his principal, a bonus for himself, as the condition of making the loan, this will not constitute usury in the principal or affect the security in his hands.<sup>678</sup> Where, however, a loan is made through the lender's agent, the lender understanding that the agent is to charge the borrower for the agent's services in procuring the loan, in addition to lawful interest, and the agent receives pay therefor accordingly, it is usurious.<sup>679</sup> Nor has an agent, authorized to lend his principal's money on unencumbered land, authority to lend it on land which is encumbered.<sup>680</sup>

A general agency to loan money and take security for its payment does not confer an agency to collect the money, in the absence of express authority to that effect,<sup>681</sup> or in the absence of circumstances showing an implied authority to collect such loan.<sup>682</sup> And the fact that payments to a loan

<sup>677</sup> *Gokey v. Knapp*, 44 Iowa, 32; *Dryfus v. Burnes*, 53 Fed. 410. Compare *Stevens v. Meers*, 11 Ill. App. 138.

<sup>678</sup> *New England Mortg. Security Co. v. Gay*, 33 Fed. 636; *Dryfus v. Burnes*, 53 Fed. 410; *Vahlberg v. Keaton*, 51 Ark. 534, 4 L. R. A. 462; *Rogers v. Buckingham*, 33 Conn. 81; *Boylston v. Bain*, 90 Ill. 283; *Ballinger v. Bourland*, 87 Ill. 513; *Brigham v. Myers*, 51 Iowa, 397, 33 Am. Rep. 140; *Flanagan v. Shaw*, 74 App. Div. (N. Y.) 508; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Bell v. Day*, 32 N. Y. 165; *Estevez v. Purdy*, 66 N. Y. 446.

<sup>679</sup> *Payne v. Newcomb*, 100 Ill. 61, 39 Am. Rep. 69; *McCall v. Herring*, 116 Ga. 235; *Richards v. Bippus*, 18 App. D. C. 293; *Leipziger v. Van Saun*, 64 N. J. Eq. 37.

<sup>680</sup> *Welsh v. Brown*, 8 Ind. App. 421.

<sup>681</sup> *Barstow v. Stone*, 10 Colo. App. 396; *Cooley v. Willard*, 34 Ill. 68, 85 Am. Dec. 296; *Fortune v. Stockton*, 182 Ill. 454; *Madison v. Cabalek*, 86 Ill. App. 450; *Church Ass'n v. Walton*, 114 Mich. 677; *Heffernan v. Boteler*, 87 Mo. App. 316; *Frank v. Tuozzo*, 26 App. Div. (N. Y.) 447; *Corey v. Hunter*, 10 N. D. 5; *Evans-Snyder-Buel Co. v. Holder*, 16 Tex. Civ. App. 300. Compare *Thornton v. Lawther*, 169 Ill. 228; *Cheshire Provident Inst. v. Feusner*, 63 Neb. 682.

<sup>682</sup> See *Harrison Nat. Bank v. Williams* (Neb.) 89 N. W. 245; *Pochin v. Knoebel*, 63 Neb. 123.

company of interest falling due on a mortgage were forwarded to the holder of the mortgage note did not bind the holder as to a subsequent payment so made, or of the principal which was not forwarded, he not having recognized the company as his agent.<sup>683</sup> The receipt by a loan agent of the coupon interest notes for collection, where sent by the payee of the note secured by the mortgage, does not of itself give the agent implied authority to foreclose the mortgage.<sup>684</sup> If, however, the agent has been held out as having such authority, or if the circumstances of the case are such as to show such authority or to estop the principal from denying it, the agent may receive payments on the principal from the borrower, and such payment will be binding on the principal, although the agent misappropriates the funds.<sup>685</sup>

#### X. OF AGENT'S AUTHORITY TO SHIP.

##### § 286. Authority to ship.

Where an authority to ship is conferred upon an agent, it also includes an implied power to do all acts that are usual and necessary in carrying out the original power.<sup>686</sup> An agent having authority to ship goods for his principal has authority to enter into a contract limiting the carrier's liability, to accept a bill of lading or receipt containing conditions as to liability, or to agree upon other terms of transportation.<sup>687</sup> So such an agent may agree that the carrier

<sup>683</sup> *Richards v. Waller*, 49 Neb. 639; *Dewey v. Bradford* (Neb.) 89 N. W. 249; *Frey v. Curtis*, 52 Neb. 406; *Thompson v. Kyner*, 53 Neb. 625. And see *Bagnell v. Walker*, 65 Ark. 325.

<sup>684</sup> *Dexter v. Morrow*, 76 Minn. 412; *White v. Madigan*, 78 Minn. 286.

<sup>685</sup> *Harrison v. Legore*, 109 Iowa, 618; *Meserve v. Hanford*, 59 Kan. 777; *Doyle v. Corey*, 170 Mass. 337; *Hare v. Bailey*, 73 Minn. 409; *Brecht v. McParland*, 187 Pa. 620; *Edinburgh-American Land Mortg. Co. v. Noonan*, 11 S. D. 141; *Edinburgh Land Mortg. Co. v. Briggs* (Tex. Civ. App.) 41 S. W. 1036.

<sup>686</sup> *Armstrong v. Chicago, M. & St. P. R. Co.*, 53 Minn. 183; *Nelson v. Hudson River R. Co.*, 48 N. Y. 498.

<sup>687</sup> *Illinois Cent. R. Co. v. Jonte*, 13 Ill. App. 424; *Western Transit Co. v. Hosking*, 19 Ill. App. 607; *The St. Hubert*, 102 Fed. 362, 107 Fed. 727; *California Powder Works v. Atlantic & Pac. R. Co.*, 113 Cal. 329; *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 606, 94 Am. St. Rep. 279; *Armstrong v. Chicago, M. & St. P. R. Co.*, 53 Minn. 183; *Shelton v. Merchants' Dispatch Transp. Co.*, 59 N. Y. 258; *Jen-*

may have the benefit of any insurance that has been effected on the goods.<sup>688</sup> And where an agent is engaged in buying and shipping horses, he has authority to borrow money to purchase grain to feed the horses while awaiting shipment, since the exercise of such authority is necessary to the conduct of the business.<sup>689</sup> But an agent has no authority to modify or cancel a charter party of his principal,<sup>690</sup> nor to pledge or receive advances on the bill of lading.<sup>691</sup>

#### XI. OF AGENT'S AUTHORITY TO EMPLOY.

##### § 287. Authority to employ.

Where an agent is authorized to employ assistance of any kind for his principal, he has authority to enter into an agreement for all the terms of the employment, such as time, compensation, etc., unless there have been express restrictions put upon his authority in that respect.<sup>692</sup> But where he is authorized to employ and pay in money, he cannot pay part in money and part in land;<sup>693</sup> nor can he permit the employe to engage in a business adverse to the interests of his principal.<sup>694</sup>

*nings v. Grand Trunk R. Co.*, 52 Hun (N. Y.) 227; *Root v. New York & N. E. R. Co.*, 76 Hun (N. Y.) 23; *Ryan v. Missouri, K. & T. R. Co.*, 65 Tex. 13.

General authority given by a consignee to the consignor to deliver goods to a carrier for transportation includes the power to stipulate for the terms of transportation and accept a bill of lading containing exemptions from liability. *Brown v. Louisville & N. R. Co.*, 36 Ill. App. 140.

<sup>688</sup> *Missouri Pac. R. Co. v. International Marine Ins. Co.*, 84 Tex. 149.

<sup>689</sup> *Rider v. Kirk*, 82 Mo. App. 120.

<sup>690</sup> *Ye Seng Co. v. Corbitt*, 7 Sawy. 368, 9 Fed. 423.

<sup>691</sup> *Zachrisson v. Ahman*, 2 Sandf. (N. Y.) 68.

<sup>692</sup> *Alabama G. S. R. Co. v. Hill*, 76 Ala. 303; *Barnes v. Hogate*, 103 Iowa, 743; *Cross v. Atchison, T. & S. F. R. Co.*, 71 Mo. App. 585; *Williams v. Getty*, 31 Pa. 461, 72 Am. Dec. 757; *Farrington v. Hayes*, 65 Vt. 153.

<sup>693</sup> *Ross v. Davless*, 4 J. J. Marsh. (Ky.) 383. Compare *Chorpenning v. Royce*, 58 Pa. 474.

A general agent authorized to hire an employe at a yearly salary has no special authority to contract to compensate the employe with a share of the profits in the principal's business. *Deffenbaugh v. Jackson Paper Mfg. Co.*, 120 Mich. 242.

<sup>694</sup> *Adams Exp. Co. v. Trego*, 35 Mo. 47.

Authority to employ need not be expressly given to an agent, but may be implied from the nature of the employment in which he is engaged or from other circumstances.<sup>695</sup> Thus, if it is shown that with the knowledge of his employers, an employe was in the habit of hiring and discharging workmen, the jury may infer that the hiring of the plaintiff was within the scope of his authority, and so binding upon his employers.<sup>696</sup> So the manager of a manufacturing company whose contract gives him full power to employ all necessary workmen and operatives has authority to employ a foreman.<sup>697</sup> One employed "to take all proper and legal suits and proceedings to recover possession and obtain undisputed title" to premises claimed by his principals was empowered to employ attorneys to prosecute such suits, and through them make his principals parties thereto.<sup>698</sup> And where the services of an attorney are necessary, in collecting a claim due his principal, an agent having authority to collect may employ such attorney.<sup>699</sup> But authority to an agent to employ counsel to represent his principal generally in legal matters will not be implied from an authority to sell machinery in certain designated counties.<sup>700</sup> So authority to an agent to collect rent does not empower him to employ an engineer in the buildings.<sup>701</sup>

The length of time for which such employment may be made, in the absence of restrictions, depends upon the nature

<sup>695</sup> *Lippitt v. St. Louis Dressed Beef & Prov. Co.*, 27 Misc. 222, 57 N. Y. Supp. 747. Compare *Cross v. Atchison, T. & S. F. R. Co.*, 141 Mo. 132; *Patterson v. Neal*, 135 Ala. 477; *Leary v. Albany Brewing Co.*, 77 App. Div. (N. Y.) 6; *Day v. Pickens County*, 53 S. C. 46 (where it was held that an architect superintending the erection of a building has no implied power to order extra work, so as to bind the owner. And an agent instructed to sell lands, which he was employed to look after, cannot make a contract with a broker for the sale thereof which will bind the principal to pay the broker for his services in effecting a sale); *Williams v. Moore*, 24 Tex. Civ. App. 402.

<sup>696</sup> *Sheetram v. Trexler Stave & Lumber Co.*, 13 Pa. Super. Ct. 219.

<sup>697</sup> *Laning v. Peters Shoe Co.*, 71 Mo. App. 646.

<sup>698</sup> *Hanrick v. Gurley*, 93 Tex. 458.

<sup>699</sup> *Strong v. West*, 110 Ga. 382. See ante, § 276 (c).

<sup>700</sup> *Kirby v. Western Wheel Scraper Co.*, 9 S. D. 623.

<sup>701</sup> *Crozler v. Reins*, 4 Ill. App. 564.

of the business to be performed, the length of time it is likely to continue, and upon all other circumstances in the case. "If it were such a business as it was apparent would last but six months, a contract for a year doubtless would not be binding on the principal, because the party employed would be acting in bad faith in undertaking when it was apparent he would not be needed; and besides, it would be equally apparent that such a contract was not necessary to the accomplishment of the object. So if the business were such as would apparently last for months, an employment for one or two months would seem to all to be covered by the agent's implied authority, and would bind."<sup>702</sup> It must be for a reasonable time, in the absence of restrictions, and what is a reasonable time in any case must depend on the nature of the business in that case, the season of the year in which it is to be prosecuted, the length of time it is likely to take to complete the work, or any other circumstances that may bear thereon.<sup>703</sup> Thus, where an agent has authority to hire a servant for the principal, in the absence of restrictive words as to the length of time of hiring, it authorizes the agent to hire a servant for such time as is reasonable, considering the nature of the business, the season of the year in which it is prosecuted, and the length of time it is likely to take to complete the work.<sup>704</sup> So such an agent may make all reasonable representations concerning the work as may be proper in the particular case; as where an agent is sent to procure miners to work in a mine he may bind his principal by representations concerning the safety of the mine as a place to work in.<sup>705</sup> But such an agent may not make representations that are not within the apparent scope of his authority.<sup>706</sup>

<sup>702</sup> *Williams v. Getty*, 31 Pa. 461, 72 Am. Dec. 759.

<sup>703</sup> *Williams v. Getty*, 31 Pa. 461, 72 Am. Dec. 759; *Decker v. Hassel*, 26 How. Pr. (N. Y.) 528; *Drohan v. Merrill & Ring Lumber Co.*, 75 Minn. 251. Where the agent is authorized to employ a clerk at so much per week, a hiring for six months is beyond his authority. *Pasco v. Smith*, 49 Conn. 576.

<sup>704</sup> *Drohan v. Merrill & Ring Lumber Co.*, 75 Minn. 251.

<sup>705</sup> *Gowen v. Bush*, 76 Fed. 349.

<sup>706</sup> *Olson v. Great Northern R. Co.*, 81 Minn. 402. As to the authority of an agent to employ medical assistance, see ante, § 263 (c).

## CHAPTER XI.

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I. IN GENERAL.

§ 288. In general.

It has been seen, in the preceding chapters, how authority may be conferred upon an agent, and how it is to be construed after it has been given. In the present chapter, then, will be considered how such authority may be executed after it has been conferred and the proper construction put upon it. For

this purpose the general rules in regard to the execution of authority will first be considered, and then, in turn, such rules will be applied to the execution of formal instruments, such as sealed or negotiable instruments, and then to parol contracts other than negotiable instruments.

**§ 289. Purpose of execution.**

It has been seen heretofore that the object in appointing an agent is to give him power to represent and act for the principal, whether in the making of a contract or in doing some act by which contractual relations are established between the principal and a third party. It should be the purpose of the agent, then, in executing his authority, to do so in such a manner as to bring about a contract between his principal and the party with whom he is dealing, and not with himself or another. His sole purpose should be to so execute his power that all the benefits arising from the transaction would result to his principal, and that the latter would be bound by any liabilities arising therefrom. It would not be a proper execution of his authority to do it in such a manner that the agent himself derived the benefits or assumed the responsibilities, or if he bound the third person to himself or to any one other than his principal. For the purpose of the transaction in which he is employed, he is authorized to act as if he were the principal's other self, and to do all acts as if he were the principal acting for himself; and executing it in such a manner as to give the benefits or impose the liabilities upon another than the principal, in the absence of special authority to that effect, would be an improper execution of the power.

**§ 290. Agent should act in name of principal.**

It may be stated as a general rule that in order that an act of an agent may be binding on the principal it must be executed in the name or on behalf of the latter, and should be executed by the agent, as such.<sup>1</sup> This rule, however, is sub-

<sup>1</sup> *White v. Cuyler*, 6 Term R. 176; *Clealand v. Walker*, 11 Ala. 1058, 46 Am. Dec. 238; *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665; *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65, *Wamb. Cas.* 586; *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am.

ject to some exceptions as will be noted hereafter. "There is much learning and much discussion, in the books of the law, as to the proper mode of executing authority by agents. In what form the agent should execute his authority, so as to bind his principal and not himself, has been a subject largely considered in elementary works, and much discussed in numerous adjudged cases. The rule commonly laid down by all the authorities is that to bind the principal the instrument must purport, on its face, to be the instrument of the principal, and executed in his name; or, at least, that the tenor of the instrument should clearly show that the principal is intended to be bound thereby, and that the agent acts merely as his agent in executing it."<sup>2</sup> "When any one has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority."<sup>3</sup> Thus, in order to bind the principal on a contract made by an agent, as a general rule, it must purport on its face to be the contract of the principal, and his name must be inserted in it and signed to it. It is not enough that the agent be described as such in the instrument.<sup>4</sup> But if, in such cases, in furtherance of the public policy of encouraging trade, it can, upon the whole instrument, be collected, that the true object and intent of it are, to bind the principal, and not merely the agent, courts of justice will

Dec. 771; *Brinley v. Mann*, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; *Hale v. Woods*, 10 N. H. 470, 34 Am. Dec. 176; *Montgomery v. Dorrion*, 7 N. H. 484; *Stone v. Wood*, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529.

<sup>2</sup> By *Fletcher, J.*, in *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 773.

"A power of attorney must be executed in the name of the person who gives it. The agent or attorney is put in the place or stead of his principal and is to act in his name." *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.) 174, 203.

<sup>3</sup> *Combes' Case*, 9 Coke, 75a, Wamb. Cas. 33.

<sup>4</sup> *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665. And see post, § 295.

adopt that construction of it, however informally it may be expressed.<sup>5</sup>

Upon principle, the true question for consideration in every case is, or at least ought to be, whether, taking the writing as a whole, it sufficiently appears therefrom that it is intended to be binding upon the principal rather than upon the agent who has signed it. It is not at all usual for a person executing a note or other contract, to add words descriptive of himself, or to refer to his relation to other persons, who have no connection with the transaction; and when he designates his representative capacity, to assume that such designation was intended merely as a description of himself is to assume something which is rarely, and perhaps never, in harmony with the facts. Of course, if he only describe himself as agent or officer without indicating who his principal is, the instrument must necessarily be treated as the obligation of the agent, or treated as void for want of a designated obligor. If, on the other hand, he, upon the face of the writing, discloses not only that he is an agent or officer, but also of whom he is such agent or officer, we must be astute to misapprehend, or else we must concede that he has employed language better calculated to evidence the obligation of his principal than of himself.<sup>6</sup>

### § 291. Execution of authority by joint agents.

(a) **In general.**—As a general rule when authority to do an act is conferred upon two or more agents, it is considered a joint, and not a several authority, and must be executed by them all jointly in order to make the act binding upon the principal, unless there is a provision in the employment that a certain number of them may act.<sup>7</sup> Thus an agency dele-

<sup>5</sup> *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665. Story, Ag. § 154. Post, § 332.

<sup>6</sup> See note to *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 48 Am. St. Rep. 911, 919.

<sup>7</sup> *Brown v. Andrew*, 18 Law J. Q. B. 153; *Bell v. Nixon*, 9 Bing. 393; *Loeb v. Drakeford*, 75 Ala. 464; *Caldwell v. Harrison*, 11 Ala. 755; *Johnson v. Smith*, 21 Conn. 627; *Patterson v. Leavitt*, 4 Conn. 50, 10 Am. Dec. 98; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 185; *Cedar Rapids & St. P. R. Co. v. Stewart*, 25 Iowa, 115; *Penn. v. Ev-*

gated to three persons, by a written instrument, by which it is created and defined, cannot be executed by one of them.<sup>8</sup> And where a commission vests power in two, without words of survivorship, and one of them dies, unless there is a subsequent recognition by the principal of the survivor as agent, his acts will not bind the principal.<sup>9</sup> Nor will a submission to three arbitrators justify an award by two of them, the third dissenting from them.<sup>10</sup>

But if there is a manifest intention to confer the authority upon the agents severally, or jointly and severally, and not jointly alone, it may be executed by one or all of them, and such execution will be sufficient.<sup>11</sup> "If two agents are appointed by separate instruments, with equal authority to act for the principal the right is not exclusive in either, and any act done by either within the scope of his authority will conclude the other."<sup>12</sup>

ans, 28 La. Ann. 576; *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699; *First Parish v. Cole*, 3 Pick. (Mass.) 232; *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198; *Heard v. March*, 12 Cush. (Mass.) 580; *Scott v. Detroit Young Men's Soc.*, 1 Doug. (Mich.) 119; *Deakin v. Underwood*, 37 Minn. 98, 5 Am. St. Rep. 827; *Rollins v. Phelps*, 5 Minn. 463; *Andover v. Grafton*, 7 N. H. 304; *Jewett v. Alton*, 7 N. H. 253; *Wilder v. Ranney*, 95 N. Y. 7; *McCoy v. Curtice*, 9 Wend. (N. Y.) 17, 24 Am. Dec. 113; *Salisbury v. Brisbane*, 61 N. Y. 617; *Green v. Miller*, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; *In re Turnpike Road by Chad's Ford*, 5 Bin. (Pa.) 481; *Allegheny County Com'rs v. Lecky*, 6 Serg. & R. (Pa.) 166, 9 Am. Dec. 418; *Union Bank v. Belrne*, 1 Grat. (Va.) 226; *Low v. Perkins*, 10 Vt. 532, 33 Am. Dec. 217; *Soens v. Racine*, 10 Wis. 271.

<sup>8</sup> *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699. And see *Pulaski County v. Lincoln*, 9 Ark. 320.

<sup>9</sup> *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 181; *Boone v. Clark*, 3 Cranch (U. S.) 389; *Salisbury v. Brisbane*, 61 N. Y. 617.

<sup>10</sup> *Towne v. Jaquith*, 6 Mass. 46, 4 Am. Dec. 84; *Patterson v. Leavitt*, 4 Conn. 50, 10 Am. Dec. 98. Compare where an award by two is authorized, *Moore v. Ewing*, *Coxe* (N. J.) 144, 1 Am. Dec. 195; *Peterson v. Ayre*, 15 C. B. 724.

<sup>11</sup> *Guthrie v. Armstrong*, 5 Barn. & Ald. 628; *Purinton v. Security L. Ins. Co.*, 72 Me. 22; *French v. Price*, 24 Pick. (Mass.) 13; *Heard v. March*, 12 Cush. (Mass.) 580; *Hawley v. Keeler*, 53 N. Y. 116; *In re Turnpike Road by Chad's Ford*, 5 Bin. (Pa.) 481; *Soens v. Racine*, 10 Wis. 271.

<sup>12</sup> *Cushman v. Glover*, 11 Ill. 600, 52 Am. Dec. 461.

(b) **Application to public agents.**—But the above general rule does not apply where the authority conferred upon several agents is of a public nature. Where such authority is given to several public agents, and all the persons in whom such power is vested meet for the purpose of executing it, the act of a majority of them is deemed the act of all, and binding on the principal.<sup>13</sup> Thus, where authority is conferred on county commissioners in relation to public business, it may be exercised by a majority, and all need not join.<sup>14</sup> So where one of three assessors fails to attend and act in assessing a tax, after proper notice, it is held that the other two may proceed without him; Shaw, C. J., saying: "Where a body or board of officers is constituted by law to perform a

<sup>13</sup> *Grindley v. Barker*, 1 Bos. & P. 229; *Cortis v. Kent Water Works*, 7 Barn. & C. 314; *Rex v. Beeston*, 3 Term R. 592; *Cooley v. O'Connor*, 12 Wall. (U. S.) 391; *Caldwell v. Harrison*, 11 Ala. 755; *Crain v. State*, 45 Ark. 452; *Holland v. Davies*, 36 Ark. 446; *People v. Coghill*, 47 Cal. 361; *Johnson v. Smith*, 21 Conn. 627; *Patterson v. Leavitt*, 4 Conn. 50, 10 Am. Dec. 98; *Gallup v. Tracy*, 25 Conn. 10; *Louk v. Woods*, 15 Ill. 256; *Hanson v. Dexter*, 36 Me. 516; *Worcester v. Railroad Com'rs*, 113 Mass. 161; *Weymouth & B. Fire Dist. v. Norfolk County*, 108 Mass. 142; *Scott v. Detroit Young Men's Soc.*, 1 Doug. (Mich.) 119; *Rollins v. Phelps*, 5 Minn. 463; *Andover v. Grafton*, 7 N. H. 304; *Jewett v. Alton*, 7 N. H. 253; *People v. Nichols*, 52 N. Y. 478, 11 Am. Rep. 734; *Ex parte Rogers*, 7 Cow. (N. Y.) 526; *Green v. Miller*, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; *Downing v. Rugar*, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223; *McCoy v. Curtice*, 9 Wend. (N. Y.) 17, 24 Am. Dec. 113; *Austin v. Helms*, 65 N. C. 560; *In re Turnpike Road by Chad's Ford*, 5 Bin. (Pa.) 481; *Jefferson County v. Slagle*, 66 Pa. 202; *McCready v. Guardians of the Poor*, 9 Serg. & R. (Pa.) 94, 11 Am. Dec. 667; *State v. Dellesseline*, 1 McCord (S. C.) 52; *Hodges v. Thacher*, 23 Vt. 455; *Hill v. Sunderland*, 7 Vt. 215; *Low v. Perkins*, 10 Vt. 532, 33 Am. Dec. 218; *Beaver Dam v. Frings*, 17 Wis. 398; *Soens v. Racine*, 10 Wis. 271.

<sup>14</sup> *Allegheny County Com'rs v. Lecky*, 6 Serg. & R. (Pa.) 166, 9 Am. Dec. 418 (approved and followed in *Commonwealth v. Canal Com'rs*, 9 Watts [Pa.] 466); *Cooper v. Lampeter Township*, 8 Watts (Pa.) 128. See, also, *First Nat. Bank v. Town of Mt. Tabor*, 52 Vt. 87, 36 Am. Rep. 734. But see *Geter v. Commissioners for Tobacco Inspection*, 1 Bay (S. C.) 354, 1 Am. Dec. 621, holding that where a power is conferred by statute on fire commissioners jointly, they must all join in its performance, and the act of four of them is not valid.

trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body. And where all have due notice of the time and place of meeting, in the manner prescribed by law, or by the rules and regulations of the body itself, if there be any, otherwise if reasonable notice is given, and no practice or unfair means are used to prevent all from attending and participating in the proceeding, it is no objection if all the members do not attend, if there be a quorum."<sup>15</sup> Where, however, public authority is conferred upon two, it cannot be exercised by one without the other's consent, because the number does not admit of a majority; but it seems that to prevent a failure of justice, where immediate action is necessary, one may act alone if the other is dead, absent, or interested.<sup>16</sup>

But although they do not all concur, it seems to be well settled in such cases, that it is necessary that there should be a meeting and deliberation of all the persons appointed to exercise the power, or they should have due notice thereof, unless obviated by the circumstances of the particular case. As has been said: "It has long been perfectly well settled that where a statute constitutes a board of commissioners or other officers to decide any matter, but makes no provision that a majority shall constitute a quorum, all must be present to hear and consult, though a majority may then decide."<sup>17</sup> Or as it has been stated in another court: "If the act is one which requires the exercise of discretion and judgment, in which case it is usually termed a judicial act, unless special provision is otherwise made, the persons to whom the authority is given must meet and confer together, and be present when the act is performed, in which case a majority of them may perform the act; or after all of them

<sup>15</sup> *Williams v. School Dist.*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; *George v. School Dist.*, 6 Metc. (Mass.) 497. Compare *Pulaski County v. Lincoln*, 9 Ark. 320.

<sup>16</sup> *Downing v. Rugar*, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223.

<sup>17</sup> By Cowen, J., in *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 218, 34 Am. Dec. 232; *Water Commissioners v. Lansing*, 45 N. Y. 19. And see cases cited *supra* this section.

have been notified to meet, a majority of them having met will constitute a quorum or sufficient number to perform the act, and according to some modern authorities the act may be legally done by the direction or with the concurrence of a major part of the quorum so assembled."<sup>18</sup>

**§ 292. Execution of authority by partnership as agent.**

Nor has this rule any application where the authority is given to a partnership as such. Each member of a partnership is the agent of the firm, and all the partners are jointly accountable for the acts of each other; and where a person appoints a partnership as his agent, he must be deemed to have done so with reference to these rules of law. When a person delegates authority to a firm, it is an appointment of the partnership as his agent, and not of the individual members as his several and separate agents. Hence each partner may execute the authority, and the act of one is the act of the firm, and in strict pursuance of the power.<sup>19</sup> The particular form of the execution of the authority is not material, if it be on behalf of the firm. Where power to execute a contract is given to a firm, the principal is bound, although the member of the firm who signs the principal's name adds his own individual name, instead of the name of the firm, as agent. And if the agent simply fixed to the instrument the name of the principal alone, the latter would be effectually bound.<sup>20</sup> Where the power is given to two or more by name as individuals, they cannot act as partners, though they are such in fact, but must act jointly.<sup>21</sup> But if the power is given to several, describing them in the style

<sup>18</sup> Storrs, C. J., in *Martin v. Lemon*, 26 Conn. 192. And see *Crofoot v. Allen*, 2 Wend. (N. Y.) 494.

<sup>19</sup> *Deakin v. Underwood*, 37 Minn. 98, 5 Am. St. Rep. 827; *Kennebec Co. v. Augusta Ins. Co.*, 6 Gray (Mass.) 204; *Eggleston v. Boardman*, 37 Mich. 14; *Purinton v. Security L. Ins. & Annuity Co.*, 72 Me. 22; *Beck v. Martin*, 2 McM. (S. C.) 260; *Gordon v. Buchanan*, 5 Yerg. (Tenn.) 71; *Frost v. Erath Cattle Co.*, 81 Tex. 505, 26 Am. St. Rep. 831; *Jeffries v. Mutual L. Ins. Co.*, 110 U. S. 309.

<sup>20</sup> *Deakin v. Underwood*, 37 Minn. 98, 5 Am. St. Rep. 827.

<sup>21</sup> *Gordon v. Buchanan*, 5 Yerg. (Tenn.) 71.



of the co-partnership, the act of one in the name of the firm is the act of the firm and of its members.<sup>22</sup>

## II. EXECUTION OF SEALED INSTRUMENTS.

### § 293. In general.

Perhaps the most important power conferred upon an agent is the power to execute a sealed instrument, and where such a power has been given to an agent it is important that he execute the authority in the proper manner. It will be the scope of this subdivision, then, to treat fully those rules applicable to the execution of an instrument under seal by an agent, whether it be a deed, bond, or other instrument that requires a seal to give it validity. For the sake of preventing needless repetitions the word "deed" will be used throughout this subdivision in its broadest sense, as meaning any instrument under seal.

At common law a sealed instrument was regarded with great solemnity and as the highest class of written instruments; and although in many states of this country the requirement of a seal has been done away with by statutes, and much of the importance attaching to such instruments has been taken away, yet even in such states those instruments, which were required to be under seal at common law, are regarded as more solemn and important than simple written contracts. On account of the solemnity of these instruments, and by reason of the fact that parties thereto are more effectually bound than by instruments of a less formal character, an agent must strictly pursue his authority in executing such instruments; and whatever formalities are required should be complied with by him. Once an agent has executed an instrument of this sort, and he has not followed his authority in so doing, any mistake or excess of authority

<sup>22</sup> *Gordon v. Buchanan*, 5 Yerg. (Tenn.) 71. But see *Cummings v. Parish*, 39 Miss. 412, wherein it was held that a power of appointment to two persons by name "trading under the style and firm name of B. & P." vested in them as individuals and not in their partnership character, that the use of the firm name in the appointment was merely a specific designation of the persons intended, and that an appointment by one was void.

that he may have made, is much less easily rectified than in the case of less formal instruments.

Of course if the instrument is one that is not required to be executed under seal, the fact that it is defectively executed as a sealed instrument will not affect its validity, for the seal will be regarded as surplusage.<sup>23</sup>

**§ 294. Must be made and sealed in name of principal.**

It is a well settled principle of the common law that a sealed instrument is binding only on those parties whose names appear thereon; and for this reason, if an agent wishes to bind his principal by such an instrument, it is indispensable that it should be signed and sealed in the name of the principal and purport to be his deed; and if the agent puts his own name and seal to it and there are apt words in the instrument to charge him, he will be personally bound, though he describes himself in the body of the contract as acting for his principal, for this is a mere *descriptio personae*, and in no way relieves him from the liability imposed by signing and sealing the instrument in his own name.<sup>24</sup> "If it clearly appears, on the face of the instru-

<sup>23</sup> *Lancaster v. Knickerbocker Ice Co.*, 153 Pa. 427; *Steele v. McElroy*, 1 Sneed (Tenn.) 341; *Kirschbon v. Bonzel*, 67 Wis. 178; *Stowell v. Eldred*, 39 Wis. 614.

<sup>24</sup> *England*: *Combes' Case*, 9 Coke, 75a, Wamb. Cas. 33; *White v. Cuyler*, 6 Term R. 176; *Wilks v. Back*, 2 East, 142, Wamb. Cas. 583; *Schack v. Anthony*, 1 Maule & S. 573.

*United States*: *Lutz v. Linthicum*, 8 Pet. 165; *Clarke v. Courtney*, 5 Pet. 319; *Duval v. Craig*, 2 Wheat. 45.

*Alabama*: *Hall v. Cockrell*, 28 Ala. 507; *Carter v. Doe*, 21 Ala. 72; *Jones v. Morris*, 61 Ala. 518.

*California*: *Morrison v. Bowman*, 29 Cal. 337; *Echols v. Cheney*, 28 Cal. 157; *Fisher v. Salmon*, 1 Cal. 413, 54 Am. Dec. 297.

*Georgia*: *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665.

*Illinois*: *Home Library Ass'n v. Witherow*, 50 Ill. App. 117; *Hancock v. Yunker*, 83 Ill. 208.

*Indiana*: *McClure v. Bennett*, 1 Blackf. 189, 12 Am. Dec. 223; *Pitman v. Kitner*, 5 Blackf. 250, 33 Am. Dec. 469; *Prather v. Ross*, 17 Ind. 495; *Deming v. Bullitt*, 1 Blackf. 241.

*Kentucky*: *Taul v. Winn*, 5 J. J. Marsh. 438; *Banks v. Sharp*, 6 J. J. Marsh. 180.

ment, who is intended to be bound, and if the mode of execution be such as that he may be bound, the necessary consequence of the universal principle applicable to contracts is that he is bound, and that if such appears to be the intention of the parties he alone is bound."<sup>25</sup> If there are two grantors, and one of them acts as the attorney in fact of the other,

*Maine:* *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65, Wamb. Cas. 586.

*Maryland:* *Harper v. Hampton*, 1 Har. & J. 622, 709; *McDonough v. Templeman*, 1 Har. & J. 156, 2 Am. Dec. 510.

*Massachusetts:* *Brinley v. Mann*, 2 Cush. 337, 48 Am. Dec. 669, Wamb. Cas. 593; *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126; *Fulham v. West Brookfield*, 9 Allen, 1; *Tippets v. Walker*, 4 Mass. 595. "It is not enough for the attorney, in the form of the conveyance, to declare that he does it as attorney; for he being in the place of the principal, it must be the act and deed of the principal, done and executed by the attorney in his name." *Fowler v. Shearer*, 7 Mass. 19; *Sargeant v. Webster*, 13 Metc. 497, 46 Am. Dec. 743.

*Mississippi:* *Grubbs v. Wiley*, 9 Smedes & M. 29; *Holmes v. Carman*, 1 Freem. Ch. 408.

*Missouri:* *Einstein v. Holt*, 52 Mo. 340; *Martin v. Almond*, 25 Mo. 313; *Endsley v. Strock*, 50 Mo. 508.

*New Hampshire:* *Cofran v. Cockran*, 5 N. H. 458; *Underhill v. Gibson*, 2 N. H. 352, 9 Am. Dec. 82.

*New Jersey:* *Borcherling v. Katz*, 37 N. J. Eq. 150, Wamb. Cas. 647; *Sheldon v. Dunlap*, 16 N. J. Law, 245.

*New York:* *Taft v. Brewster*, 9 Johns. 334, 6 Am. Dec. 280, Wamb. Cas. 585; *Stone v. Wood*, 7 Cow. 453, 17 Am. Dec. 529; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617, Huffc. Cas. 248; *Schaefer v. Henkel*, 75 N. Y. 378; *Klersted v. Orange & A. R. Co.*, 69 N. Y. 343, 25 Am. Rep. 199; *Buffalo Catholic Institute v. Bitter*, 87 N. Y. 250; *Randall v. Van Vechten*, 19 Johns. 60, 10 Am. Dec. 193.

*North Carolina:* *Locke v. Alexander*, 9 N. C. (2 Hawks) 155, 11 Am. Dec. 750; *Bryson v. Lucas*, 84 N. C. 680, 37 Am. Rep. 634; *Scott v. McAlpin*, 4 N. C. 587 (Term R. 155), 7 Am. Dec. 703.

*Pennsylvania:* *Hopkins v. Mehaffy*, 11 Serg. & R. 126, Wamb. Cas. 590; *Bellas v. Hays*, 5 Serg. & R. 427, 9 Am. Dec. 385; *Hefferman v. Addams*, 7 Watts, 121; *Quigley v. De Haas*, 82 Pa. 267.

*South Carolina:* *Webster v. Brown*, 2 S. C. 428; *Varnum v. Evans*, 2 McMul. 409; *Welsh v. Usher*, 2 Hill Eq. 167, 29 Am. Dec. 63.

*Vermont:* *Roberts v. Button*, 14 Vt. 195.

*Virginia:* *Martin v. Flowers*, 8 Leigh, 158; *Stinchcomb v. Marsh*, 15 Grat. 202.

*Wisconsin:* *North v. Henneberry*, 44 Wis. 306.

<sup>25</sup> *Hunter's Adm'rs v. Miller's Ex'rs*, 6 B. Mon. (Ky.) 612.

he must subscribe his name twice, once as attorney in fact of the other and once for himself. One signature and a second seal is not equivalent to a second subscription.<sup>26</sup> But, "however clearly the body of the deed may show an intent that it shall be the act of the principal, yet unless it is executed by his attorney for him, it is not his deed, but the deed of the attorney or no one."<sup>27</sup> But lands belonging to a town or the government may be conveyed by a deed in the name of a duly authorized agent.<sup>28</sup>

**§ 295. Description of agent as such not sufficient.**

It is not sufficient that a person, in order to discharge himself from a promise in writing, should show that he was in fact the agent of another, but it should be made to appear that he treated as agent, and actually bound his principal by the contract.<sup>29</sup> "Nor is it sufficient that the agent described himself in the deed or contract, as acting for, and in behalf, or as attorney of the principal, or as a committee to contract for, or trustees of a corporation, etc., for if he do not bind his principal, but set his own name and seal, such expressions are but *designatio personae*, it is his own act and deed, and he is bound personally."<sup>30</sup> A deed of land executed under a power of attorney is not valid where it recites that the attorney, and not his principals, thereby bargains and sells, and it is signed, sealed, and acknowledged as the deed of the attorney and not of the principals.<sup>31</sup>

<sup>26</sup> *Meagher v. Thompson*, 49 Cal. 189.

<sup>27</sup> *Metcalf, J., in Mussey v. Scott*, 7 Cush. (Mass.) 216, 54 Am. Dec. 719; *Clarke v. Courtney*, 5 Pet. (U. S.) 350. But see post, § 303.

<sup>28</sup> *Cofran v. Cockran*, 5 N. H. 458; *Ward v. Bartholomew*, 6 Pick. (Mass.) 409.

<sup>29</sup> *Arrifridson v. Ladd*, 12 Mass. 173.

<sup>30</sup> *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65, Wamb. Cas. 586; *Appleton v. Binks*, 5 East, 148; *Hall v. Cockrell*, 28 Ala. 507; *Stoble v. Dills*, 62 Ill. 432; *Sperry v. Fanning*, 80 Ill. 371; *Tucker v. Bass*, 5 Mass. 164; *Tippets v. Walker*, 4 Mass. 595; *Fowler v. Shearer*, 7 Mass. 14; *Taft v. Brewster*, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280. Wamb. Cas. 585; *Seyfert v. Bean*, 83 Pa. 450.

<sup>31</sup> *Williams v. Paine*, 7 App. D. C. 116.

**§ 296. No particular form of execution is required.**

No particular form of words is required to be used, in executing a deed for the principal, provided it is signed and sealed in the name of the principal, and purports to be his deed. Whether such is the purport of an instrument, must be determined from its general tenor, and not from any particular clause. "Such construction must be given, in this as well as in other questions arising on conveyances, as shall make every part of the instrument operative as far as possible; and where the intention of the parties can be discovered, such intention shall be carried into effect, if it can be done consistently with the rules of law."<sup>32</sup> This rule has been well stated as follows: "In the case of a sealed instrument executed by an attorney, duly authorized by a person, under seal, no particular form of words is necessary to render it valid and binding upon the principal, provided it appears upon the face of the instrument that it was intended to be executed as the deed of the principal, and that the seal affixed to the instrument is his

<sup>32</sup> *Wilks v. Back*, 2 East, 142, Wamb. Cas. 583; *Magill v. Hinsdale*, 6 Conn. 464a, 16 Am. Dec. 70; *Hovey v. Magill*, 2 Conn. 680; *Willburn v. Larkin*, 3 Blackf. (Ind.) 55; *Bridge v. Wellington*, 1 Mass. 219; *Hutchins v. Byrnes*, 9 Gray (Mass.) 367; *McClure v. Herring*, 70 Mo. 18, 35 Am. Rep. 406; *Hale v. Woods*, 10 N. H. 470, 34 Am. Dec. 176; *Sheldon v. Dunlap*, 16 N. J. Law, 245; *Townsend v. Hubbard*, 4 Hill (N. Y.) 351; *Locke v. Alexander*, 9 N. C. (2 Hawks) 155, 11 Am. Dec. 750; *Bryson v. Lucas*, 84 N. C. 680, 37 Am. Rep. 634; *Varnum v. Evans*, 2 McM. (S. C.) 409; *Roberts v. Button*, 14 Vt. 195; *Jones' Devisees v. Carter*, 4 Hen. & M. (Va.) 184.

In *Hunter's Adm'rs v. Miller's Ex'rs*, 6 B. Mon. (Ky.) 612, it is said: "There is no inflexible rule as to the mode in which this is to be done; and when both names are to be used both in the caption or body and signature of the instrument, it is a question of intention and construction, whether the act is done, or the engagement made, in the name of the principal or of the agent. The terms of the covenant itself are commonly decisive as to intention. The description in the caption and the mode of signature are referred to, either as aids in discovering the intention, or as determining whether the form of the instrument corresponds with this intention, so that it may be carried out. If, in view of all its parts, the instrument can be regarded as the deed or covenant of the party intended to be bound, it must, on principle, be so regarded."

seal and not the seal of the attorney or agent merely."<sup>33</sup> And again it has been said: "It is not material in what form the deed be signed, whether A. B. by C. D. or C. D. for A. B., provided it appears in the deed, and by the execution that it is the deed of the principal."<sup>34</sup>

The most usual and approved form of executing a deed by attorney is by writing the name of the principal, and adding "by A. B., his attorney," or "by his attorney, A. B." But this is not the only form of execution which will make the deed the act of the principal.<sup>35</sup> The execution of a deed by an attorney in fact for his principal is sufficient, if he sign the name of his principal with a seal annexed, stating it to be done by him as attorney for his principal; or if he sign his own name with a seal annexed, stating it to be done for his principal.<sup>36</sup>

If the granting part of the deed and the covenants are in the name of the principal, or purport to be his act and deed, the following will be sufficient executions of the deeds: "A., agent for B.;"<sup>37</sup> "For J. B., M. W.;"<sup>38</sup> "D. K., attorney for Z. K."<sup>39</sup> It is otherwise, however, where the granting clause of the deed is: "I, A. B., attorney in fact of C. D., do grant," etc., and signed "A. B., agent of C. D."<sup>40</sup>

<sup>33</sup> *Townsend v. Hubbard*, 4 Hill (N. Y.) 351.

<sup>34</sup> *Ruffin, C. J.*, in *Redmond v. Coffin*, 17 N. C. (2 Dev. Eq.) 437.

<sup>35</sup> *Mussey v. Scott*, 7 Cush. (Mass.) 215, 54 Am. Dec. 719; *Wilburn v. Larkin*, 3 Blackf. (Ind.) 55; *Patterson v. Henry*, 4 J. J. Marsh. (Ky.) 127; *Spencer v. Field*, 10 Wend. (N. Y.) 88; *Berkey v. Judd*, 22 Minn. 287.

<sup>36</sup> *Shanks v. Lancaster*, 5 Grat. (Va.) 110, 50 Am. Dec. 108; *Carter v. Doe*, 21 Ala. 72; *Magill v. Hinsdale*, 6 Conn. 464a, 16 Am. Dec. 70; *Wilburn v. Larkin*, 3 Blackf. (Ind.) 55; *Hunter's Adm'rs v. Miller's Ex'rs*, 6 B. Mon. (Ky.) 612; *Bend v. Susquehanna Bridge & Bank Co.*, 6 Har. & J. (Md.) 128, 14 Am. Dec. 261; *Mussey v. Scott*, 7 Cush. (Mass.) 215, 54 Am. Dec. 719; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 105, Wamb. Cas. 614; *Whitehead v. Reddick*, 34 N. C. (12 Ired.) 95; *Varnum v. Evans*, 2 McMul. (S. C.) 409.

<sup>37</sup> *Magill v. Hinsdale*, 6 Conn. 464a, 16 Am. Dec. 70; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274; *Martin v. Almond*, 25 Mo. 313.

<sup>38</sup> *Wilks v. Back*, 2 East, 142, Wamb. Cas. 583; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 105, Wamb. Cas. 614.

<sup>39</sup> *Hale v. Woods*, 10 N. H. 470, 34 Am. Dec. 176.

<sup>40</sup> *Welsh v. Usher*, 2 Hill Eq. (S. C.) 167, 29 Am. Dec. 63.

It has been said, that: "There is a striking and substantial difference between the covenant of an agent who describes himself as contracting for his principal, and the covenant of a principal, through the means, and by the instrumentality, of an agent. The first is the individual covenant of the agent, the second is the individual covenant of the principal."<sup>41</sup> But this distinction is not thought to be a good one and is contrary to the weight of authority as will be seen from the above cases and illustrations. If the agent is authorized to covenant for his principal, it is hard to see how there can be any difference between his describing himself as agent acting for his principal, or by acting as principal by himself as agent. In either case he is but the instrument through which the principal accomplishes the desired end. As has been said in a leading English case: "Where is the difference between signing J. B., by M. W., his attorney, which must be admitted to be good, and M. W. for J. B.? In either case, the act of sealing and delivering is done in the name of the principal and by his authority. Whether the attorney put his name first or last cannot affect the validity of the act done."<sup>42</sup>

#### § 297. Illustrations of sufficient execution.

Thus the following was held a well executed deed: "I, H., for myself, and as attorney for T. and T., by their letters of attorney under their hands and seals, in consideration of \$—, to us paid by L., do sell and convey to L. \* \* \* And we, the said T. and T., do covenant with said L. \* \* \*. In witness whereof, I, H., in my own right, have hereunto set my hand and seal, and as attorney for said T. and T., have hereunto set their hands and seals." The names of H. and of T. and T., by H., their attorney in fact, were subscribed, with seals severally affixed to all the names.<sup>43</sup> So a "deed made by the attorney was in the name of A. B., attorney in fact for J. B. and C., his wife, of the first part."

<sup>41</sup> Gibson, J., in *Hopkins v. Mehaffy*, 11 Serg. & R. (Pa.) 126, Wamb. Cas. 591.

<sup>42</sup> Grose, J., in *Wilks v. Back*, 2 East, 142, Wamb. Cas. 583.

<sup>43</sup> McClure v. Herring, 70 Mo. 18, 35 Am. Rep. 404.

And it proceeded in the same style to convey the land, and in the same style he covenanted for himself, his heirs and executors, in behalf of J. B. and C., his wife, under authority of a power of attorney, duly executed, and of record, to warrant the title to the plaintiff free from the claims of himself and his heirs, and concluded: "In witness whereof, the said A. B., attorney in fact for J. B. and C., his wife, as aforesaid, has hereunto set his hand and seal," etc. "J. B. (Seal) and C., his wife (Seal), by A. B. (Seal), their attorney in fact," was held a deed sufficient to pass the title of J. B. to the grantee.<sup>44</sup> So a deed executed in the following manner was held to be the deed of the corporation: "Know all men by these presents that the West Kansas Land Company, by Solomon Houck, president, and Theodore S. Case, secretary, has granted," etc. "In witness whereof we hereunto subscribe our names and affix our seals," and was signed, "Solomon Houck, President (Seal), Theodore S. Case, Sect'y, (Seal), W. K. Land Co. (Seal)."<sup>45</sup>

And again the following deed was held good: "I, Daniel King, as well for myself as attorney for Zachariah King, doth for myself and the said Zachariah, remise, release, and forever quitclaim the premises described in the deed, together with all the estate, right, title, interest, use, property, claim, and demand whatsoever, of me, the said Daniel, and said Zachariah, which we now have, or heretofore had at any time, in said premises. And we, the said Daniel and Zachariah, do hereby for ourselves, our heirs and executors, covenant that the premises are free from all incumbrance, and that the grantee may quietly enjoy the same without

<sup>44</sup> *Shanks v. Lancaster*, 5 Grat. (Va.) 110, 50 Am. Dec. 108; *Butterfield v. Beall*, 3 Ind. 203; *Bradstreet v. Baker*, 14 R. I. 546; *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, Wamb. Cas. 596, 18 Am. Rep. 631. The only circumstance that raised any difficulty in this case was that in the commencement of a lease, Lawrence, the president of the company, is described as the party of the second part, and the covenant is by "the said party of the second part." The contract, as claimed, is one made by a corporation, which can act only by its agents; and it is apparent upon the face of the instrument that Lawrence does not act individually, but as president of the company for the company.

<sup>45</sup> *Kansas City v. Hannibal & St. J. R. Co.*, 77 Mo. 180.



any claim or hindrance from us, or any one claiming under us, or either of us. In witness whereof, we, the said Daniel for himself, and as attorney aforesaid, have hereunto set our hands and seals," etc. Signed "Daniel King"; and also "Daniel King, attorney for Zachariah King, being duly authorized as appears of record," with seals affixed to each signature.<sup>46</sup> So a deed executed in the following form, was held to be sufficiently executed: "By virtue of the authority vested in me as aforesaid in the name and in behalf of the said V., F. & Co., I accept the provisions in the said assignment made in this behalf, and do further release," etc. signed "John Winslow (L. S.), agent for Varnum, Fuller & Co."<sup>47</sup>

An assignment executed in the following manner was held to be valid: "I, John H. Poor, by my attorney, Samuel Clendenen, do hereby transfer and make over unto William B. Bend one hundred shares of stock held by me in the Susquehanna Bridge and Bank Company, Maryland, on which thirty per cent. has been paid, subject to the payment of the remaining seventy per cent., agreeably to the charter of incorporation;" which is signed and sealed by Samuel Clendenen, and underwritten, "Att'y for Wm. B. Bend." The fact that he made a mistake in signing himself as attorney for the assignee instead of the assignor was held not to invalidate the assignment.<sup>48</sup>

### § 298. Illustrations of execution not sufficient.

The insufficiency of execution may consist either in not properly showing, in the body of the instrument, an intention to bind the principal or purporting it to be his act and deed, or, although the body of the instrument may show a clear intention to bind the principal, by not properly signing and sealing the same. Thus it was held that where an agent duly authorized to enter into a sealed contract for the

<sup>46</sup> *Hale v. Woods*, 10 N. H. 470, 34 Am. Dec. 176. And see *Montgomery v. Dorion*, 7 N. H. 484.

<sup>47</sup> *Varnum v. Evans*, 2 McMul. (S. C.) 409. And see *Whitehead v. Reddick*, 34 N. C. (12 Ired.) 95.

<sup>48</sup> *Bend v. Susquehanna Bridge & Bank Co.*, 6 Har. & J. (Md.) 128, 14 Am. Dec. 261.

sale of the land of his principals, had entered into a contract under his own name and seal, intending to execute the authority conferred upon him, the principals could not treat the covenants made by the agent as theirs, although it clearly appeared in the body of the contract that the stipulations were intended to be between the principals and purchasers, and not between the purchasers and the agent.<sup>49</sup>

So the following was held not to be a good execution of the deed. After a recital of the power of attorney given by Jonathan Elwell to Joshua Elwell, was the following: "Now know ye that I, the said Joshua, by virtue of the power aforesaid, in consideration of two hundred dollars, paid me by J. S. and T. P. S. of," etc., "the receipt whereof I do hereby acknowledge, do hereby bargain, grant, sell and convey unto the said J. S. and T. P. S. \* \* \* to have and to hold to them, the said," etc., "their heirs," etc., "forever; and I do covenant with the said J. S. and T. P. S. that I am duly empowered to make the grant and conveyance aforesaid; that the said Jonathan, at the time of executing said power, was, and now is, lawfully seised of the premises, and that he will warrant and defend the same to," etc., "against the lawful claims and demands of all persons. In testimony whereof, I have hereunto set the name and seal of the said Jonathan, this," etc.; and signed "Joshua Elwell," and seal.<sup>50</sup> A deed signed "C. C., Treasurer of New England Silk Co.," and acknowledged by C. C., treasurer, etc., to be his free act and deed, is not the deed of the corporation, though the corporation is described therein as the grantor.<sup>51</sup> A conveyance by an agent, in the style of "I, A. B., attorney in fact of C. D., do grant," etc., and signed "A. B., agent of C. D.," is insufficient at law to pass the principal's title.<sup>52</sup>

So the following was held to be the deed of the agent and not of the principal: "Know all men by these presents, that I, Josiah Little, of," etc., "by virtue of a vote of the Pejoscot

<sup>49</sup> *Townsend v. Hubbard*, 4 Hill (N. Y.) 351.

<sup>50</sup> *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126.

<sup>51</sup> *Brinley v. Mann*, 2 Cush. (Mass.) 337, 48 Am. Dec. 669, Wamb. Cas. 593.

<sup>52</sup> *Welsh v. Usher*, 2 Hill Eq. (S. C.) 167, 29 Am. Dec. 63. And see *Fowler v. Shearer*, 7 Mass. 15.

Proprietors, passed on the first day of September, 1784, authorizing me to give and execute deeds for and in behalf of said proprietors, for and in consideration of the sum of thirty-seven pounds to me in hand paid by Thomas Stinchfield, of," etc., "the receipt whereof I do hereby acknowledge, have given, granted, released, conveyed and confirmed unto him, the said T. S., his heirs and assigns forever, two hundred acres," etc. "To have and to hold the above granted and bargained premises, with all the privileges and appurtenances thereof, to him, the said T. S., his heirs and assigns forever, as an absolute estate of inheritance in fee-simple forever; hereby covenanting in behalf of said proprietors, their respective heirs, executors and administrators, to and with the said T. S., his heirs and assigns, to warrant, confirm and defend him and them in the possession of the said granted premises, against the lawful claims of all persons whatsoever. In testimony that this instrument shall be forever hereafter acknowledged by the said proprietors as their act and deed and be held good and valid by them, I, the said Josiah Little, by virtue of the aforesaid vote, do hereunto set my hand and seal, this nineteenth day of February," etc., with the agent's name and seal attached.<sup>53</sup>

#### § 299. Execution of a lease under seal.

A lease under seal executed by an agent in his individual name, although the fact of the agency is recited, and it extrinsically appears that the lessee acted as agent, is not binding upon the principal.<sup>54</sup> But the execution of such a lease by an authorized attorney signing his own name "for" the principal (naming him), and affixing a seal, is valid,<sup>55</sup> and the same is true where he signs the name of the principal (seal) by himself as agent.<sup>56</sup>

<sup>53</sup> *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65, Wamb. Cas. 586.

<sup>54</sup> *Klersted v. Orange & A. R. Co.*, 69 N. Y. 343, 25 Am. Rep. 199; *McColgan v. Katz*, 29 Misc. 136, 60 N. Y. Supp. 291.

<sup>55</sup> *Mussey v. Scott*, 7 Cush. (Mass.) 215, 54 Am. Dec. 719.

<sup>56</sup> *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, 18 Am. Rep. 631.

**§ 300. Execution of bonds.**

As has been stated heretofore, although the agent may describe himself as such, unless there otherwise appears a clear intention to bind the principal alone, such signature will be held to be a mere description of his personality and in no way render the act his principal's. Thus a bond phrased, "I promise to pay," etc., and not mentioning the obligor's name in the body, and executed by an agent as follows: "Witness my hand and seal, H. S. Lucas (Seal), for Charles Callender, president of the Chester Mica and Porcelain Co.," was held to be binding on the agent only.<sup>57</sup> So where a bond was executed by certain parties who were described as "Trustees of the Baptist Society of the town of R.," it was said by the court: "The bond must be considered as given by the defendants in their individual capacities. It is not the bond of the Baptist church; and if the defendants are not bound the church certainly is not, for the church has not contracted, either in its corporate name or by its seal. The addition of trustees to the names of the defendants is, in this case, a mere descriptio personarum."<sup>58</sup> So a bond signed T. D., acting for J. D., was held the bond of T. D. and not of J. D.<sup>59</sup>

**§ 301. There must be an intention to execute under the power.**

A deed executed under a power of attorney is not valid, unless there was an intention on the part of the attorney to execute the deed under and by virtue of the power, or at least it should not appear that the contrary intention existed.<sup>60</sup> Thus where a deed purported to be made by attorneys under power from two grantors, and some evidence was given of the existence of a joint power from them, but only a power

<sup>57</sup> *Bryson v. Lucas*, 84 N. C. 680, 37 Am. Rep. 634.

<sup>58</sup> *Taft v. Brewster*, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280, Wamb. Cas. 585. And see *Fullam v. Inhabitants of West Brookfield*, 9 Allen (Mass.) 1; *Dayton v. Warne*, 43 N. J. Law, 659.

<sup>59</sup> *Oliver v. Dix*, 21 N. C. (1 Dev. & B. Eq.) 158.

<sup>60</sup> *Davenport v. Parsons*, 10 Mich. 42, 81 Am. Dec. 772; *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Scott v. McAlpin*, 4 N. C. (Term R. 155) 554, 7 Am. Dec. 703; *Hill v. Conrad*, 91 Tex. 341.

from one of them individually was produced, it was held that the execution of the deed could not be referred to this separate power, so as to uphold it as the deed of the grantor who had given such power.<sup>61</sup> But where the agent has an interest in the land, and also a power to sell, and he executes a conveyance thereof, without referring to the power, the land shall pass by virtue of his ownership, even though his ownership be of a part only, while his power is over the whole.<sup>62</sup> A mere reference to a power which the agent had will not render effectual a deed executed by an agent, if it otherwise appears from the instrument that there was no intention to exercise such power. Thus, it has been held in Texas that a deed from one who has power of attorney to sell passes title, though he does not refer to such power, and has no estate in the land so conveyed.<sup>63</sup> But where from a deed executed by one having a power giving authority to execute it, or from the attending circumstances, it appears that it was not the intention of the party who executed the deed to exercise the power granted to him, the deed cannot be made sufficient to convey the title of the donor, by referring it to the power which the donee actually had, but failed to exercise.<sup>64</sup>

### § 302. Exception to general rule—Public agents.

An exception is made, however, to the above general rule, in the case of public agents. "Where a contract is entered into, or a deed executed in behalf of the government by a duly authorized public agent, and the fact so appears, notwithstanding the agent may have affixed his own name and seal, it is the contract or deed of the government which alone is responsible, and not of the agent," unless the intent to bind the latter is clearly apparent.<sup>65</sup> "A contrary doctrine

<sup>61</sup> *Davenport v. Parsons*, 10 Mich. 42, 81 Am. Dec. 772.

<sup>62</sup> *Hay v. Mayer*, 8 Watts (Pa.) 203, 34 Am. Dec. 453.

<sup>63</sup> *Hill v. Conrad* (Tex. Civ. App.) 41 S. W. 541; *Pool v. Unknown Heirs* (Tex. Civ. App.) 49 S. W. 928.

<sup>64</sup> *Hill v. Conrad*, 91 Tex. 341.

<sup>65</sup> *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65, Wamb. Cas. 586; *Unwin v. Wolseley*, 1 Term R. 674; *Macbeath v. Haldimand*, 1 Term R. 172; *Ghent v. Adams*, 2 Ga. 214; *Wallis v. Johnson School Town-*

*C. & S.—44.*

would be productive of the most injurious consequences to the public, as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would consent to become a public agent, if he should be made personally responsible for contracts on the public account."<sup>66</sup> But his agency will not protect him if he exceeds his authority; nor if he disavows his character of public agent, by denying to the government that he made the contract.<sup>67</sup> Thus a bond in these words: "We, the commissioners for the sale of lots in the town of Pinckney, promise to pay, or cause to be paid, to Thomas and Robert McCleinticks, or their assigns, on or before the first day of March next, the sum of thirteen hundred and twenty dollars, which we owe to them for building a jail in the town of Pinckney. Witness our hands and seals," etc. Signed, "David Bryant, Andrew Fourn, Moses Summers," was held to be binding on the commissioners individually because they had exceeded their powers in dealing in credit. "The words are apt to charge them as commissioners, if they had power in that capacity to deal in credit;" but as they had not such authority, "they bound their own credit, and none else."<sup>68</sup>

### § 303. Modern rule—Under the statutes.

But there is now a general disposition to relax the rigid rules of the common law in regard to conveyances. The formality and exactness formerly deemed necessary are not

ship, 75 Ind. 368; *Kentucky Bank v. Sanders*, 3 A. K. Marsh. (Ky.) 185, 13 Am. Dec. 149; *Murray v. Carothers*, 1 Metc. (Ky.) 71; *Dawes v. Jackson*, 9 Mass. 490; *Brown v. Austin*, 1 Mass. 208, 2 Am. Dec. 11; *Freeman v. Otis*, 9 Mass. 272, 6 Am. Dec. 66; *Tutt v. Hobbs*, 17 Mo. 486; *Knight v. Clark*, 48 N. J. Law, 22, 57 Am. Rep. 534; *Sheffield v. Watson*, 3 Calnes (N. Y.) 69; *Fox v. Drake*, 8 Cow. (N. Y.) 191; *Belknap v. Reinhart*, 2 Wend. (N. Y.) 375, 20 Am. Dec. 621; *Hodgson v. Dexter*, 1 Cranch (U. S.) 345; *Jones v. Le Tombe*, 3 Dall. (U. S.) 384; *U. S. v. Blount*, 4 N. C. (2 Law Repos. 84) 181; *Heidelberg School Dist. v. Horst*, 62 Pa. 301; *Miller v. Ford*, 4 Rich. Law (S. C.) 376, 55 Am. Dec. 687.

<sup>66</sup> By Chief Justice Marshall, in *Hodgson v. Dexter*, 1 Cranch (U. S.) 345.

<sup>67</sup> *Freeman v. Otis*, 9 Mass. 272, 6 Am. Dec. 66.

<sup>68</sup> *McCleinticks v. Bryant*, 1 Mo. 598, 14 Am. Dec. 310.

now required. There is a disposition to effectuate the intention of the parties where that can be certainly ascertained from the deed.<sup>69</sup> And especially is this so in some states, under statutory provisions. Thus, in a Maine case in which the agent signed and sealed the deed in his own name, this doctrine was fully stated, as follows: "Applying the principles settled by the courts, and the provisions of our statute to the question under consideration, we think the true rule in this state is that where a deed is executed by an agent or attorney, with authority therefor, and it appears by the deed that it was the intention of the parties to bind the principal or constituent, that it should be his deed and not that of the agent or attorney—it must be regarded as the deed of the principal or constituent, though signed by the agent or attorney in his own name. In determining the meaning of the parties, recourse must be had to the whole instrument—the granting part, the covenants, the attestation clause, the sealing and acknowledgment, as well as the manner of signing. If signed by the agent in his own name, it must appear by the deed that he did so for his principal. This may appear in the body of the deed as well as immediately after the signature."<sup>70</sup> But such a statute does not validate a deed given under a power of attorney, and executed as the deed of the attorney, and not of the principal.<sup>71</sup> A deed set out that the inhabitants of the town of N. con-

<sup>69</sup> McClure v. Herring, 70 Mo. 18, 35 Am. Rep. 407.

<sup>70</sup> Inhabitants of Nobleboro v. Clark, 68 Me. 87, 28 Am. Rep. 22. Maine Rev. St. c. 73, §§ 10, 15. And see Simpson v. Garland, 72 Me. 40, 39 Am. Rep. 298; Andrews v. Estes, 11 Me. 267, 26 Am. Dec. 521; Purinton v. Security Life Ins. & Annuity Co., 72 Me. 22; McCreary v. McCorkle (Tenn. Ch. App.) 54 S. W. 53; Warner v. Mower, 11 Vt. 385; McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274; Bryan v. Stump, 8 Grat. (Va.) 241, 56 Am. Dec. 139; Stinchcomb v. Marsh, 15 Grat. (Va.) 202. A lease executed by an agent in his own name, from the body of which it is evident that he intended to bind his principal and not himself, will be treated as the contract of the principal and he may maintain an action on it. The distinction at law between sealed and unsealed instruments in this respect, has ceased to exist since the abolition of private seals. Gibbs v. Dickson, 33 Ark. 107.

<sup>71</sup> Williams v. Paine, 7 App. D. C. 116.

veyed to Clark a certain tract of land. In witness whereof, they, "by the hand of Hatch, hereunto duly authorized, \* \* \* have set their seal, and the said Hatch has hereunto subscribed his name." Hatch, as agent of N., acknowledged the instrument to be the free act and deed of the inhabitants of the town, and it was held the deed of the inhabitants of N.<sup>72</sup>

In a Pennsylvania case, the following language was used: "Every presumption of law must give way to facts. The general rule, to be sure, is that a deed signed by an agent and sealed with his own seal is his deed; but there are exceptions. The law raises a presumption that he intended to bind himself. For if it is not his deed, it is the deed of nobody. But if, from the nature and terms of the instrument, it appears that the party is an agent and that he means to bind his principal, and to act for him and not on his own account, the law will give the paper that intentment to carry out the actual meaning of the parties, however inartificial the language may be. And there is no difference on this point whether the instrument be a deed or an unsealed instrument."<sup>73</sup>

But in at least one state it is held that the fact the common law requirement of a seal on deeds has been done away with by statute does not alter the rule as to the execution of such instruments by an agent.<sup>74</sup>

#### § 304. Should deed purport to be executed by the agent.

(a) **Rule that agent should add his name as agent.**—There has been much discussion among the authorities as to whether a deed, executed by an agent, should purport on its face to be executed by the agent, on behalf of the principal, or whether the agent may, throughout the instrument, use the principal's name alone, without disclosing that it has been so used by an agent. It has been held that, unless the attorney in fact signing his principal's name to a deed, adds his own name as agent or attorney, it is not a valid execu-

<sup>72</sup> *Inhabitants of Nobleboro v. Clark*, 68 Me. 87, 28 Am. Rep. 22.

<sup>73</sup> *Abrams v. Musgrove*, 12 Pa. 292.

<sup>74</sup> *Jones v. Morris*, 61 Ala. 518.



tion of such instrument.<sup>75</sup> Thus it has been held that when there are two grantors and one of them acts as the attorney in fact of the other, he must subscribe his name twice, once as attorney in fact for the other, and once for himself. One signature and a second seal is not equal to a second subscription.<sup>76</sup> In perhaps the leading case upholding this doctrine, it is said: "It should appear upon the face of the instruments that they were executed by the attorney, and in virtue of the authority delegated to him for this purpose. It is not enough that an attorney in fact has authority, but it must appear, by the instruments themselves, which he executes, that he intends to execute this authority. The instruments should be made by the attorney expressly as such attorney; and the exercise of his delegated authority should be distinctly avowed upon the instruments themselves. Whatever may be the secret intent and purpose of the attorney, or whatever may be his oral declaration or profession at the time, he does not in fact execute the instruments as attorney, and in the exercise of his power as attorney, unless it is so expressed in the instruments. The instruments must speak for themselves. Though the attorney should intend a deed to be the deed of his principal, yet it will not be the deed of the principal, unless the instrument purports on its face to be his deed. The authority given clearly is that the attorney shall execute the deed as attorney, but in the name of the principal."<sup>77</sup>

(b) **Rule that he may sign in principal's name alone.**—But notwithstanding the obvious utility of the mode of execution above indicated, the weight of authority seems to be in favor of the doctrine that an agent or attorney may execute an instrument, either under seal or without seal, by signing the principal's name alone, especially where the fact that it is executed by an attorney appears in the body of

<sup>75</sup> *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Meagher v. Thompson*, 49 Cal. 189.

<sup>76</sup> *Meagher v. Thompson*, 49 Cal. 189.

<sup>77</sup> By Fletcher, J., in *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 772. And see *Hunter v. Giddings*, 97 Mass. 41, 93 Am. Dec. 54.

the instrument.<sup>78</sup> "Although it is usual and better for him to sign the name of his principal, and to add thereto his own signature, with proper words indicating that the act is done by him as such attorney, yet it is not necessary in all cases that he should so append his own name. When the deed on its face purports to be the indenture of the principal, made by his attorney in fact, therein designated by name, it may be properly executed by such attorney by his subscribing and affixing thereto the name and seal of his principal alone."<sup>79</sup>

In perhaps the leading case upholding the first rule, this latter rule has been commented upon in the following words: "If such a mode of execution is proper and legal, it seems most remarkable that it is nowhere stated or suggested in any work of authority. The execution of instruments by agents in this way would certainly be attended with great difficulties and dangers. If the agent might execute instruments in this mode, the principal, if he found his name signed to an instrument, would have no means of knowing by whom it had been signed, or whether he was bound or not bound by such signature; and other persons might be greatly deceived and defrauded by relying upon such signature as the personal act and signature of the principal, when the event might prove that it was put there by an agent, who had mistaken his authority, and consequently, that the principal was not bound. When it should be discovered that the name of the principal was not written by him, as it purports to be, it might be wholly impossible to prove the execution by attorney, as there would be nothing on the note to indicate such an execution."<sup>80</sup>

And the rule first discussed has been commented upon as follows: "No case, I apprehend, can be found in the books

<sup>78</sup> *Devinney v. Reynolds*, 1 Watts & S. (Pa.) 328; *Forsyth v. Day*, 41 Me. 382; *Wilks v. Back*, 2 East, 142, Wamb. Cas. 533.

<sup>79</sup> *Berkey v. Judd*, 22 Minn. 287. And see *First Nat. Bank v. Loyhed*, 28 Minn. 396, and *Deakin v. Underwood*, 37 Minn. 98, 5 Am. St. Rep. 827, where the doctrine of *Berkey v. Judd* is recognized, although these were not cases of sealed instruments.

<sup>80</sup> By *Fletcher, J.*, in *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 773.

which will sustain the rule so broadly laid down by the learned judge in the case of *Wood v. Goodridge*, cited above. Nor can the doctrine be sustained on principle. It is difficult to perceive any sound reason why, if one man may authorize another to act for him and bind him, he may not authorize him thus to act for him and bind him in one name as well as in another. As matter of convenience in preserving testimony, it may be well that the names of all parties who are in any way connected with a written instrument should appear upon the instrument themselves. But the fact that the name of the agent by whom the signature of the principal is affixed to an instrument appears upon the instrument itself, neither proves nor has any tendency to prove the authority of such agent. That must be established aliunde, whether his name appears as agent or whether he simply places the name of his principal to the instrument to be executed. More, even: the authorities clearly show that one man may be bound by the use of his name by another, simply from an implied authority."<sup>81</sup>

(c) **Summary.**—It will be seen from an examination of the cases, that the second doctrine was set forth in cases in which it appeared from the face of the instruments that they were executed by an attorney. Where, then, such a state of facts does not exist, it would seem that the doctrine first above set forth would be the better one to follow. Or these rules may be stated, from the facts as they are in the cases above cited, that where there is nothing on the face of the instrument to indicate that it is being executed by an agent or attorney, and naming him, then it should be signed in the principal's name with the agent's name added; but where it appears from the face of the instrument that it is being executed by an agent or attorney, then such signature may be made in the principal's name alone, without adding the agent's name.

(d) **Where principal is present.**—The rules above set forth apply only to cases where the principal is absent at the time the agent executes the instrument; for when one writes the name of another to a deed, in his presence, and at his re-

<sup>81</sup> Rice, J., in *Forsyth v. Day*, 41 Me. 391.

quest, and by his direction, the act of writing is regarded as the party's personal act, as much as if he had held the pen, and signed and sealed the instrument with his own hand, and of course in such case it would not be necessary to indicate in the instrument that it was executed by an agent.<sup>82</sup>

**§ 305. Where agent executes for several parties.**

Where an agent executes an instrument under seal for several parties, he may use only one seal in executing for them all, if there appears an intention of each to adopt the seal as his own.<sup>83</sup> Thus, though a deed be executed by an attorney for several principals, it is not necessary to affix a separate seal for each, provided it appear that the seal affixed was intended to be adopted as the seal of all.<sup>84</sup>

**§ 306. Where instrument conveys more than one kind of property.**

An instrument executed by an agent, although entire in form, may be good in part and void in part, as it is a sufficient conveyance in regard to one species of property, and not to another; hence, where the directors of a corporation authorize its treasurer to make an assignment of all its property, real and personal, and he executes a deed under his own name and seal, if accepted, it will be sufficient to pass the title to the personal property,<sup>85</sup> but not the real property.

**§ 307. Admissibility of parol evidence to discharge agent, or charge principal.**

It is a well settled common-law principle that no one can sue or be sued upon a sealed instrument but those who are

<sup>82</sup> *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Ball v. Dunsterville*, 4 Term R. 313; *Lovelace's Case*, Wm. Jones, 268; *Hibblewhite v. McMornie*, 6 Mees. & W. 200; *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; *Kidder v. Prescott*, 24 N. H. 263; *Hanson v. Rowe*, 26 N. H. 327. And see ante, § 15.

<sup>83</sup> *Townsend v. Hubbard*, 4 Hill (N. Y.) 351; *Ball v. Dunsterville*, 4 Term R. 313; *Bohannons v. Lewis*, 3 T. B. Mon. (Ky.) 376; *Stabler v. Cowman*, 7 Gill & J. (Md.) 284; *Yarborough v. Monday*, 13 N. C. (2 Dev.) 493.

<sup>84</sup> *Townsend v. Hubbard*, 4 Hill (N. Y.) 351.

<sup>85</sup> *Sargent v. Webster*, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

named in it as parties. From this another settled rule follows, that where an agent, who is authorized to execute a sealed instrument in behalf of his principal, does it in such a manner that it appears from the face of the instrument to be made by the agent personally, he alone will be bound thereby, and parol evidence is not admissible to discharge him from such liability, or to charge the principal thereon, or to enable a third person to sue on such instrument.<sup>86</sup> Where, however, the deed is so ambiguous that it does not appear from the face of the instrument who is to be charged thereby, parol evidence may be admitted to explain such ambiguity and to show who was intended to be charged.<sup>87</sup> Thus, where a lease was made by the officers of a corporation, it was claimed that because the instrument was under seal and signed by such officers in their individual names, without the addition of their official title, they have made themselves personally liable for the performance of the covenant to pay the rent reserved in the lease. To this, Ruger, C. J., says: "This question, like others arising upon the interpretation of contracts, must be determined by the language of the instrument itself, unless some ambiguity appears upon its face, or unless phrases of doubtful meaning are employed therein requiring explanation, in which case resort may be had to parol evidence and proof of the attendant circumstances to discover the real meaning and intent of the parties."<sup>88</sup>

**§ 308. Rule in equity as to imperfect execution of a sealed instrument by an agent.**

Although an instrument under seal, made by an attorney for his principal, is inoperative at law for want of a formal

<sup>86</sup> *Beckham v. Drake*, 9 Mees. & W. 79, Wamb. Cas. 647, note; *Inhabitants of Nobleboro v. Clark*, 68 Me. 87, 28 Am. Rep. 22; *Dellus v. Cawthorn*, 13 N. C. (2 Dev.) 90; *Briggs v. Pardridge*, 64 N. Y. 357, 21 Am. Rep. 617, Huffc. Cas. 248; *Spencer v. Field*, 10 Wend. (N. Y.) 88; *Lincoln v. Crandell*, 21 Wend. (N. Y.) 101; *Townsend v. Hubbard*, 4 Hill (N. Y.) 351; *Platt v. Cathell*, 3 Denio (N. Y.) 604; *Willis v. Bellamy*, 52 N. Y. Super. Ct. 373; *Borchering v. Katz*, 37 N. J. Eq. 150.

<sup>87</sup> *Shuetze v. Bailey*, 40 Mo. 69.

<sup>88</sup> *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131.

execution in the name of the principal, yet it is binding in equity if the attorney had authority;<sup>89</sup> and if the instrument so defectively executed be a conveyance of real estate, it will be sustained in equity as an agreement to convey, and will be good against the principal, subsequent lien creditors and subsequent purchasers with notice.<sup>90</sup> Thus, a mortgage made by an agent will be enforced in equity, and without reformation, against the principal and subsequent lien creditors, and also against purchasers with notice, though the mortgage be inoperative at law for want of a formal execution in the name of the principal, if the agent had authority to execute the instrument; and his failure to do so in the name of the principal was the result of accident or mistake.<sup>91</sup>

**§ 309. Nonexecution not aided by intention.**

But equity will not lend its aid in making a conveyance under a power where there has been no execution at all of such power. Nor can such nonexecution be aided by proof of an intention to execute it. Thus, if an attorney in fact, acting under a power of attorney, executed by both husband and wife, sign a deed of conveyance as the attorney of the husband only, the deed will operate to convey only the husband's interest, and will not bar dower of the wife; and the failure to execute the deed as the attorney of the wife cannot be aided by evidence showing a mistake on the part of the attorney in drawing the deed.<sup>92</sup>

<sup>89</sup> *Love v. Sierra N. Lake Water & Min. Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Johnson v. Johnson's Heirs*, 1 Dana (Ky.) 364; *McNaughten v. Partridge*, 11 Ohio, 223, 38 Am. Dec. 731; *Giddens v. Byers' Heirs*, 12 Tex. 82; *Traynham v. Jackson*, 15 Tex. 170, 65 Am. Dec. 153; *Daughtrey v. Knolle*, 44 Tex. 450; *Fisher v. Salmon*, 1 Cal. 413, 54 Am. Dec. 297.

<sup>90</sup> *Love v. Sierra N. Lake Water & Min. Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Salmon v. Hoffman*, 2 Cal. 138, 56 Am. Dec. 322; *Gerdes v. Moody*, 41 Cal. 335; *Colsten's Heirs v. Chaudet*, 4 Bush (Ky.) 675; *Welsh v. Usher*, 2 Hill, Eq. (S. C.) 167, 29 Am. Dec. 63; *Fisher v. Salmon*, 1 Cal. 413, 54 Am. Dec. 297.

<sup>91</sup> *Love v. Sierra N. Lake Water & Min. Co.*, 32 Cal. 639, 91 Am. Dec. 602.

<sup>92</sup> *Wilkinson v. Getty*, 13 Iowa, 157, 81 Am. Dec. 428.

## III. EXECUTION OF WRITINGS NOT UNDER SEAL.

*A. Negotiable Instruments.***§ 310. In general.**

Among contracts not under seal, or simple contracts, negotiable instruments properly constitute a class by themselves. For this reason the rules applicable to the execution of such instruments by agents will be considered separately from the rules applicable to the execution of other simple contracts. Especially is this so as negotiable instruments play such an important part in commercial business or transactions. Owing to the obscure manner in which such instruments have been drawn, and the uncertainty of the terms of description where contracts have been made or promissory notes given by agents, there has been difficulty in determining whether the principal or the agent, or both, are liable, not because of any difference in the principles of construction governing in such cases, but from their application to particular cases; and no uniform and consistent rule can be extracted from the authorities on the subject. Sometimes the agent may attach to his signature the character in which he signs the instrument, without any correspondent, or other description, in the body of the instrument, or he may, in the body of the instrument, disclose the name of his principal and sign his own individual name, without any additional description whatever, or he may sign his own name, without apt terms to charge himself, and in the body of the instrument use doubtful expressions to describe the principal, leaving the precise meaning of the instrument, to be gathered from the terms on its face, so ambiguous or obscure as to render its interpretation, per se, too difficult and uncertain for just and sound construction.

In general the same rules as to executing such instruments in the name of the principal apply, as in the case of sealed instruments, but such rules are not applied as strictly to the former as to the latter class of cases.

**§ 311. General rule.**

As a general rule, therefore, when an agent is employed to execute negotiable instruments for his principal, he must

execute them in the name of his principal; or he must execute them in such a manner that an intention to bind the principal thereby is manifest from the face of the instrument. If he does so, the agent himself will be exempted from any personal liability and the principal alone will be bound; but if he does not so execute it, and the words of the instrument are such as indicate an apt intention to bind the agent, he alone will be bound; but it is not necessary that the principal's name should be placed on the instrument in any particular form, if the intention to bind him alone plainly appears from the whole instrument.<sup>93</sup> "When an agent, duly authorized, subscribes an engagement in such manner as to manifest an intention not to bind himself, but to bind the principal, and when, by his subscription, he has actually bound the principal, then it is clear that the contract cannot be binding on him personally. It will be agreed that no precise form of words is required to be used in the signature; that every word must have an effect, if possible, and that the intention must be collected from the whole instrument taken together."<sup>94</sup>

<sup>93</sup> *Leadbitter v. Farrow*, 5 Mees. & W. 345, Wamb. Cas. 602; *Alexander v. Sizer*, L. R. 4 Exch. 102; *Lazarus v. Shearer*, 2 Ala. 718; *Blanchard v. Kaull*, 44 Cal. 440; *Rawlings v. Robson*, 70 Ga. 596; *Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 175; *Little v. Unitarian Church*, 87 Ill. 239; *Fulton v. Loughlin*, 118 Ind. 286; *Means v. Swarmstedt*, 32 Ind. 87, 2 Am. Rep. 330; *Armstrong v. Kirkpatrick*, 79 Ind. 527; *Haile v. Pierco*, 32 Md. 327, 3 Am. Rep. 139; *Laffin & Rand Powder Co. v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472; *Morell v. Coddington*, 4 Allen (Mass.) 403; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Barlow v. Congregational Soc.*, 8 Allen (Mass.) 460; *Farmers' & M. Bank v. Troy City Bank*, 1 Doug. (Mich.) 457; *Hasey v. White Pigeon Beet Sugar Co.*, 1 Doug. (Mich.) 193; *Fowler v. Atkinson*, 6 Minn. 578; *Gillig v. Lake Bigler Road Co.*, 2 Nev. 214; *Savage v. Rix*, 9 N. H. 263; *Dow v. Moore*, 47 N. H. 419; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Casco Nat. Bank v. Clark*, 139 N. Y. 307, Huffc. Cas. 374; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *Barker v. Mechanic Fire Ins. Co.*, 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; *Cape Fear Bank v. Wright*, 48 N. C. (3 Jones) 376; *Anderton v. Shoup*, 17 Ohio St. 125; and see cases more specifically cited hereafter.

<sup>94</sup> *Hovey v. Magill*, 2 Conn. 680.



### § 312. The test question.

The test question in any particular case is whether the agent executing and signing the instrument professes and intends to bind himself, and adds the name of another to indicate the capacity or the trust in which he acts, or the person for whose account the promise is to be made; or whether the words referring to the principal are intended to indicate that he does a ministerial act in giving authenticity to the act, promise and contract of another. Does the person signing apply the executive hand as the instrument of another or the promising and engaging mind of a contracting party?<sup>95</sup>

### § 313. Forms of signing negotiable instruments by agent.

Perhaps the best form of signing such an instrument is, A. B. by C. D. his agent or attorney, or A. B. by his agent or attorney C. D.; but it is not necessary that it should be in this form, as A. B. by C. D. has been held a good signature, as also has A. B. agent for C. D., A. B. for C. D., and for C. D., A. B., if the evident intention of the instrument is to bind the principal.<sup>96</sup> Thus promissory notes signed "York Butter and Cheese Company, by F. A. Bidwell, president, J. D. White, secretary," are obligations of the corporation, and not of the individuals.<sup>97</sup> So a note in the following form was held to be binding on the principal: "For value received, the pastor and deacons of the First Freewill Baptist Church in Lowell, in behalf of said church, promise to pay," etc., and signed, "S. D. York, agent for the First Freewill Baptist Church in Lowell."<sup>98</sup> And a note signed "P. & J. for G." is the note of G.,

<sup>95</sup> *Bradlee v. Boston Glass Co.*, 16 Pick. (Mass.) 350, *Huffc. Cas.* 364; *Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 176, and cases cited.

<sup>96</sup> *Rawlings v. Robson*, 70 Ga. 595; *Tiller v. Spradley*, 39 Ga. 35; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240.

<sup>97</sup> *Nebraska Nat. Bank v. Ferguson*, 49 Neb. 109, 59 Am. St. Rep. 522.

<sup>98</sup> *Jefts v. York*, 4 Cush. (Mass.) 371, 50 Am. Dec. 791. To the same effect see *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Webb v. Burke*, 5 B. Mon. (Ky.) 51; *Cook v. Sanford*, 3 Dana (Ky.) 237. But see

though the form is "We jointly and severally promise."<sup>99</sup> So a note made "We promise to pay," and signed, "William Slyfield, for himself and George Little," was held to be sufficiently executed for both.<sup>100</sup> A promissory note, signed "John Neuffer, for Nath'l Pope, Sam'l Byers," where Byers wrote the latter names, intending to sign as agent for Pope, is a note of Pope, and renders him liable.<sup>101</sup> But even "agent for" has been held under some circumstances a mere *descriptio personae* of the agent, as where the name following these words was not the proper name of the principal. Thus where a note was signed "David Hoyt, agent for the Churchman," it was held to be the note of Hoyt and not of the principal, as the word "Churchman" was the name of a newspaper which the agent carried on for the principal, and in the name of the principal.<sup>102</sup> So where there is nothing in the body of the bill or note evincing an intent to bind the principal, it is held that the signature "T. R. T., agent for S. T.," does not bind the principal, and is the bill of the agent.<sup>103</sup> And a note running "I promise," etc., and signed, "Robert Early [for Sam'l Early]," was held to be the note of Robert Early.<sup>104</sup>

Where A. authorized B. to borrow money for him of C. and sign A.'s name to a note therefor, and B. borrowed the money, and in his presence and at his request D. signed the note thus: "A. by D.," it was held that A. was bound.<sup>105</sup> And a note signed "Pro W. G.—J. S. C.," was also held to be binding on the principal.<sup>106</sup>

*Offutt v. Ayres*, 7 T. B. Mon. (Ky.) 356; *Dawson v. Cotton*, 26 Ala. 591.

<sup>99</sup> *Rice v. Gove*, 22 Pick. (Mass.) 158, 33 Am. Dec. 724.

<sup>100</sup> *Olcott v. Little*, 9 N. H. 259, 32 Am. Dec. 357.

<sup>101</sup> *Robertson v. Pope*, 1 Rich. Law (S. C.) 501, 44 Am. Dec. 267.

<sup>102</sup> *De Witt v. Walton*, 9 N. Y. 571. And see *Shattuck v. Eastman*, 12 Allen (Mass.) 369, where it was held that a paper in the form of a receipt, signed "Robert Eastman, agent for Ward 6, Lowell, Mass.," if executed under such circumstances as to amount to a contract, might be binding on the agent personally.

<sup>103</sup> *Tannatt v. Rocky Mountain Nat. Bank*, 1 Colo. 278, 9 Am. Rep. 156.

<sup>104</sup> *Early v. Wilkinson*, 9 Grat. (Va.) 68.

<sup>105</sup> *Weaver v. Carnall*, 35 Ark. 198, 37 Am. Rep. 22.

<sup>106</sup> *Long v. Colburn*, 11 Mass. 97, 6 Am. Dec. 160; *Emerson v.*

But a note executed and signed by the agent as "agent of" the principal is not sufficient to bind the principal.<sup>107</sup> Thus a note signed by two persons, with the addition "Trustees of Union Religious Society, Phelps," was held to bind the signers personally;<sup>108</sup> and a note signed, "John Franklin, President of the Mechanic Fire Insurance Company," was held not to be the note of the company, although alleged to have been made within the authority of the president and the scope of the legitimate business of the corporation; the court saying: "In this case, there is an averment that the president was lawfully authorized; but it does not appear that he acted under that authority; he does not say that he signs for the company; he describes himself as president of the company, but to conclude the company by his acts he should have contracted in their name, or at least on their behalf."<sup>109</sup>

**§ 314. Merely affixing words indicating agency, to agent's name, not sufficient execution.**

The mere fact that an agent adds words of description to his name, indicating his character or the relation he holds to the principal, is not sufficient to exempt the agent from personal liability or to bind the principal, if there is nothing else in the instrument showing that such description was used in that particular case with an intention of binding the principal.<sup>110</sup> As has been said: "In order to exempt

Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66, where a note signed "for the Providence Hat Mfg. Company, Frink Roberts," was held to be binding on the company.

<sup>107</sup> Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101, Wamb. Cas. 616; Haverhill F. Ins. Co. v. Newhall, 1 Allen (Mass.) 130; Fiske v. Eldridge, 12 Gray (Mass.) 474; Millen v. Moore, 68 Me. 390, 28 Am. Rep. 77. But see Mann v. Chandler, 9 Mass. 335, where notes worded "I, the subscriber, treasurer of the D. T. Corporation, promise," etc., and signed "G. L. C., treasurer of the D. T. Corporation," were held to be binding on the corporation and not on the treasurer personally.

<sup>108</sup> Hills v. Bannister, 8 Cow. (N. Y.) 31.

<sup>109</sup> Barker v. Mechanic F. Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664.

<sup>110</sup> Lazarus v. Shearer, 2 Ala. 718; Drake v. Flewellen, 33 Ala.

an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express some form of words that the writing is the act of the principal, though done by the hand of the agent. If he expresses this the principal is bound, and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal or to exempt the agent from personal liability."<sup>111</sup> Thus, where the trustees of a church gave a promissory note for a church debt, describing themselves in the body of the note as "trustees of" the church, and after their signature appending the word "trustees," it was held that they were individually liable on the note.<sup>112</sup> So a promissory note in the form: "I promise to pay to the order of S. & Co.," etc., and signed "John T. Hull, Treas. St. Paul's Parish," is the note of the signer.<sup>113</sup> Where the form of a signature was "David Hubbell Hoyt, agent for the Church-

106; *Chamberlain v. Pacific Wool-Growing Co.*, 54 Cal. 103; *Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 175; *Williams v. Lafayette Second Nat. Bank*, 83 Ind. 237; *Hayes v. Brubaker*, 65 Ind. 27; *Prescott v. Hixon*, 22 Ind. App. 139, 72 Am. St. Rep. 291; *Burbank v. Posey*, 7 Bush (Ky.) 372; *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421; *Ross v. Brown*, 74 Me. 352; *Fogg v. Virgin*, 19 Me. 352, 36 Am. Dec. 757; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101, Wamb. Cas. 614; *Davis v. England*, 141 Mass. 587; *Seaver v. Coburn*, 10 Cush. (Mass.) 324; *Gillig v. Lake Bigler Road Co.*, 2 Nev. 214; *De Witt v. Walton*, 9 N. Y. 571; *Cortland Wagon Co. v. Lynch*, 82 Hun (N. Y.) 173; *Fash v. Ross*, 2 Hill (S. C.) 294.

<sup>111</sup> By *Gray, J.*, in *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101, Wamb. Cas. 614.

<sup>112</sup> *Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 175.

<sup>113</sup> *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409. And see *Sheridan v. Carpenter*, 61 Me. 83; *McClure v. Livermore*, 78 Me. 390; *Fiske v. Eldridge*, 12 Gray (Mass.) 474; *Landyskowski v. Lark*, 108 Mich. 500; *Rupert v. Madden*, 1 Chand. (Wis.) 146; *Hobbs v. Cowden*, 20 Ind. 310; *Barker v. Mechanic F. Ins. Co.*, 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; *Exchange Bank v. Lewis County*, 28 W. Va. 273.

man," Gardiner, C. J., in commenting on this signature, says: "It is not sufficient that he describes himself as agent; but he must give a right of action against the principal."<sup>114</sup> And where the note runs, "I promise to pay," etc., and was signed by A. B. & C., "as trustees of the First Universalist Society," a blank being left above these words for the signature of D., a fourth trustee, and the note was delivered to the payee to obtain that signature, which he did after tearing off, without D.'s knowledge, the descriptive words, it was held that as the body of the note showed a personal undertaking, the makers would have been personally liable on the note, even had the descriptive words not been torn off.<sup>115</sup> So a note in form, "We promise to pay," etc., and signed by third parties in their individual names, with the addition of the words "President" and "Secretary" respectively, is in law their individual note, and nothing short of notice, express or implied, that the note was issued as the note of the corporation of which the signers were officers, and was not intended to bind the signers personally, can defeat, on the ground that it was a corporate obligation, the remedy against the individuals actually liable on the note as promisors.<sup>116</sup>

But there seems to be an exception to this rule in the case of cashiers of banks, by reason of commercial usage in such cases. Thus, where a creditor called on his debtor, a banking firm, for his debt, and they instructed their cashier to make out a check for the amount, which he did, signing his name as "cashier," his act in so doing was the act of his principals, and they were liable on the check as though they drew it themselves.<sup>117</sup> But where this exception has been applied has generally been cases in which the name of the bank appeared on the instrument. It is, at least, doubtful if it would be applied to cases in which the name of the bank in no wise appeared on the instrument, either in the heading, on the margin, or in the body thereof, and was merely signed by the cashier as such; especially in cases

<sup>114</sup> *De Witt v. Walton*, 9 N. Y. 571.

<sup>115</sup> *Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177.

<sup>116</sup> *First Nat. Bank v. Wallis*, 150 N. Y. 455.

<sup>117</sup> *Brenner v. Lawrence*, 27 Misc. (N. Y.) 755. And see post, § 324.

where the instrument was in the hands of a bona fide holder for value, without notice that the cashier was acting for the bank.

**§ 315. Where name of corporation is signed followed by name of agent with official title.**

There are some cases involving corporations, in which the signature of the name of the corporation followed by the name of the agent with his official title affixed thereto, without the intervention of the preposition "by" or "per," have been held to make the note or bill binding on the corporation, and not on the agent personally, although the instrument may be "we promise to pay," etc. Thus a promissory note reading "we promise," and signed, "Pioneer Mining Company, John E. Mason, Supt.," and not sealed, may be shown by parol to have been understood by the payee to be the note of the company alone.<sup>118</sup> And in deciding on a similar

<sup>118</sup> *Bean v. Pioneer Min. Co.*, 66 Cal. 451, 56 Am. Rep. 106. And to the same effect see *Draper v. Massachusetts Steam Heating Co.*, 5 Allen (Mass.) 338; *Turner v. Potter*, 56 Iowa, 251; *Castle v. Belfast Foundry Co.*, 72 Me. 167; *Atkins v. Brown*, 59 Me. 90; *Falk v. Moebs*, 127 U. S. 597; *Miller v. Roach*, 150 Mass. 140; *Reeve v. First Nat. Bank*, 54 N. J. Law, 208, 33 Am. St. Rep. 675, where it was held that when nothing appears in the body of a note to indicate the maker, and it is signed by a corporate name, under which name appears the name of an officer of the corporation with his corporate official title affixed, the note is taken conclusively to be that of the corporation, although it is in form, "we promise to pay."

In *Bean v. Pioneer Min. Co.*, 66 Cal. 451, 56 Am. Rep. 106, *McKinstry, J.*, says: "It is insisted by the appellant that the instrument is the note of the company and Mason; that the words 'we promise to pay,' clearly establish this. But the question is not to be determined merely by reference to rules of grammar. If the note was signed unmistakably by the company, and the company alone, we could see that the mistake which would make the collective 'company' the nominative, instead of the corporate name, might easily have occurred. It must be conceded that if the note had been signed 'Pioneer Mining Company, by John E. Mason, Superintendent,' and the superintendent had power to execute notes of the corporation, it would be the note of the corporation, notwithstanding the words 'we promise.' If we reject the words subscribed to the note in suit, 'John E. Mason, Sup't,' whose note is it? Would the words 'Pioneer Mining Company,' not accompanied by any words in-

note signed, "San Pedro Mining and Milling Company, F. Kraus, President," Orton, J., says: "The principle of these authorities seems to be 'that if the agent signed the note with his own name alone, and there was nothing on the face of the note to show that he was acting as agent, he will be personally liable; but if his agency appears with his signature, then his principal only is bound.' Here the corporation could not sign its own name, and it is not otherwise shown on the face of the note than that Kraus signed the corporate name, and by adding the word 'President,' to his own name he shows conclusively that as president of the corporation he signed the note and not otherwise. Such is the natural and reasonable construction of these signatures, and so it would be generally understood. The affix "cashier," "secretary," "president," or "agent" to the name of the person sufficiently indicates and shows that such person signed the bank or corporate name, and in that character and capacity alone. The use of the word 'by' or 'per' or 'pro' would not add to the certainty of what is thus expressed."<sup>119</sup> So a promissory note running "we, the trustees of the First Freewill Baptist Society of Chicago" and signed "Trustees of the First Freewill Baptist Society of Chicago, Ill.," followed by the individual names of the trustees, was held to be the note of the corporation, or the trustees in their corporate capacity and not of the individual makers.<sup>120</sup> And a note beginning "We promise to pay," and signed, "The Sanitary Milk Co., T. A. Houston, Trs.," is the several note of the

dicating by whom they were written, establish a liability on the part of the company? Immediately below the words is written 'John E. Mason, Sup't.' Shall we say the omission of the word 'by' or 'per' renders the note unmistakably the note of Mason? The signature is not 'John E. Mason, Superintendent of the Pioneer Mining Company,' the last portion of which, in the absence of any words in the body of the note indicating the intention that it should be an obligation of the company, might, it is claimed, be held to be mere *descriptio personae*. But here the words 'Pioneer Mining Company,' precede the name 'John E. Mason.' "

<sup>119</sup> *Liebscher v. Kraus*, 74 Wis. 387, 17 Am. St. Rep. 171, Wamb. Cas. 624.

<sup>120</sup> *New Market Sav. Bank v. Gillet*, 100 Ill. 254, 39 Am. Rep. 39.

company, and not the joint note of the company and its treasurer.<sup>121</sup>

In these cases, as a general rule, it makes no difference whether the note runs "I" or "We" promise to pay, etc., if the rest of the note shows an intention to make it binding on the corporation. Whether the pronoun "I" or the pronoun "We" is used in the body of the note, if it is signed by the corporation acting by its officer or officers it is the obligation of the corporation. Thus a note reading "I or we promise to pay," etc., and bearing the corporate seal, and signed in the name of the corporation, "per C. I. Williams, Sec., George J. Williams, Gen Mangr.," is not the joint note of the corporation and the general manager, notwithstanding the word "per" is not prefixed to his signature nor his signature joined to the secretary's by the word "and;" but is the obligation of the corporation.<sup>122</sup> The decisions on this point, however, are not entirely in harmony. Thus a promissory note running "We promise to pay," etc., and signed "Independence Manuf. Co.," and directly below this was "B. J. Brownell, Pres't, D. B. Sanford, Sect'y," was held to be binding both on the president and on the company.<sup>123</sup> And again a note, "I promise," etc., and signed, "for the M. H. & F. S. Co., W. McB., president," was held to be the individual note of McB.<sup>124</sup>

<sup>121</sup> *Gleason v. Sanitary Milk Supply Co.*, 93 Me. 544, 74 Am. St. Rep. 370.

<sup>122</sup> *Williams v. Harris*, 198 Ill. 501, reversing *Harris v. Coleman & A. White Lead Co.*, 98 Ill. App. 27, where such note was held to be the joint note of the corporation and George J. Williams, and that parol evidence was not admissible to show that the said George J. Williams signed the same in any other character than as a joint maker with the company.

<sup>123</sup> *Heffner v. Brownell*, 70 Iowa, 591. And this case was followed in *McCandless v. Belle Plaine Canning Co.*, 78 Iowa, 161, 16 Am. St. Rep. 429, where a promissory note reading "we promise," etc., and signed "Belle Plaine Canning Co., A. J. Hartman, President, H. Wessel, Secretary," in the absence of a clause showing the capacity in which the parties signed, was held binding on all the persons signing, including the corporation. And see *Mathews v. Dubuque Mattress Co.*, 87 Iowa, 246. But see *Williams v. Harris*, 198 Ill. 501; *Gleason v. Sanitary Milk Supply Co.*, 93 Me. 544, 74 Am. St. Rep. 370.

<sup>124</sup> *Macbean v. Morrison*, 1 A. K. Marsh. (Ky.) 545. And see *Chase*



**§ 316. Naming principal in body of the instrument and agent signing his own name thereto not sufficient.**

The general rule appears to be that where the names of both the principal and agent appear upon an instrument, it will be held to be the bill or note of him who signs it, unless it satisfactorily appears that he signed it in a mere ministerial capacity, intending to bind another. Where the agent signs his own name to a negotiable instrument, whether as maker, drawer, or acceptor, without an addition indicating agency, he will be personally liable on such instrument, if the face of the instrument is such as indicates an apt intention to bind him individually, although it appears in the body of the instrument that he is acting as agent, or for and on behalf of his principal.<sup>125</sup> The mere inser-

v. Pattberg, 12 Daly (N. Y.) 171, where a note "We promise to pay," etc., "[Signed] English S. M. Co., H. Pattberg, Manager," was held not to be binding on the company but on Pattberg, personally.

<sup>125</sup> *Leadbitter v. Farrow*, 5 Maule & S. 345, Wamb. Cas. 602; *Penkivil v. Connell*, 5 Exch. 381; *Rawlings v. Robson*, 70 Ga. 595; *Cleveland v. Stewart*, 3 Ga. 283; *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71; *Bayliss v. Pearson*, 15 Iowa, 279; *Caphart v. Dodd*, 3 Bush (Ky.) 584, 96 Am. Dec. 258; *Scott v. Messick*, 4 T. B. Mon. (Ky.) 535; *McKensey v. Edwards*, 88 Ky. 272, 21 Am. St. Rep. 339; *Pack v. White*, 78 Ky. 243; *Cooley v. Esteban*, 26 La. Ann. 515; *Hancock v. Fairfield*, 30 Me. 299; *Fogg v. Virgin*, 19 Me. 352, 36 Am. Dec. 757; *Condon v. Pearce*, 43 Md. 83; *Bass v. O'Brien*, 12 Gray (Mass.) 477; *Bedford Commercial Ins. Co. v. Corell*, 8 Metc. (Mass.) 442; *Mayhew v. Prince*, 11 Mass. 54; *Barlow v. Congregational Soc.*, 8 Allen (Mass.) 460, Wamb. Cas. 609; *Bank of British North America v. Hooper*, 5 Gray (Mass.) 567, 66 Am. Dec. 390; *Bradlee v. Boston Glass Manufactory*, 16 Pick. (Mass.) 347, Huffc. Cas. 363; *Bank of Rochester v. Monteath*, 1 Denio (N. Y.) 402, 43 Am. Dec. 681; *Barker v. Mechanic Fire Ins. Co.*, 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; *Titus v. Kyle*, 10 Ohio St. 444; *Pomeroy v. Slade*, 16 Vt. 220. But see *Aggs v. Nicholson*, 1 Hurl. & N. 165; *Continental Nat. Bank v. Heilman*, 81 Fed. 36.

In *Leadbitter v. Farrow*, 5 Maule & S. 345, Lord Ellenborough, C. J., says: "Is it not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly, 'I am the mere scribe,' he becomes liable.

tion of "for," or "for and in behalf of" the principal, in the body of the note, does not make it the contract of the principal, if signed by the mere name of the agent without addition.<sup>126</sup> A note by which "the directors of the J. and G. T. Road promise to pay," and signed by them without official designation, must be regarded as the undertaking of the parties whose names appear to it as obligors, and not that of the corporation.<sup>127</sup> So where the trustees of a church signed as individuals a note simply describing them as such trustees, it was held that they were liable individually.<sup>128</sup>

A direction in a bill of exchange drawn by an agent to place the amount "to the account" of his principal is not sufficient to exempt an agent signing his own name without addition.<sup>129</sup> Thus, it is held that an agent drawing a bill in his own name, without stating that he acts as agent, is personally liable thereon, notwithstanding a request to charge to a particular account, and although the payee knows him to be an agent, except where he contracts in behalf of the government.<sup>130</sup> But where in addition to the above words "charge to the account," etc., the agent adds the word "agent" to his signature, the bill is binding on the principal alone.<sup>131</sup>

In Maine, however, a contrary doctrine has been held under the statutes. Thus a note by which "the subscribers for the Carmel Cheese Manufacturing Co. promise to pay,"

\* \* \* Every person, it is to be presumed, who takes a bill of the drawer, expects that his responsibility is to be pledged to its being accepted."

<sup>126</sup> *Barlow v. Congregational Soc.*, 8 Allen (Mass.) 460, Wamb. Cas. 612.

<sup>127</sup> *McKensey v. Edwards*, 88 Ky. 272, 21 Am. St. Rep. 339.

<sup>128</sup> *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71.

<sup>129</sup> *Barlow v. Congregational Soc.*, 8 Allen (Mass.) 460, Wamb. Cas. 612; *Mayhew v. Prince*, 11 Mass. 54; *Bank of British North America v. Hooper*, 5 Gray (Mass.) 567, 66 Am. Dec. 390; *Snow v. Goodrich*, 14 Me. 235; *Leadbitter v. Farrow*, 5 Maule & S. 345, Wamb. Cas. 602.

<sup>130</sup> *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45.

<sup>131</sup> *Davis v. Henderson*, 25 Miss. 549, 59 Am. Dec. 229; *Tripp v. Swanzev Paper Co.*, 13 Pick. (Mass.) 291; *Witte v. Derby Fishing Co.*, 2 Conn. 260.

and signed by the directors of the company without official description, is held the obligation of the company.<sup>132</sup>

**§ 317. Where principal adopts agent's name as his own.**

Where, however, the principal adopts the name of the agent as his own, there exists an apparent exception to the above rule; and in such cases the negotiable instrument, or other contract, executed in the name of the agent, would be binding on the principal, if it did not appear that the agent intended to make it his own.<sup>133</sup> Thus, a firm is bound by an acceptance in the agent's name, which it has adopted as the firm name by an agreement of the partners to do business under the name of such agent, where it does not appear that the agent was doing business also on his own

<sup>132</sup> Maine Rev. St. c. 73, § 15; *Simpson v. Garland*, 72 Me. 40, 39 Am. Rep. 297. In this case, Libbey, J., refers to the rule laid down in *Nobleboro v. Clark*, 68 Me. 87, 28 Am. Rep. 22, in reference to sealed instruments, as follows: "Applying the principles settled by the courts, and the provisions of our statutes, to the question under consideration, we think the rule in this state is that where a deed is executed by an agent or attorney, with authority therefor, and it appears by the deed that it was the intention of the parties to bind the principal or constituent, that it should be his deed and not the deed of the agent or attorney, it must be regarded as the deed of the principal or constituent, though signed by the agent or attorney in his own name," etc. He then says: "This rule applies with full force to simple contracts, as well as to deeds." In an earlier Maine case, however, the general rule above set forth was followed. Thus in *Fogg v. Virgin*, 19 Me. 352, 36 Am. Dec. 757, it was held that makers of a promissory note who describe themselves in the body of the instrument as trustees of an unincorporated association, but who sign the same in their individual capacity, are personally bound thereby.

<sup>133</sup> *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225; *Phelps v. Livingston*, 2 Root (Conn.) 495; *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158, 51 Am. Dec. 59; *Brown v. Parker*, 7 Allen (Mass.) 337; *Chandler v. Coe*, 54 N. H. 561; *Bank of Rochester v. Montearth*, 1 Denio (N. Y.) 402, 43 Am. Dec. 681; *Crocker v. Colwell*, 46 N. Y. 212; *De Witt v. Walton*, 9 N. Y. 571; *Rumsey v. Briggs*, 139 N. Y. 323; *Devendorf v. West Virginia Oil & Oil Land Co.*, 17 W. Va. 135; *Bank of South Carolina v. Case*, 8 Barn. & C. 427. Compare *Kansas Nat. Bank v. Bay*, 62 Kan. 692, 84 Am. St. Rep. 417.

account; but if that fact appears, it must be shown that he accepted the bill on account of the partnership in order to bind it.<sup>134</sup>

But in order that an instrument executed in such manner and under such circumstances may be binding on the principal, it is necessary to establish by affirmative and satisfactory evidence that the principal has adopted such name as his own and has consented to its use for his own signature, in such cases.<sup>135</sup> Thus, an action is not maintainable against a partnership on a note signed "A. B., Ag't," on the principle that "A. B., Ag't," was the firm name under which the partners had chosen to transact business, where the only evidence to establish that fact is that the firm, while conducting the business of furniture dealers, owns a manufactory in another town, at which the business is conducted by A. B., under the name of "A. B., Ag't;" that in the course of the conduct of such business, A. B. signed the note sued on, giving it in payment for goods delivered to workmen upon his order; that in a previous instance of a similar claim on a like note, the firm had paid it; and that the partners on that and other occasions said that they would settle or be responsible for all claims for anything that went into their business at the manufactory.<sup>136</sup>

**§ 318. Where intention to bind principal is apparent on face of the instrument.**

Where, however, the face of the instrument clearly imports an intention to bind the principal, and the agent adds such words to his signature as indicate that he is acting in a representative capacity only, the instrument will be binding on the principal, and the agent will be exempted from any personal liability thereon.<sup>137</sup> Thus a note running "the president and directors of the Woodstock Glass Company

<sup>134</sup> *Bank of Rochester v. Monteath*, 1 Denio (N. Y.) 402.

<sup>135</sup> *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396; *Brown v. Parker*, 7 Allen (Mass.) 337; *Devendorf v. West Virginia Oil & Oil Land Co.*, 17 W. Va. 135.

<sup>136</sup> *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396.

<sup>137</sup> *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521; *Blanchard v. Kaull*, 44 Cal. 440; *Leach v. Blow*, 16 Miss. 221.

promise to pay," etc., and signed "W. Hicks, President," was held binding on the company, and was not the personal obligation of the president.<sup>138</sup> So a note in form, "I, the subscriber, treasurer of the D. T. Corporation, promise," etc., and signed "G. L. C., treasurer of the D. T. Corporation," was held to be binding on the corporation and not on the treasurer personally.<sup>139</sup> And where the note read, "We, two directors of the A. B. Society, by and on behalf of said society, do hereby promise," etc., and was signed "C. D., E. F., directors," it was held that the directors were not personally liable on the note.<sup>140</sup> So a note running, "We the trustees of the First Freewill Baptist Society of Chicago, promise to pay," etc., and signed by several with the addition, "Trustees of the First Freewill Baptist Society of Chicago, Illinois," was held the note of the society and not of the individual makers.<sup>141</sup> A bill drawn by "Geo. W. Williams, G. W. P.," and attested by "L. Hord, G. S.," on "Thomas B. Posey, treasurer grand division of Kentucky," concluded, "In full of copies of \* \* \* New Era ordered to be sent General D. G. W. Patriarchs," etc., was held to be the bill of the corporation, and Williams was not liable personally on it.<sup>142</sup>

**§ 319. Where name of principal appears on the margin, etc., of the instrument.**

It is not necessary, however, that the name of the principal should unequivocally appear on the bill or note in order to exonerate the agent who draws or makes it as such. It is sufficient if enough appears upon the head, bottom, or margin of the bill or note to put a prudent man upon inquiry before taking it; and to indicate the principal for whom the agent named in the instrument is acting.<sup>143</sup> Thus

<sup>138</sup> *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550. And see *Yowell v. Dodd*, 3 Bush (Ky.) 581, 96 Am. Dec. 256.

<sup>139</sup> *Mann v. Chandler*, 9 Mass. 335.

<sup>140</sup> *Aggs v. Nicholson*, 1 Hurl. & N. 165; *Lindus v. Melrose*, 3 Hurl. & N. 177.

<sup>141</sup> *New Market Sav. Bank v. Gillet*, 100 Ill. 254, 39 Am. Rep. 39. Compare *Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 175.

<sup>142</sup> *Taylor v. Williams*, 17 B. Mon. (Ky.) 489.

<sup>143</sup> *Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank*,

a bill drawn by a party who signs himself as agent, and requests the drawee to "charge same to your agency at N.," discloses upon its face sufficient facts to put a prudent man upon inquiry as to whether the drawer signed in a representative capacity, or intended to bind himself personally.<sup>144</sup> So a bank check, with the words "Aetna Mills" printed on the margin, and signed by "I. D. Farnsworth, Treasurer," is the check of the mills and not the personal check of F.<sup>145</sup> A draft not naming the principal otherwise than by concluding "and charge the same to the Swanzey Paper Company. Yours respectfully, Joseph Hooper, Agent," was held to be the draft of the company;<sup>146</sup> and a draft with the words "Pompton Iron Works" printed in the margin, and concluding "which place to the account of Pompton Iron Works, W. Burt, Agent," was held to bind the proprietor of the Pompton Iron Works.<sup>147</sup> A bill headed "Office of the Belleville Nail Co.," and concluding, "Charge same to account of the Belleville Nail Co., A. B. Prest., C. D. Secy.," was held to bind the company and not the signers.<sup>148</sup> So a bill with the words "Office of the Tioga Navigation Company," printed at the top, and concluding, "Charge to motive power and account, and oblige, yours, etc., James R. Wilson, Prest. T. N. Co.," was held to purport on its face to be the bill

97 Fed. 181; *Continental Nat. Bank v. Heilman*, 81 Fed. 36; *Second Nat. Bank v. Midland Steel Co.*, 155 Ind. 581; *Lacy v. DuBuque Lumber Co.*, 43 Iowa, 510; *Chipman v. Foster*, 119 Mass. 189, *Huffc. Cas.* 373; *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360; *Davis v. Henderson*, 25 Miss. 549, 59 Am. Dec. 229; *Fitch v. Lawton*, 6 How. (Miss.) 371; *Gillig v. Lake Bigler Road Co.*, 2 Nev. 214; *Schaefer v. Bidwell*, 9 Nev. 209; *Van Leuvan v. Kingston First Nat. Bank*, 6 Lans. (N. Y.) 378.

<sup>144</sup> *Davis v. Henderson*, 25 Miss. 549, 59 Am. Dec. 229.

<sup>145</sup> *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360, *Wamb. Cas.* 618.

<sup>146</sup> *Tripp v. Swanzey Paper Co.*, 13 Pick. (Mass.) 291; *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45.

<sup>147</sup> *Fuller v. Hooper*, 3 Gray (Mass.) 334. And see *Bank of British North America v. Hooper*, 5 Gray (Mass.) 567.

<sup>148</sup> *Hitchcock v. Buchanan*, 105 U. S. 416. And see to same effect *Waugh v. Suter*, 3 Ill. App. 271; *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280.

of the corporation, and not the individual bill of the signer.<sup>149</sup> So drafts in form, "Office of Portage Lake Mfg. Co., Hancock, Mich., June 5, 1861, E. T. Loring, Agt. At four months sight, pay to the order of I. H. Slawson, \$400.00, and charge to the account of this company. I. R. Jackson, Agt.," without further indorsement would be the draft of the company and not of the individual drawer.<sup>150</sup> But it further appeared in this case that the drafts in question were accepted across the face with the words: "Accepted, June 15, E. T. Loring, Agt.," and by reason of such acceptance E. T. Loring was held individually liable.<sup>151</sup>

In a New York case, where the words "Ridgewood Ice Company" were printed on the margin of a note, which was signed by "John Clark, Prest., E. H. Close, Treas.," and the note was worded "We promise to pay," etc., Gray, J., for the court said: "The appearance upon the margin of the

<sup>149</sup> *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 84 Am. Dec. 298.

<sup>150</sup> *Slawson v. Loring*, 5 Allen (Mass.) 340, 81 Am. Dec. 750. As was said by Bigelow, Chief Justice, in this case: "The first and most obvious conclusion which is to be drawn from the form of the bills is that the drawer signs his name as agent of the company named therein, and that they are not intended as drafts of the agent, personally, on his own funds in the hands of the drawee, but as those of the principals, acting through their agent, on funds belonging to the company. This appears clearly from the fact that the bills bear date at the office of the company in Hancock, Mich., and direct the drawee to charge amount of them 'to the account of this company,' the drawer signing his name to these words. No one can doubt that on bills thus drawn the agent fully discloses his principal, and that the drawer could not be personally chargeable thereon."

<sup>151</sup> "Taking the signature of the defendant as acceptor, written across the face of the drafts, by itself, without reference to other parts of the instruments, it is clear that it would bind him personally. It discloses no principal, nor is it in a form which would exclude the personal liability of the acceptor. It is equivalent to this promise, 'Having funds of the drawers in my hands, I hereby agree to pay the amount of drafts at maturity.' The addition of the word 'agent' to his name is not sufficient to exempt a party from liability on such a contract. It is a mere *descriptio personae*, designed to indicate the fund to which the money is to be charged, or the use to which it is to be appropriated." *Slawson v. Loring*, 5 Allen (Mass.) 340, 81 Am. Dec. 750.

note of the printed name Ridgewood Ice Company was not a fact carrying any presumption that the note was, or was intended to be, one by that company. It was competent for its officers to obligate themselves personally, for any reason satisfactory to themselves, and, apparently to the world, they did so by the language of the note, which the mere use of a blank form of note, having upon its margin the name of their company, was insufficient to negative."<sup>152</sup>

**§ 320. Where seal bearing principal's name is impressed upon the instrument.**

And where the note or bill bears a seal containing the name of the company for which it was executed, such name on the seal has a like effect as if printed on the margin or heading of the instrument.<sup>153</sup> Thus, where the secretary of an incorporated company gave a promissory note, using the words "We promise to pay," etc., and signed it with his own name, with "Sec'y" affixed, and impressed thereon the seal of the corporation, it was held the note of the corporation, and the secretary himself was not personally liable thereon.<sup>154</sup> So a promissory note phrased, "We promise

<sup>152</sup> *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 36 Am. St. Rep. 705, *Huffc. Cas.* 374. And see *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314, 36 Am. St. Rep. 710.

<sup>153</sup> *Means v. Swormstedt*, 32 Ind. 87, 2 Am. Rep. 330; *Miller v. Roach*, 150 Mass. 140; *Williams v. Harris*, 198 Ill. 501; *Guthrie v. Imbrie*, 12 Or. 182, 53 Am. Rep. 331; *Dow v. Moore*, 47 N. H. 419.

<sup>154</sup> *Means v. Swormstedt*, 32 Ind. 87, 2 Am. Rep. 330.

In this case, Ray, J., says: "We know that to hold the letters 'sec'y,' as intended to be 'a description of the person,' would simply be a legal fiction, false in fact. It would simply amount to rejecting the words as surplusage. But this cannot be done if effect can be given to them upon the face of the paper itself. Most certainly it should never be done against the plain intent of the party who adds the letters to his name for an evident purpose, where that purpose can be collected from the entire instrument, and does not render the paper itself a nullity. The seal of the company is in the hands of the secretary; it is his duty to affix it to papers executed by the corporation. The presumption is, then, that he did, after signing his name and adding his office, affix the seal of the corporation, which, containing upon its face the proper designation of the corporation, was a signing of their name."



to pay," etc., and signed by one, with the addition, "Prest.," and by another with the addition, "Sec. G. M. Co.," and impressed with a seal inscribed, "Granger Market Co., Portland, Oregon, November 4, 1874," is the obligation of the corporation.<sup>155</sup>

"It may often happen in the haste incident of the prompt execution of business, or through inadvertence, being more intent on the substance than the form, that merchants or others engaged in business transactions express themselves in their writings informally, and without precision of language, and hence the liberal policy of allowing the intent of the parties to govern, as discoverable from the whole instrument. But we do not think it usual for persons engaged in business transactions, when acting for themselves and not in a representative capacity, to attach to their signatures such designations of office, and to attest the same with the seal of the corporation bearing an impression of its corporate name. On the contrary we believe when such things are done, and the instrument is consistent and operative with such indicia, they are more properly referable to the company than the persons as individuals who signed the instrument."<sup>156</sup>

<sup>155</sup> Guthrie v. Imbrie, 12 Or. 182, 53 Am. Rep. 331. In this case, Lord, J., says: "Leaving out of consideration the seal upon the note in question, there is nothing in its terms or language which purports to bind the corporation or to be a contract of the corporation. But the character in which the signatures were attached to the note in hand, and the intent, as discoverable from the instrument, whether to bind the corporation or the individuals signing it, is relieved of much difficulty when the seal is taken into consideration. On the note is an impression of a seal bearing the words 'Granger Market Co.' It must be assumed that the seal bearing these words, plainly stamped upon the note, was put there to serve some purpose, and to give some effect to the instrument, and certainly it tends to explain the purport and purpose of the words 'Prest.' and 'Sec. G. M. Co.' attached to the signatures." And see Scanlan v. Keith, 102 Ill. 634, 40 Am. Rep. 624, where a like note signed, "Samuel Keith, President, Chicago Ready Roofing Co.," and at the left was signed, "W. H. Kletzing, Secretary," and bore the seal of the company, was held the note of the company. See, however, Reed v. Fleming, 102 Ill. App. 668.

<sup>156</sup> By Lord, J., in Guthrie v. Imbrie, 12 Or. 182, 53 Am. Rep.

But a different conclusion was reached in an English case on a note as follows: "We, the directors of the Isle of Man Slate & Flag Company, Limited, do promise to pay," etc., signed "Richard J. Marsh, Chairman, Joseph Higgins, Samuel Brondbert, Henry Johnson," and in the corner of the note the company's seal was affixed, "Witnessed by Leslie Lochort."<sup>157</sup>

338. It will be noticed in *Means v. Swormstedt*, 32 Ind. 87, 2 Am. Rep. 330, that the plural expression "we promise" is followed by a single signature, which is more consistent with an intent to bind the company, who are many, than the individual. But this fact must have been considered of little importance by the court, as there is no reference or allusion to it, although it may have received consideration in connection with other and stronger indicia, upon which stress was laid and deemed controlling in determining the intent with which the note was executed. But in *Guthrie v. Imbrie*, 12 Or. 182, 53 Am. Rep. 338, the plural expression "we promise" is followed by two signatures, which is as consistent with the intention to bind themselves individually as to bind the company, unless the effect of the seal with its designation of the company excludes the intent to bind personally.

<sup>157</sup> *Dutton v. Marsh*, L. R., 6 Q. B. 361, in delivering the decision of the court, Cockburn, C. J., said: "But this case was rendered doubtful by the fact of the corporate seal being affixed to the document. It does not purport in form to be a promissory note, made on behalf of or on account of the company. So far as the written portion of it goes, it is totally without such qualifying expression, but some doubt was raised in my mind whether the affixing of the seal might not be taken as equivalent to a declaration in terms, on the face of the note, that the note was signed by the persons who put their names to it on behalf of the company, and not on behalf of themselves. But on consideration, I agree with my learned brothers that that effect cannot be given to the placing of the seal of the company upon the note. It may be that that was simply for the purpose of ear-marking the transaction, or in fact showing as to the directors that, as between them and the company, it was for the company they were signing the note, and that it was a transaction in which the proceeds to be received upon the note would operate to the benefit of the company; but there is no case that goes the length of saying that the affixing of the seal, where the parties do not otherwise use terms to exclude their personal liability, would have that effect. We think it is going too far to say that the mere affixing of the seal has that effect."

**§ 321. Agent need not disclose his own name.**

Where an agent has authority to execute a negotiable instrument in the name of his principal, or where an unauthorized execution is ratified, it is not essential to a valid execution of such authority that he should also sign his own name, as agent, to the instrument, or that it appears at all on the instrument; and he will render the principal liable on such an instrument, by signing his principal's name only, without any indication of agency.<sup>158</sup> As has been said: "It is by no means true that acts of agents derive their validity from professing, on the face of them, to have been done in the exercise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments known to the common law, rules of form have been prescribed. But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts: (1) That the act was done in the exercise, and (2) within the limits of the powers delegated."<sup>159</sup>

A different doctrine was laid down in a Massachusetts case,<sup>160</sup> but the remarks there were principally applicable to the formal execution of a mortgage by an attorney in fact, although the language was much wider and seemed to take in cases of this sort. But the case shows that these were mere dicta, totally unnecessary to a decision; nor was the decision placed on that ground, but upon the ground that the attorney was not authorized by the instrument under which he professed to act, to make either a note or a mortgage. In addition to that, four years after that case was

<sup>158</sup> *First Nat. Bank v. Gay*, 63 Mo. 33, 21 Am. Rep. 430; *Cravens v. Gillilan*, 63 Mo. 28; *Watkins v. Vince*, 2 Starkie, 324; *Neal v. Erving*, 1 Esp. 61; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. (U. S.) 327, *Huffc. Cas.* 369; *Hefner v. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106; *Walter v. School Trustees*, 12 Ill. 63; *Paul v. Berry*, 78 Ill. 158; *Forsyth v. Day*, 41 Me. 382; *First Nat. Bank v. Loyhed*, 28 Minn. 396; *Morse v. Green*, 13 N. H. 32, 38 Am. Dec. 471; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558, *Wamb. Cas.* 643; *First Nat. Bank v. Whitney*, 4 Lans. (N. Y.) 40; *Haven v. Hobbs*, 1 Vt. 238, 18 Am. Dec. 678; 1 *Daniel Neg. Inst.* §§ 298, 299.

<sup>159</sup> By Mr. Justice Johnson, in *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. (U. S.) 326, *Huffc. Cas.* 371.

<sup>160</sup> *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771.

decided, it was held in another case in the same state that a principal might be bound by permitting his agent to use his name and signature.<sup>161</sup>

**§ 322. Where agent does not disclose principal though he signs as "agent."**

If an agent, in executing a bill or note for his principal, does not disclose the name of his principal on the face of the instrument, but executes the whole instrument in his own name, he alone will be personally liable on such instrument, and the fact that he adds the word "agent," or some other word importing an agency, to his name, does not relieve him from such liability,<sup>162</sup> and notwithstanding the payee of such instrument knew he was acting as such agent at the time.<sup>163</sup> Daniel, in his work on Negotiable Instru-

<sup>161</sup> *Brigham v. Peters*, 1 Gray (Mass.) 139.

<sup>162</sup> *Schmaltz v. Avery*, 16 Q. B. 655, Wamb. Cas. 643; *Price v. Taylor*, 5 Hurl. & N. 540, Wamb. Cas. 604; *Armstrong v. Brolaski*, 46 Fed. 903; *Drake v. Flewellen*, 33 Ala. 106; *Anderson v. Pearce*, 36 Ark. 293, 38 Am. Rep. 39; *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193; *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529 (but see *Farmers' & Mechanics' Bank v. Colby*, 64 Cal. 352); *Bedell v. Scarlett*, 75 Ga. 56; *Graham v. Campbell*, 56 Ga. 258; *School Trustees of Cahokia v. Rautenberg*, 88 Ill. 219; *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Hayes v. Brubaker*, 65 Ind. 27; *McClellan v. Robe*, 93 Ind. 298; *Williams v. Second Nat. Bank*, 83 Ind. 237; *Wing v. Glick*, 56 Iowa, 473, 41 Am. Rep. 118; *American Ins. Co. v. Stratton*, 59 Iowa, 696; *Thurston v. Mauro*, 1 Greene (Iowa) 231; *Coburn v. Omega Lodge*, 71 Iowa, 581; *Sumwalt v. Ridgely*, 20 Md. 114; *Fiske v. Eldridge*, 12 Gray (Mass.) 474; *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396; *Bartlett v. Hawley*, 120 Mass. 92; *Fowler v. Atkinson*, 6 Minn. 578; *Tilden v. Barnard*, 43 Mich. 376, 38 Am. Rep. 197; *Savage v. Rix*, 9 N. H. 263; *Luna v. Mohr*, 3 N. M. 63; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558, Wamb. Cas. 643; *Brockway v. Allen*, 17 Wend. (N. Y.) 40; *Snelling v. Howard*, 7 Rob. (N. Y.) 400; *Hills v. Bannister*, 8 Cow. (N. Y.) 31; *Minard v. Mead*, 7 Wend. (N. Y.) 68; *Collins v. Buckeye State Ins. Co.*, 17 Ohio St. 215, 93 Am. Dec. 612; *Bank v. Cook*, 38 Ohio St. 442; *Anderton v. Shoup*, 17 Ohio St. 125; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 447, 58 Am. Rep. 829; *Arnold v. Sprague*, 34 Vt. 402; *Exchange Bank v. Lewis County*, 28 W. Va. 273. 1 Daniel Neg. Inst. § 305.

<sup>163</sup> *Collins v. Buckeye State Ins. Co.*, 17 Ohio St. 215, 93 Am.

ments, says: "If the agent sign a note with his own name and discloses no principal, he is personally bound. The party so signing must have intended to bind somebody upon the instrument, and no promisor but himself therein appearing, it must be construed as his note, or as a nullity. And though he terms himself 'agent,' such suffix to his name will be regarded as a mere descriptio personae, or as an earmark of the transaction, and may be rejected as surplusage."<sup>164</sup> It is provided by the negotiable instruments law that: "Where the instrument shows either in the body thereof, or by means of words added after the signature, that it was signed for or on behalf of a principal, or in a representative capacity, the signer is not personally liable if he was duly authorized; but the mere addition of words describing the signer as an agent, or as acting in a representative capacity, without disclosing his principal, will not relieve the signer from personal liability."<sup>165</sup> But an agent is not liable under the provisions of such law, in a suit by the payee, upon a note signed by him as agent, but without disclosing his representative character upon the face of the note, where the payee of the note was one of the persons appointing him to execute such note.<sup>166</sup>

Dec. 612. But see *Sharpe v. Bellis*, 61 Pa. 69, 100 Am. Dec. 618, where it was held that a note is that of the corporation, and not of the individual, where it was made by one who was the treasurer of the corporation to the order of the payee, personally, without any designation of the corporation of which he was president, but was indorsed by him with the affix "Pres't," if the holders, who took it thus indorsed, knew that the indorser was the president, although, it seems, the indorser would have been individually liable if the holders were strangers to this fact.

<sup>164</sup> 1 Daniel Neg. Inst. § 305.

<sup>165</sup> Selover Neg. Inst. Law, § 24. And see, *Negotiable Instruments Laws of Colorado; Connecticut; District of Columbia; Florida; Maryland; Massachusetts; New York (§ 39); North Carolina; North Dakota; Oregon; Rhode Island; Tennessee; Utah; Virginia; Washington (§ 20); and Wisconsin (§ 1675-20).*

<sup>166</sup> A trustee of an insolvent firm, for the benefit of creditors thereof, appointed by such firm and its creditors, is not personally liable under the provisions of this law, upon a note signed by him as "trustee," but without disclosing his representative character upon the face of the note, where the payee is one of such

Mere rules of grammar will not prevent the application of this general rule where it would otherwise apply, as where the bill or note is expressed in the plural and signed in the singular, or where it is expressed in the singular and signed in the plural. Of course, in some cases, such a fact may aid the other circumstances in determining the intention of the parties; but that fact alone will not indicate the intention. As has been said: "There is no difference between the words 'I promise' and 'we promise,' so far as the creation of a personal obligation upon the speaker or writer is concerned. To hold otherwise would be trifling, and not the performance of a grave duty."<sup>167</sup> Thus, notes made in the usual form, without anything to indicate the principal, and executed in the following manner, were held to be the individual notes of the agent: "We promise to pay," etc. "A. Hassett, President;"<sup>168</sup> or signed, "George Moore, treasurer of Mechanic Falls Dairying Association;"<sup>169</sup> "I promise to

creditors and the consideration for which the note was given was property purchased from the payee for the benefit of the trust estate. *Megowan v. Peterson*, 173 N. Y. 1.

<sup>167</sup> *Walton, J.*, in *Mellen v. Moore*, 68 Me. 390, 28 Am. Rep. 78.

<sup>168</sup> *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193.

<sup>169</sup> *Mellen v. Moore*, 68 Me. 390, 28 Am. Rep. 77; *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421, *Huffc. Cas.* 360.

In *Mellen v. Moore*, 68 Me. 390, 28 Am. Rep. 78, *Walton, J.*, referring to *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409, says: "The only difference between that case and this consists in this: In that case the personal pronoun 'I' was used; in this it is 'we.' There it was 'I promise;' here it is 'we promise.' It is suggested that this difference would justify the court in coming to a different conclusion. We think not. The language used just as clearly imports an undertaking on the part of the speaker or writer in the one case as in the other. There is the same absence of apt words indicating an intention to bind another, and not the speaker or writer. There is no difference between the words 'I promise' and 'we promise,' so far as the creation of a personal obligation upon the speaker or writer is concerned. To hold otherwise would be trifling, and not the performance of a grave duty. \* \* \* Lord Elgin is quoted as saying that instead of struggling by little circumstances to take cases out of a general rule, it is more wholesome to struggle not to let little circumstances prevent the application of a general rule; and Lord Mansfield that such subtleties

pay," etc., signed, "E. K. Collins, Agt.;"<sup>170</sup> and this is true although the agency is determined before the note becomes due.<sup>171</sup>

So a promissory note signed "A. B., Agt.," merely, and mentioning no principal, nor containing any other reference such as would enable a court, from the whole instrument, to infer that the true intent and object is to bind the principal, and not the agent, will bind "A. B.," the agent, only, and will not support an action against any other person.<sup>172</sup>

A due bill "for work done on the Hazel Valley school-house and hall," and signed by two individuals with the addition "committee," is the personal obligation of the signers.<sup>173</sup> But it is held that a negotiable note made by school trustees, for the proper purposes of their office, and purporting to be their individual obligation, but with the addition to their signatures of their official description, is binding upon the school corporation.<sup>174</sup> A drawer of a bill of exchange, signed "Chas. F. Hale, Pres't," is individually liable thereon.<sup>175</sup>

In some cases, however, it is held that although a negotiable instrument signed by one as "agent," and apparently binding on him, would in an action at law bind him alone, yet in a suit in equity it might be enforced against the principal by showing that the consideration moved from him, or by showing other circumstances. Thus parol evidence is admissible to show the consideration and purpose of a note, signed by a husband as "acting trustee," to explain the character of the transaction, and constitute it a charge upon the wife's separate estate; the court saying: "Although such

and refinements are encroachments upon common sense, and mankind would so regard them, that they should be got rid of, and no additions made to them."

<sup>170</sup> *Collins v. Buckeye State Ins. Co.*, 17 Ohio St. 215, 93 Am. Dec. 612.

<sup>171</sup> *Hall v. Bradbury*, 40 Conn. 32.

<sup>172</sup> *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396.

<sup>173</sup> *Anderson v. Pearce*, 36 Ark. 293, 38 Am. Rep. 39.

<sup>174</sup> *School Town v. Kendall*, 72 Ind. 91, 37 Am. Rep. 139; *Sheffield School Township v. Andress*, 56 Ind. 157. See post, § 325.

<sup>175</sup> *Rand v. Hale*, 3 W. Va. 495, 100 Am. Dec. 761.

note, in the absence of extrinsic evidence, would *prima facie* impose a personal liability upon her husband, yet the fact that his name was subscribed to it, with the description of 'acting trustee,' would entitle him, or its owner, to show by parol evidence the consideration, intention, and purpose of the note, and the true character of the transaction; and these being thus proved, a court of chancery would not allow the sense and equity of the transaction to be controlled by the mere form of the note."<sup>176</sup> So in a proper proceeding the instrument might in some cases be reformed.<sup>177</sup>

**§ 323. Where agent expressly excludes liability in the instrument.**

Where an agent in executing a negotiable instrument for another expressly provides against any personal responsibility on his part, he cannot be held individually liable thereon. Thus, where a promissory note was made, "We as trustees but not individually promise to pay," and signed "A., B., and C., trustees," it was held that the makers were not personally liable thereon, in the absence of proof that they had funds of the principal in their hands applicable to the payment of the same.<sup>178</sup> So a person who signs a note in the name of another, by himself as attorney in fact, with the knowledge of the payee and subsequent indorsee that he has no authority to use such other's name, and who refuses to assume personal responsibility by signing his own name, is not liable on the note as his contract, although it is given in a transaction of his own, and he generally uses the name signed to the note as a trade name.<sup>179</sup>

<sup>176</sup> *Baker v. Gregory*, 28 Ala. 544, 65 Am. Dec. 366. And to the same effect see *Drake v. Flewellen*, 33 Ala. 106; *Lazarus v. Shearer*, 2 Ala. 718; *Kenyon v. Williams*, 19 Ind. 44; *Davison v. Davenport Gas-Light Co.*, 24 Iowa, 419; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Foster v. Clifford*, 44 Wis. 569, 28 Am. Rep. 606; *Hubbard v. Galusha*, 23 Wis. 398; *Peterson v. Johnson*, 22 Wis. 21. Or to show from whom the consideration moved. *Bank of British North America v. Hooper*, 5 Gray (Mass.) 567, 66 Am. Dec. 390.

<sup>177</sup> *Lee v. Percival*, 85 Iowa, 639.

<sup>178</sup> *Shoe & Leather Nat. Bank v. Dix*, 123 Mass. 148, 25 Am. Rep. 49. See *Leach v. Blow*, 16 Miss. 221.

<sup>179</sup> *Kansas Nat. Bank v. Bay*, 62 Kan. 692, 84 Am. St. Rep. 417.



**§ 324. Where agent is the payee and indorser.**

Where an agent is made the payee and indorser of a negotiable bill or note, the same general principles apply thereto as do to his execution of such an instrument as maker, drawer, or acceptor. And when a bill or note is thus made payable to the agent he is deemed the payee, and if it is indorsed by him, he is liable personally on such indorsement as if the word "agent," or other like word, was not added to his name.<sup>180</sup> Thus, where a note payable to C. B. M., agent, was indorsed "G. Agricultural Works, C. B. M., agent," the indorsement was held to be that of C. B. M., agent.<sup>181</sup> But it is held that a note given in the principal's name by an agent having a broad power of attorney binds the principal none the less because made to the agent as payee, and by him indorsed.<sup>182</sup> An indorsement on a note in the form, "Estate of Jona D. Wheeler, Henry F. Wing, Executor," was held to be an indorsement binding on the estate of Wheeler and not on Wing individually.<sup>183</sup>

— **Where principal is a corporation.**—In the case of corporations, however, the above rule is not generally applicable. The general rule in such cases is that where a note or bill is made payable to the order of the cashier, treasurer, or other officer of a corporation, as such, the corporation is to be considered the payee; and an indorsement of such instrument by the officer to whom it is made payable, in his official capacity, is

<sup>180</sup> *Castleberry v. Fennell*, 4 Ala. 642; *Ord v. McKee*, 5 Cal. 515; *Chadsey v. McCreery*, 27 Ill. 253; *Yates v. Spofford*, 7 Idaho, 737; *Bartlett v. Hawley*, 120 Mass. 92; *Shaw v. Stone*, 1 Cush. (Mass.) 228; *West Boylston Mfg. Co. v. Searle*, 15 Pick. (Mass.) 225; *Toledo Agricultural Works v. Heisser*, 51 Mo. 128. But see *Bowne v. Douglass*, 38 Barb. (N. Y.) 312; *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550, where it was held that a note payable to Israel Horsefield, and indorsed "Israel Horsefield, agent," relieved the payee from personal liability; *Hicks v. Hinde*, 9 Barb. (N. Y.) 528. *University Bank v. Hamilton*, 78 Ga. 312, likewise holding contrary to the general doctrine, above stated, under Ga. Code, § 2211.

<sup>181</sup> *Farmington Sav. Bank v. Fall*, 71 Me. 49. To same effect see *Mann v. Springfield Second Nat. Bank*, 34 Kan. 746.

<sup>182</sup> *Eldridge v. Husted*, 22 Misc. (N. Y.) 534.

<sup>183</sup> *Grafton Nat. Bank v. Wing*, 172 Mass. 513, 70 Am. St. Rep. 303.

considered the indorsement of the corporation.<sup>184</sup> As has been said: "The usage is universal for presidents and cashiers of incorporated companies, acting as the executive officers and agents of such companies, to make in their behalf, indorsements and transfers of negotiable paper, by simply indorsing their names, with additions of their titles of office."<sup>185</sup> Thus a note payable to the order of "L. M., President of M. F. & M. Ins. Co.," is a note payable to such insurance company, and an indorsement by the president as such would operate to transfer the note, in the absence of proof that he was unauthorized to transfer it.<sup>186</sup> And where a promissory note was made payable "to the order of C. W. S., Treasurer of the I. M. B. Co.," it was held that the legal intendment was that the contract was made with the company and not with the treasurer individually.<sup>187</sup> So a note signed "A. Co., B. Sec. and Treas.," and payable to and indorsed "B., Sec. & Treas.," was held to be the note and indorsement of the A. Co.<sup>188</sup> And so where a negotiable instrument is drawn upon the treasurer, or other officer, of a corporation, as such, and is accepted or indorsed by him with the addition of his official title, it is considered as the acceptance or indorsement of the corporation.<sup>189</sup> Where an indorsement is made in the name of a corporation by a duly authorized officer, it is not necessary that the

<sup>184</sup> *Nichols v. Frothingham*, 45 Me. 220, 71 Am. Dec. 539; *Vater v. Lewis*, 36 Ind. 288, 10 Am. Rep. 29; *Trustees of Ministerial & School Fund v. Parks*, 10 Me. 441; *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665; *Lockwood v. Coley*, 22 Fed. 192; *Babcock v. Beman*, 1 E. D. Smith (N. Y.) 593, affirmed 11 N. Y. 200.

<sup>185</sup> *Chillicothe Branch of State Bank v. Fox*, 3 Blatchf. 431, Fed. Cas. No. 2,683.

<sup>186</sup> *Nichols v. Frothingham*, 45 Me. 220, 71 Am. Dec. 539.

<sup>187</sup> *Vater v. Lewis*, 36 Ind. 288, 10 Am. Rep. 29.

<sup>188</sup> *Falk v. Moebs*, 127 U. S. 597.

<sup>189</sup> *Laffin & Rand Powder Co. v. Sinshelmer*, 48 Md. 411, 30 Am. Rep. 472; *Hager v. Rice*, 4 Colo. 90, 34 Am. Rep. 68; *Shelton v. Darling*, 2 Conn. 435; *Northampton Bank v. Pepoon*, 11 Mass. 288; *Amison v. Ewing*, 2 Cold. (Tenn.) 366; *Elwell v. Dodge*, 33 Barb. (N. Y.) 336; *Nicholas v. Oliver*, 36 N. H. 219; *Robinson v. Kanawha Val. Bank*, 44 Ohio St. 441, 58 Am. Rep. 829.

agency should appear, in order to make it the indorsement of the corporation.<sup>190</sup>

But in a Minnesota case, where a note was made payable to and indorsed by the treasurer of a corporation, it was held that *prima facie* the indorsement bound the treasurer personally, but that parol evidence was admissible to show that he made it only in his official capacity and that it was binding on the corporation.<sup>191</sup> So in a Kansas case it was held that the directors of a corporation who write their names upon the back of a corporate note, before its delivery, and append their official title to their signatures, may, as against the original payee or any subsequent holder who accepts the note with full notice, show by parol evidence that they indorsed the instrument merely as agents of the corporation and not in their individual capacity.<sup>192</sup>

— **Cashiers of banks.** In the case of cashiers of banks there seems to be an exception to the general rule that only such person is bound by a negotiable instrument whose name appears as a party thereto. In such cases there seems to have arisen a commercial usage by which such an instrument in the name of one as "cashier" has the same effect as if made in the name of the bank. Thus, where a note or bill is made payable to the order of the cashier of a bank, the bank is, in judgment of law, the payee, although its name does not appear thereon, and no indorsement is necessary to give the bank title;<sup>193</sup> and where in-

<sup>190</sup> *Second Nat. Bank v. Martin*, 82 Iowa, 442.

<sup>191</sup> *Souhegan Nat. Bank v. Boardman*, 46 Minn. 293.

<sup>192</sup> *Kline v. Bank*, 50 Kan. 91, 34 Am. St. Rep. 107.

<sup>193</sup> *First Nat. Bank v. Hall*, 44 N. Y. 395, 4 Am. Rep. 698; *Wright v. Boyd*, 3 Barb. (N. Y.) 523; *Bank of New York v. Bank of Ohio*, 29 N. Y. 619; *Watervliet Bank v. White*, 1 Denio (N. Y.) 608; *Nave v. Lebanon First Nat. Bank*, 87 Ind. 204; *Dutch v. Boyd*, 81 Ind. 146; *Erwin Lane Paper Co. v. Farmers' Nat. Bank*, 130 Ind. 367; *Pratt v. Topeka Bank*, 12 Kan. 570; *Commercial Bank v. French*, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; *Barney v. Newcomb*, 9 Cush. (Mass.) 46; *Barlow v. Congregational Society*, 8 Allen (Mass.) 460; *Garton v. Union City Nat. Bank*, 34 Mich. 279; *Bank of Manchester v. Slason*, 13 Vt. 334. Compare *Maher v. First Nat. Bank*, 93 Ill. App. 404, where a note payable to "T. C. Estee for the First Nat. Bank" was held to be the same as if payable to T. C. Estee for the use of

dorsement of such instrument is made by the cashier, as such, it is considered the indorsement of the bank, and not of the cashier in his individual capacity.<sup>194</sup> Thus, where a bill of exchange drawn on A. B., cashier of F. & M. Bank, was accepted by writing across the face of the bill, "Accepted, A. B., cashier," it was held to bind the bank as acceptor, and not the cashier.<sup>195</sup> By the negotiable instruments law it is provided that "where an instrument is drawn or indorsed to a person as 'cashier' or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to such bank or corporation, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of such officer."<sup>196</sup> This rule enlarges the previously existing rule that paper payable or indorsed to a cashier is payable to the bank, by making paper payable to "other fiscal officers" payable to the bank.<sup>197</sup>

**§ 325. Where executed by a public agent.**

Contracts of public agents within the scope of their power, as has been seen heretofore, are presumed to be made upon

the bank, the legal title to the note, without indorsement thereon, being in T. C. Estee, and not in the bank. But it will be noticed that this was not a case of a cashier of a bank.

<sup>194</sup> *Baldwin v. Newbury Bank*, 1 Wall. (U. S.) 234; *Lafayette Bank v. Illinois State Bank*, 4 McLean, 208, Fed. Cas. No. 7,987; *Stamford Bank v. Ferris*, 17 Conn. 268; *Collins v. Johnson*, 16 Ga. 458; *State Bank v. Wheeler*, 21 Ind. 90; *Farrar v. Gilman*, 19 Me. 440, 36 Am. Dec. 766; *Burnham v. Webster*, 19 Me. 232; *Folger v. Chase*, 18 Pick. (Mass.) 63; *Hartford Bank v. Barry*, 17 Mass. 94; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Robb v. Ross County Bank*, 41 Barb. (N. Y.) 586; *Mechanics' Banking Ass'n v. White Lead Co.*, 35 N. Y. 505; *State Bank of New York v. Muskingum Branch Bank*, 29 N. Y. 619, Wamb. Cas. 606; *Houghton v. First Nat. Bank*, 26 Wis. 663, 7 Am. Rep. 107; *Aiken v. Marine Bank*, 16 Wis. 679; *Kennedy v. Knight*, 21 Wis. 345, 94 Am. Dec. 543.

<sup>195</sup> *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 Doug. (Mich.) 457.

<sup>196</sup> *Selover Neg. Inst. Law*, 192. And see *Neg. Inst. Laws of Colorado*; *Connecticut*; *District of Columbia*; *Florida*; *Maryland*; *Massachusetts*; *New York* (§ 72); *North Carolina*; *North Dakota*; *Oregon*; *Rhode Island* (§ 50); *Tennessee*; *Utah*; *Virginia*; *Washington* (§ 42); and *Wisconsin* (§ 1676-12).

<sup>197</sup> See *Selover Neg. Inst. Law*, 192.

the credit of the principal and the latter alone is bound thereby, unless an intention to bind the agent is clearly apparent upon the face of the contract, although the contract is executed in such a manner that it would be binding upon the agent were it executed for a private individual. The authorities, however, do not all agree as to the effect of a negotiable instrument executed by a public agent on behalf of the government. But as a general rule, no distinction should be made between this class of contracts and any other simple contracts by public agents. Where a negotiable instrument is executed by a public agent, within the scope of his authority, on behalf of his principal, the presumption is that it was made on the credit of the principal alone, and the agent will not be bound thereby, unless an intention to do so clearly appears upon the face of the instrument.<sup>198</sup> Thus a negotiable note made by school trustees, for the proper purposes of their office, and purporting to be their individual obligation, but with the addition to their signatures of their official description, is binding upon the school corporation.<sup>199</sup> So an instrument promising to pay "F., for work and labor on the court house in the village of Oswego," a certain sum, which "we find to be due him" therefor "on settlement," and was signed by D. and P., "Commissioners for building the court house at Oswego village," was held to be not binding on the commissioners personally. In this case Savage, C. J., said: "This is a case in which the defendants are not personally liable, unless it was clearly their intention to assume personal responsibility, which does not appear."<sup>200</sup> So where a sealed note was made, "We, Allen S. Clark, William M. Colson and Joseph H. Knight, members of the township committee of the township of Har-

<sup>198</sup> *School Trustees of Cahokia v. Rautenberg*, 88 Ill. 219; *Jones v. Le Tombe*, 3 Dall. (U. S.) 384; *Wallis v. Johnson Tp.*, 75 Ind. 368; *Harvey v. Irvine*, 11 Iowa, 82; *Baker v. Chambles*, 4 G. Greene (Iowa) 428; *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45; *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502; *Fowler v. Atkinson*, 6 Minn. 579; *Tutt v. Hobbs*, 17 Mo. 486.

<sup>199</sup> *School Town of Monticello v. Kendall*, 72 Ind. 91, 37 Am. Rep. 139. See *Moral School Tp. v. Harrison*, 74 Ind. 93.

<sup>200</sup> *Fox v. Drake*, 8 Cow. (N. Y.) 191.

rison, county of Gloucester, N. J., and our successors in office, promise to pay," etc., and concluded, "Witness our hands and seals," etc., and signed and sealed by them as individuals, it was held not to bind them individually.<sup>201</sup> And where such an instrument is made payable to a public agent, it is in contemplation of law payable to the principal, and an action should be brought on it in the name of such principal.<sup>202</sup>

Other cases, however, hold that the addition of the word "trustees" or other words of like purport are mere descriptio personae and that the agent is individually liable on a negotiable instrument so executed by him, although he is acting for a public principal.<sup>203</sup> It will be found, however, from an examination of these cases that the conclusions therein were arrived at by applying to public agents the rule applicable to private agents, and citing cases of private agents to support their decisions, or else there were special circumstances in the case causing such decision, as that the purpose for which the note was given was unauthorized. Thus a contract, phrased, "We promise to pay," and signed by two with the respective addition of "president school board and secretary school board," but containing no reference to any school district, was held to be a personal obligation.<sup>204</sup>

### § 326. Acceptance of a bill by an agent.

In the preceding sections the rules applicable to the exe-

<sup>201</sup> Knight v. Clark, 48 N. J. Law, 22, 57 Am. Rep. 534.

<sup>202</sup> State v. Boles, 11 Me. 474; Irish v. Webster, 5 Me. 171.

<sup>203</sup> Wing v. Glick, 56 Iowa, 473, 41 Am. Rep. 118, 37 Am. Rep. 142, note; Savage v. Rix, 9 N. H. 263; Ross v. Brown, 74 Me. 352; Exchange Bank v. Lewis County, 28 W. Va. 273; Anderson v. Pearce, 36 Ark. 293, 38 Am. Rep. 39, where a due bill "for work done on the Hazel Valley school house and hall," and signed by two individuals with the addition "committee," was held the personal obligation of the signers.

<sup>204</sup> Wing v. Glick, 56 Iowa, 473, 41 Am. Rep. 118, 37 Am. Rep. 142, note; but the court, in rendering an opinion in this case, seemed to lose sight of the distinction between agents acting for public and agents acting for private principals. See Bayliss v. Peterson, 15 Iowa, 279. But see Baker v. Chambles, 4 G. Greene (Iowa) 428.

cution of a negotiable instrument by an agent for his principal, as maker or drawer of a note or bill of exchange, have been considered, in both of which cases the rules are the same. An agent may also be authorized to accept a bill of exchange for his principal. In this connection it may be stated that the same general principles apply as have applied heretofore; that is, in order that such acceptance may be binding on the principal, it should be executed in such a manner as will show an evident intention to make it the acceptance of the principal. But it will be found that a greater liberality prevails in construing such execution so as to make the acceptance that of the principal, than prevailed heretofore in reference to makers or drawers. The rules in reference to the execution of an acceptance by an agent may be stated as follows: If the bill is drawn upon an agent in his own name, whether as agent or in his individual capacity, and he accepts it in his own name, he is personally liable as acceptor, and the fact that he adds to his signature such terms as "agent," "treasurer," "president," etc., will not relieve him from such liability nor charge his unnamed principal.<sup>205</sup> Thus, where a bill is drawn on E. T. L., Agent, and is accepted by E. T. L., Agent, it was held that E. T. L. was personally liable as acceptor.<sup>206</sup> So where the drawee of a bill of exchange, drawn by the "Kanawha & Ohio Coal Co.," was described as "John A. Robinson, Agt.," and it was accepted by him as "John A. Robinson, Agent K. & O. C. Co.," it was held that the acceptance was the personal obligation of John A. Robinson, and that in a suit upon the acceptance by an indorsee against him, parol evidence was not admissible, in the absence of fraud, accident, or mistake, to show that the defendant intended to bind the drawer as his principal, and that this was known to the plaintiff when it acquired the paper.<sup>207</sup> But in a Colorado case, where a bill was drawn on F. D. Hager, Treas., by Wm. Anderson, Prest., and the name of the

<sup>205</sup> *Mare v. Charles*, 5 El. & Bl. 978.

<sup>206</sup> *Slawson v. Loring*, 5 Allen (Mass.) 340, 81 Am. Dec. 750.

<sup>207</sup> *Robinson v. Kanawha Val. Bank*, 44 Ohio St. 441, 58 Am. Rep. 829.

company appeared on the face of the bill, and it was accepted by "F. D. Hager, Treas.," it was held that parol evidence was admissible in a suit by the payee against the acceptor, to show that the acceptance was in an official capacity and was known to be so by the plaintiff.<sup>208</sup> It was said in this case that: "Where there is a latent ambiguity, as between the original parties to a bill of exchange and others affected with notice, especially where the name of the principal is in some manner disclosed upon the face of the instrument, we deem the true rule to be that the real nature of the transaction may be investigated." So where a bill is drawn by a principal upon his agent in his individual capacity, and it is accepted by the agent, as agent of his principal, it has been held that parol evidence is admissible to show that the acceptance was designed only in his representative capacity.<sup>209</sup> So where a bill is drawn upon one as agent of a named principal, and is accepted by him as such agent, it has been held that he is personally bound;<sup>210</sup> though another case holds that parol evidence is admissible in such case to explain the acceptance.<sup>211</sup> And if it is drawn upon him as agent and he accepts in his individual capacity, he is personally bound thereby.<sup>212</sup> But where the bill is drawn upon the agent in his own name, and he accepts in the name of his principal, neither party is bound thereby,—not the principal, because he is not named as drawee, and only the drawee can accept; nor the agent, for he is not named

<sup>208</sup> *Hager v. Rice*, 4 Colo. 90, 34 Am. Rep. 68.

<sup>209</sup> A bill drawn by the L. F. & M. Co. per S. J. A. on L. S., and accepted L. S., Treas. L. F. & M. Co., may be shown to be accepted only in an official capacity. *Lafin & Rand Powder Co. v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472.

<sup>210</sup> *Moss v. Livingston*, 4 N. Y. (4 Comst.) 208; *Jones v. Jackson*, 22 Law T. (N. S.) 828. But where a bill drawn upon A. B., cashier of F. & M. Bank, was accepted by writing across the face of the bill, "Accepted, A. B., Cashier," it was held to bind the bank as acceptor, and not the cashier. *Farmers & Mechanics' Bank v. Troy City Bank*, 1 Doug. (Mich.) 457.

<sup>211</sup> *Shelton v. Darling*, 2 Conn. 435.

<sup>212</sup> *Arnold v. Sprague*, 34 Vt. 402; *Taber v. Cannon*, 8 Metc. (Mass.) 456; *Lallerstedt v. Griffin*, 29 Ga. 708.



as acceptor.<sup>213</sup> So, if the bill is drawn on the principal and is accepted by the agent in his own name, as agent, the agent is not bound, because he is not named as drawee, but in such case the principal is held bound, because as only the drawee can accept, the acceptance by the agent as such is held to be for the principal.<sup>214</sup> Where a bill is drawn upon several, as in the case of a partnership, and it is accepted by one of them as agent for them all, it has been held that the acceptance is binding upon them all, though he does not execute the acceptance for or on behalf of them all.<sup>215</sup>

**§ 327. Admission of parol evidence—In general.**

It is a general principle of the common law that only such persons are parties to a negotiable instrument whose names appear or are described therein; and that parol evidence is not admissible to charge on such instrument parties who are not thus named or described. But although the general principle is well settled, the cases are so varied, and the conclusions arrived at, by the courts, upon practically the same state of facts so different, that the law on this subject is more or less confused. This confusion seems to have been caused in the application of the general principle to cases in which the manner of executing the instruments are widely different; and also by the courts construing cases practically the same altogether differently. Thus one court may construe an instrument as binding on the agent only, while another court may construe the same in an opposite manner. For this reason it is impossible to lay down any definite rules that will apply to all the different cases that may arise. There are certain classes of cases, however, in which the rules as to admitting parol evidence are pretty well settled. These classes are, (1) those cases in which the face of the instrument clearly indicates an intention to bind the principal only; (2) those cases in which the face of the instrument clearly indicates an intention to bind the agent

<sup>213</sup> *Walker v. Bank*, 9 N. Y. 582.

<sup>214</sup> *Souhegan Nat. Bank v. Boardman*, 46 Minn. 293, 296. And see *Polhill v. Walker*, 3 Barn. & Adol. 114.

<sup>215</sup> *Jenkins v. Morris*, 16 Mees. & W. 877; *Mason v. Rumsey*, 1 Camp. 384; *Beach v. State Bank*, 2 Ind. 488.

only; (3) those cases in which the face of the instrument is so ambiguous that it is doubtful as to who was intended to be bound. In the first and second of these classes, it is clear that parol evidence cannot be introduced to vary or contradict the instrument. In the third class it is also clear that parol evidence may be admitted to show who was intended to be bound by the instrument. If all the cases arising on this subject could be grouped under one or the other of these classes, much of the confusion now existing would be done away with. But there arise many cases which, coming between these different classes, are difficult of classification, some of the courts putting a case in one class and other courts putting the same case in a different class. For example a case might arise that comes between the second and third classes, or again between the first and third classes, one court holding that the instrument is binding on the principal only, another that it is binding on the agent only, and still another may hold that it is so ambiguous as to admit parol evidence to explain it. It is desired to show by these remarks how much of the confusion now existing has arisen, and a fuller explanation of these different decisions will be seen in the following sections.

In the following sections it will be attempted to place the decision under one or the other of the three classes, above mentioned, according to the holding of the court in each particular case. But, at the same time, the reader will notice that a case cited under one class may have practically the same state of facts as a case cited under another class. The reason for this is, as stated above, that the courts do not agree as to the class to which a case, having a certain state of facts, belongs.

**§ 328. Rule where instrument apparently binds agent alone.**

(a) **In general.**—Where a negotiable instrument is executed by an agent, without disclosing the name of his principal or without sufficiently indicating on the face of the instrument who the principal is, or where, although the principal is disclosed, there is an evident intention to bind the agent alone, the agent alone will be bound thereby, and parol evidence cannot be introduced to charge the principal.

nor to discharge the agent, although he executed the instrument as agent, and added the word "agent" to his signature.<sup>216</sup> And especially is this true, where the maker of the bill or note executes it in his own individual name, and there is nothing on the face of the instrument to show that he was acting in a representative capacity.<sup>217</sup>

"The reason of the rule is, that each party who takes a negotiable instrument makes his contracts with the parties who appear on its face to be bound for its payment. It is a 'courier without luggage,' whose countenance is its passport; and in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal thereto, unless his name in some way is disclosed upon the instrument itself."<sup>218</sup> And "another good reason for the rule is

<sup>216</sup> Sparks v. Dispatch Transfer Co., 104 Mo. 531, 24 Am. St. Rep. 351; Desseau v. Bours, 1 McAll. 20, Fed. Cas. No. 3,825; Nash v. Towne, 5 Wall. (U. S.) 689; Conner v. Clark, 12 Cal. 168, 73 Am. Dec. 529; Bedell v. Scarlett, 75 Ga. 56; Hypes v. Griffin, 89 Ill. 134, 31 Am. Rep. 71; Hayes v. Matthews, 63 Ind. 412, 30 Am. Rep. 226; Kenyon v. Williams, 19 Ind. 45; Williams v. Lafayette Second Nat. Bank, 83 Ind. 237; Prescott v. Hixon, 22 Ind. App. 139, 72 Am. St. Rep. 291; Wing v. Glick, 56 Iowa, 473, 41 Am. Rep. 118, 37 Am. Rep. 142, note; Thurston v. Mauro, 1 G. Greene (Iowa) 231; Rendell v. Harriman, 75 Me. 497, 46 Am. Rep. 421, Huffc. Cas. 360; Hancock v. Fairfield, 30 Me. 299; Slawson v. Loring, 5 Allen (Mass.) 340, 81 Am. Dec. 750; Brown v. Parker, 7 Allen (Mass.) 337; Fuller v. Hooper, 3 Gray (Mass.) 341; Williams v. Robbins, 16 Gray (Mass.) 77, 77 Am. Dec. 396; Bartlett v. Hawley, 120 Mass. 92; Webster v. Wray, 19 Neb. 558, 56 Am. Rep. 756; Nebraska Nat. Bank v. Ferguson, 49 Neb. 109, 59 Am. St. Rep. 522; Luna v. Mohr, 3 N. M. 63; Pentz v. Stanton, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558, Wamb. Cas. 643; Phelps v. Borland, 30 Hun (N. Y.) 362; Keokuk Falls Imp. Co. v. Kingsland & D. Mfg. Co., 5 Okl. 32; Collins v. Buckeye Ins. Co., 17 Ohio St. 215, 93 Am. Dec. 612; Bank v. Cook, 38 Ohio St. 442; Anderton v. Shoup, 17 Ohio St. 126; Barnhisel v. Commercial Nat. Bank, 7 Ohio Dec. 533, 14 Ohio Circ. R. 124; Tarver v. Garlington, 27 S. C. 107, 13 Am. St. Rep. 628; Arnold v. Sprague, 34 Vt. 402; Magee v. Atkinson, 2 Mees. & W. 440.

<sup>217</sup> Sparks v. Dispatch Transfer Co., 104 Mo. 531, 24 Am. St. Rep. 351; Auburn Bank v. Leonard, 40 Barb. (N. Y.) 119; Phelps v. Borland, 30 Hun (N. Y.) 362; Shuey v. Adair, 18 Wash. 188, 63 Am. St. Rep. 879.

<sup>218</sup> 1 Daniel Neg. Inst. § 303; Slawson v. Loring, 5 Allen (Mass.)

that every part of commercial paper must be definite and certain and contained in the body of the paper itself, so that every taker and holder understands exactly what his rights in and to it are, and with whom he is contracting."<sup>219</sup> Parol evidence is also inadmissible to show an agreement between the payee and one who draws a bill of exchange as agent that the payee was to look alone to the principal of such agent for payment.<sup>220</sup>

— **Illustrations.** Thus, where the president of a corporation signs a negotiable note in his own name alone, with nothing on the instrument to indicate that he is acting as the agent of the corporation, parol evidence is not admissible to establish such agency.<sup>221</sup> So a party signing a promissory note with the addition of word "trustee" to his name is personally liable; nor is evidence admissible to show that at the time the note was made there was a parol agreement that he should not be personally liable, but the note was to be paid out of a trust fund.<sup>222</sup> And where a note recited, "We promise to pay," etc., and was signed by four individuals, adding "President and Directors of the Prospect and Stockton Cheese Company," it was held that evidence that it was the obligation of the company was inadmissible.<sup>223</sup> And again parol evidence is inadmissible to vary the effect of a note by showing an intention to bind the principal only, when such note is made by an agent in form, "I promise to pay," etc., and signed by him as agent, without any mention of the principal, and with knowledge on the part

340, 81 Am. Dec. 751; *Davis v. England*, 141 Mass. 587; *Bartlett v. Hawley*, 120 Mass. 92; *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, 24 Am. St. Rep. 354; *Heaton v. Myers*, 4 Colo. 59.

<sup>219</sup> By Gantt, P. J., in *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, 24 Am. St. Rep. 354.

<sup>220</sup> *Citizens' Bank v. Millet*, 103 Ky. 1, 82 Am. St. Rep. 546.

<sup>221</sup> *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, 24 Am. St. Rep. 351.

<sup>222</sup> *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529. And see *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71.

<sup>223</sup> *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421, *Huffc. Cas.* 360. And see *McClure v. Livermore*, 78 Me. 390.

of the payee that the maker is acting only as agent.<sup>224</sup> A note running "I promise," etc., and signed W. H. E., "Pres. & Treas.-C. I. F. Co.," was likewise held to be binding on W. H. E. alone, and parol evidence was inadmissible to show that it was agreed between the parties that it was intended to be the note of the company.<sup>225</sup> So where the makers had described themselves in the body of the instrument as directors of a certain turnpike road, and the note read, "One year after date, we or either of us, as directors, etc., promise to pay," to which each signed his individual name, it was held that each was individually liable, and that in the absence of an averment of fraud or mistake, the makers could not be permitted to show an intention on their part not to bind themselves individually.<sup>226</sup> Nor was parol evidence admitted to show that a note signed "E. G., President, J. A. C., Secretary, E. S., Director," and containing an individual promise of the signers, was the note of a school district, of which the makers of the note were officers.<sup>227</sup> And where a promissory note was in the form: "I promise to pay to the order of S. & Co.," etc., and signed, "John T. Hull, Treas. St. Paul's Parish," was held the note of Hull, and parol evidence was inadmissible to show that it was the understanding of the parties when the note was given that it was the note of the parish and not of Hull.<sup>228</sup> So where the trustees of a church signed as individuals a note simply describing them as such trustees, they were held liable individually, and parol evidence was inadmissible to vary that liability.<sup>229</sup>

— **Other cases.** But there are cases holding contrary to this rule. Thus, it has been said in New York: "The fact that the name of the principal does not appear on the face of the note is not, under the modern decisions in this state,

<sup>224</sup> *Collins v. Buckeye State Ins. Co.*, 17 Ohio St. 215, 93 Am. Dec. 612.

<sup>225</sup> *Davis v. England*, 141 Mass. 587.

<sup>226</sup> *Titus v. Kyle*, 10 Ohio St. 444.

<sup>227</sup> *American Ins. Co. v. Stratton*, 59 Iowa, 696.

<sup>228</sup> *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409, Wamb. Cas. 619.

<sup>229</sup> *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71; *Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 175.

at all conclusive. If it was intended to be given in the business of the principal, was in fact so given, and with due authority, it is binding on the principal, and all this is matter of evidence."<sup>230</sup> And where a draft was signed, "John Hindle, Agent," the name of the principal being disclosed at the time, and the payee knew that the drawer was authorized by his principal to draw the draft, as his agent, extrinsic evidence was admitted to discharge John Hindle from liability thereon.<sup>231</sup>

**(b) Where agent has been in the habit of signing for his principal.**—But where he is in fact a mere agent, and has been in the habit of expressing, in that way, his representative character in his dealings with a particular party, or parties, who recognize him in that character, and all the parties have knowledge of that fact, parol evidence may be admitted, between the immediate parties, to show that the instrument was in fact the instrument of the principal.<sup>232</sup> "Where a person acts merely as agent of another, and signs papers in that capacity, that is, signs them as agent, and the party with whom he deals has full knowledge of his agency and of the principal for whom he acts, an express disclosure of the principal's name, on the face of the papers, or in the signature, is not essential to protect the agent from personal responsibility. \* \* \* If he be in fact a mere agent, trustee, or officer of some principal, and is in the habit of expressing, in that way, his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents thus made and used as his personal obligations, contrary to the intent of the parties."<sup>233</sup>

**(c) Where intention to bind the principal is known.**—Although, as a general rule, parol evidence is not admissible to show that an instrument signed by the agent as such is binding on the principal, yet if it was the intention of the parties to bind the principal, and that fact is known to all

<sup>230</sup> By Talcott, J., in *Moore v. McClure*, 8 Hun (N. Y.) 557.

<sup>231</sup> *Hicks v. Hinde*, 9 Barb. (N. Y.) 528.

<sup>232</sup> *Metcalf v. Williams*, 104 U. S. 93; *Hovey v. Magill*, 2 Conn. 680; *Milligan v. Lyle*, 24 La. Ann. 144; *Gerber v. Stuart*, 1 Mont. 172.

<sup>233</sup> Mr. Justice Bradley, in *Metcalf v. Williams*, 104 U. S. 93.

the parties, parol evidence to that effect may be admitted in an action on the instrument, between the original parties, or between an original party and a subsequent holder with notice.<sup>284</sup> Thus parties who in their individual names sign promissory notes, in which they are described as the trustees of a corporation, are *prima facie* personally liable thereon; but they may prove by parol that they had authority to execute notes for the corporation, that the note was given for a debt due by the corporation, and was intended to bind it alone, and not them, and that these facts were known to the payee.<sup>285</sup> So where a note was signed by the makers as "Trustees of the First Baptist Society of the Village of Brockport," it was held that although the trustees were *prima facie* liable, as individuals, yet parol evidence could be introduced to show that the note was in fact given as the note of the society, and that the payee had knowledge of this fact.<sup>286</sup>

(d) **Where principal has adopted the agent's name as his own.**—An apparent exception exists, however, to the rule that parol evidence is inadmissible to charge the principal upon a negotiable instrument executed in the name of the agent alone, where the principal has adopted the agent's name as his own in business transactions, or has allowed it to be used in that manner. The law is well settled that a man may make the name and signature of another virtually his own, by using or allowing it to be used as such in the course of his business. Hence, where an agent has executed a negotiable instrument in his own name, parol evidence may be admitted to show that the name so used was in fact the name and signature of the principal, and that the instrument, although apparently the agent's alone, was in fact the principal's, and that the latter may be charged

<sup>284</sup> *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Brockway v. Allen*, 17 Wend. (N. Y.) 40; *Metcalf v. Williams*, 104 U. S. 93; *La Salle Nat. Bank v. Tolu, Rock & Rye Co.*, 14 Ill. App. 141; *Kline v. Bank of Tescott*, 50 Kan. 91, 34 Am. St. Rep. 107; *Owings v. Grubbs*, 6 J. J. Marsh. (Ky.) 31; *McClellan v. Reynolds*, 49 Mo. 312; *Roberts v. Austin*, 5 Whart. (Pa.) 313; *Markley v. Quay*, 14 Phila. (Pa.) 164.

<sup>285</sup> *Traynham v. Jackson*, 15 Tex. 170, 65 Am. Dec. 152.

<sup>286</sup> *Brockway v. Allen*, 17 Wend. (N. Y.) 40.

thereon.<sup>237</sup> Thus, a note in a name adopted and sanctioned by a corporation as indicative of its contracts, though not in its corporate name, and given by its authorized agent for a corporate liability, is the note of the corporation, and these facts may be proved to rebut the presumption arising from the face of the note; as where a note is made in the name of a firm who are the general agents of the corporation.<sup>238</sup> So where an action was brought upon certain notes alleged to have been made by the defendants, under the name of Horace Gray & Co., and it appeared that Horace Gray & Co. were a co-partnership, who for several years had conducted all the business of the Boston Iron Co., the court, by Shaw, C. J., said: "It is undoubtedly true, that the notes were not signed in the defendant's regular corporate name, by which they were incorporated; that the notes on the face of them did not disclose an agency; and that they were signed by Horace Gray & Co., who had a separate firm and house of trade of that name. If it were an absolute and unqualified rule of law, that upon these facts Horace Gray & Co., and not the corporation, were bound, and the judge was bound so to instruct, of course that would put an end to the question whether these notes could be the notes of the defendants. The court did give the instructions prayed for, but with this qualification, that the ruling was not to be understood as preventing the plaintiff from maintaining his action, if the jury were satisfied: 1. That these notes were in fact the notes of the Boston Iron Company executed under a name adopted and sanctioned by them as indicative of their contracts; or, 2. That the plaintiff received these notes upon a legal demand against the de-

<sup>237</sup> *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225; *Phelps v. Livingston*, 2 Root (Conn.) 495; *Lindus v. Bradwell*, 5 C. B. 583; *Stevenson v. Polk*, 71 Iowa, 278; *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158, 51 Am. Dec. 59; *Barlow v. Congregational Soc.*, 8 Allen (Mass.) 460, Wamb. Cas. 610; *Chandler v. Coe*, 54 N. H. 561; *Bank of Rochester v. Monteath*, 1 Denio (N. Y.) 402, 43 Am. Dec. 681; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27; *Rumsey v. Briggs*, 139 N. Y. 323; *Devendorf v. West Virginia Oil & Oil Land Co.*, 17 W. Va. 135.

<sup>238</sup> *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158, 51 Am. Dec. 59.



fendants, under a misapprehension of the facts as to the matter that Horace Gray & Co. and the Boston Iron Company were not the same; the plaintiff acting under the belief that they were, and such belief being induced by the acts of the defendants, or their legal agents.”<sup>239</sup> And a negotiable note signed “Zelotes Terry” may be proved by parol to be the note of Zelotes Terry, Trustee for the East Family of Shakers, not upon the ground of agency, but upon the principle that Zelotes Terry is the business name of the community.<sup>240</sup> A note signed S. G. D., Agent, must be treated as the note of S. G. D.; and parol evidence is not admissible to prove that it is the note of another person, unless that person carried on business in the name of such agent. In that event the name of the agent must be regarded as the business name of the principal.<sup>241</sup>

This exception applies in such cases, however, only for the purpose of charging the principal, and not for the purpose of discharging the agent, whose name appears on the instrument. Otherwise great injustice may be done to one who enters into such an instrument on the faith of the agent whose name alone appears on the instrument, unless such person was aware of the fact that the agent had been in the habit of using his name as the principal’s business name.

**(c) As between principal and agent.**—Where the controversy is between the agent and his principal, the agent may introduce parol evidence to show that the bill or note is in fact the principal’s, although on its face it appears to be the agent’s.<sup>242</sup> Thus the character in which an agent acts in drawing a bill may be shown as between himself and his principal, though he may be personally liable to third persons.<sup>243</sup>

<sup>239</sup> *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158, 51 Am. Dec. 59, 66.

<sup>240</sup> *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225.

<sup>241</sup> *Tarver v. Garlington*, 27 S. C. 107, 13 Am. St. Rep. 628.

<sup>242</sup> *Castrique v. Buttigieg*, 10 Moore P. C. (N. S.) 94; *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190; *Whitlock v. Hicks*, 75 Ill. 460; *Miles v. O’Hara*, 1 Serg. & R. (Pa.) 32; *Sharp v. Emmet*, 5 Whart. (Pa.) 288, 34 Am. Dec. 554; *Kimmell v. Bittner*, 62 Pa. 203.

<sup>243</sup> *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45.

**§ 329. Rule where instrument apparently binds principal alone.**

Where a negotiable instrument is made in such a manner that it is apparent from the face of the instrument that the principal alone was intended to be bound thereby, as where it is made in the name of the principal, parol evidence will not be admitted to show that a different intention was in the minds of the parties at the time the instrument was executed.<sup>244</sup> Thus, where a note was drawn payable to the order of "Geo. Moebs, Sec. and Treas.," by the "Peninsular Cigar Co., Geo. Moebs, Sec. and Treas.," and was indorsed "Geo. Moebs, Sec. and Treas.," it was held that the indorsement was that of the cigar company, and that parol evidence could not be admitted to show that the indorsement was intended to be that of the agent alone.<sup>245</sup> So a promissory note commencing with "We promise to pay," and signed "San Pedro Mining and Milling Company, F. Kraus, President," is the note of the company alone, and parol evidence is not admissible to prove that the president did not sign the name of the company, but did sign his own name as a joint maker.<sup>246</sup>

And the same rule applies where the instrument is binding on both principal and agent.<sup>247</sup>

**§ 330. Rule where instrument is ambiguous.**

Where, however, the names of both principal and agent appear upon a negotiable instrument in such a manner as to make it ambiguous or doubtful as to who is intended to be bound by the instrument, parol evidence may be admitted, as between the original parties, or between the original maker or drawer and a subsequent holder with notice, to remove such ambiguity, and to show who was intended to be bound

<sup>244</sup> *Dellus v. Cawthorn*, 13 N. C. (2 Dev.) 90; *McClernan v. Hall*, 33 Md. 293; *Milligan v. Lyle*, 24 La. Ann. 144.

<sup>245</sup> *Falk v. Moebs*, 127 U. S. 597.

<sup>246</sup> *Liebscher v. Kraus*, 74 Wis. 387, 17 Am. St. Rep. 171, *Wamb. Cas.* 624.

<sup>247</sup> *McCandless v. Belle Plaine Canning Co.*, 78 Iowa, 161, 16 Am. St. Rep. 429.

by the instrument.<sup>248</sup> "Sometimes the agent may attach to his signature the character in which he signs the instrument, without any correspondent, or other description, in the body of the note—or he may, in the body of the instrument, disclose the name of his principal and sign his own individual name, without any additional description whatever—or he may sign his own name, without apt terms to charge himself, and in the body of the note use doubtful expressions to describe the principal, leaving the precise meaning of the instrument, to be gathered from the terms on its face, so ambiguous or obscure as to render its interpretation, per se, too difficult and uncertain for just and sound construction. When the note is of this last description, that is, where its language or terms are so unintelligible as to admit of no rational interpretation of the meaning, or are not sufficiently decisive of the intention of the parties, but, on the contrary, are equivocal and uncertain, extraneous proof, as between the original parties, may be admitted to show the true character of the instrument, and what party—the principal, or the agent, or both—is liable."<sup>249</sup> And again this rule has been stated as follows: "Ordinarily, no extrinsic testimony of any kind is admissible to vary or explain ne-

<sup>248</sup> *Baldwin v. Newbury Bank*, 1 Wall. (U. S.) 234; *Dessau v. Bours*, 1 McAll. (U. S.) 20, Fed. Cas. No. 3,825; *Metcalfe v. Williams*, 104 U. S. 93; *McWhorter v. Lewis*, 4 Ala. 198; *Hovey v. Magill*, 2 Conn. 680; *Cleaveland v. Stewart*, 3 Ga. 283; *La Salle Nat. Bank v. Tolu Rock & Rye Co.*, 14 Ill. App. 141; *Second Nat. Bank v. Midland Steel Co.*, 155 Ind. 581; *Lacy v. Dubuque Lumber Co.*, 43 Iowa, 510; *Owings v. Grubbs*, 6 J. J. Marsh. (Ky.) 32; *Webb v. Burke*, 5 B. Mon. (Ky.) 51; *Shattuck v. Eastman*, 12 Allen (Mass.) 369; *Keldan v. Winegar*, 95 Mich. 430; *Bingham v. Stewart*, 13 Minn. 106; *Pratt v. Beaupre*, 13 Minn. 187; *Martin v. Smith*, 65 Miss. 1; *Ferris v. Thaw*, 72 Mo. 446; *Franklin Ave. German Sav. Inst. v. Board of Education*, 75 Mo. 408; *Klostermann v. Loos*, 58 Mo. 290; *Musser v. Johnson*, 42 Mo. 74, 97 Am. Dec. 316; *Shuetze v. Bailey*, 40 Mo. 69; *Gerber v. Stuart*, 1 Mont. 172; *Gillig v. Lake Bigler Road Co.*, 2 Nev. 214; *Simanton v. Vilet*, 61 N. J. Law, 595; *Barker v. Mechanic F. Ins. Co.*, 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; *Guthrie v. Imbrie*, 12 Or. 182, 53 Am. Rep. 339; *Early v. Wilkinson*, 9 Grat. (Va.) 68; *Gillmann v. Henry*, 53 Wis. 470; *Liebscher v. Kraus*, 74 Wis. 387, 17 Am. St. Rep. 171, Wamb. Cas. 624.

<sup>249</sup> By *Stewart, J.*, in *Haile v. Peirce*, 32 Md. 327, 3 Am. Rep. 141.

gotiable instruments. Such paper speaks its own language, and the meaning which the law affixes to it cannot be changed by any evidence aliunde. One of the few exceptions to this rule is where anything on the face of the instrument suggests a doubt as to the party bound, or the character in which any of the signers has acted in affixing his name, in which case testimony may be admitted between the original parties to show the true intent. Thus, where one has signed as agent of another, while the *prima facie* presumption is that the words are merely *descriptio personae*, and that the signer is individually bound, yet it may be shown, in a suit between the parties, that it was not so intended, but that on the contrary, the true intention was that the payee should look to the principal, whose name was disclosed in the signature of his agent, or who was well known to be the true party to be bound.”<sup>250</sup> Parol evidence in such cases does not contradict, alter, or add to the written instrument, but explains the intention of the parties, and which could not be ascertained with any degree of certainty from the face of the instrument itself.

And it would seem that this rule should also prevail, even in cases where the paper is in the hands of an innocent holder for value without actual notice, if the ambiguity on the face of the instrument is so great as to charge him with constructive notice thereof. Thus where a check was signed “B., Secy. C. V., Pres’t,” the court said: “The fact that it bore two official signatures \* \* \* is so unusual on the hypothesis of its being an individual transaction, and points so distinctly to an official origin, that it may very well be doubted whether any holder could claim to be innocently ignorant of its true character.”<sup>251</sup> Indeed it has been contended that since the above rule is confined to cases where the ambiguity—that is the indication of agency—appears on the face of the instrument, it should also be applicable against a subsequent holder without notice of the actual

<sup>250</sup> By Chalmers, J., in *Hardy v. Pilcher*, 57 Miss. 18, 34 Am. Rep. 433.

<sup>251</sup> *Metcalf v. Williams*, 104 U. S. 93. And see 1 Daniel, Neg. Inst. § 299.

facts, since an ambiguity which is obvious to a judge ought to be obvious to a merchant, and he should be held charged with constructive notice of what appeared upon the face of the instrument, and thus put upon inquiry as to its execution. As has been said: "The rule is applicable to negotiable instruments, not to negotiable instruments in the hands of bona fide holders. \* \* \* The only case which should admit parol evidence is a case of ambiguity, and that is as obvious to a bona fide holder as to the original party."<sup>252</sup> This contention is believed to be a good one, for what is apparent upon the face of an instrument should be as much so to one who has not actual notice as to one who has; or at least he should be charged with such constructive notice as would make him guilty of negligence in failing to make due inquiry concerning the execution of the instrument. Nevertheless the weight of authority is against this view; and it has been held that the fact that the word "Agent," "Treasurer," "President," or other words of like purport, are added to a signature does not of itself charge third persons with the fact that signer executes the instrument in a representative capacity.<sup>253</sup>

The main difficulty in applying the above rule is in determining what creates an ambiguity on the face of the instrument. And upon this question the courts are greatly in conflict, as may be seen from the preceding sections. Upon this question the following rules have been deduced by an eminent text writer as covering perhaps the greater number of cases: "(1) An ambiguity is not created merely by words descriptive of agency added to the signature, except (a) where there are two signatures and the one with the descriptive words follows the other, and (b) in cases of indorsement. (2) An ambiguity may be created by recitals or marginal memoranda, disclosing the name of the principal, which, if read with the signature and its descriptive words, would leave a reasonable doubt as to which party is intended to be charged. (3) An ambiguity is created by merely descriptive words following an indorsement."<sup>254</sup>

<sup>252</sup> Huffcut, Ag. (1st Ed.) 201. And see Tiffany, Ag. 341.

<sup>253</sup> Metcalf v. Williams, 104 U. S. 93.

<sup>254</sup> Huffcut, Ag. (1st Ed.) 209.

— **Illustrations.** Thus a promissory note reading, "We promise," and signed, "Pioneer Mining Company, John E. Mason, Supt.," and not sealed, may be shown by parol to have been understood by the payee to be the note of the company alone.<sup>255</sup> The court, in this case, says: "Whether, in the case before us, the note was the promise of Mason, or the promise of the company, by Mason claiming to act as its agent, was ambiguous at least, and an inquiry into the circumstances might render it certain whose promise, if any person's, it was." And where a note read: "We, the president and directors of the D. V. and S. A. T. Co.," etc., and was signed by C. T. H., "president," J. N. H. and J. G. D., "directors," and E. R. S., "secretary," it was held that parol evidence was admissible to show that the drawers of the note signed it as agents of the company and not as individuals.<sup>256</sup> And where a note was in form "I promise to pay," and was signed by the defendant with the addition to his name of the words, "Treasurer Ohio & Miss. R. R. Co.," parol evidence was held admissible to discharge the defendant.<sup>257</sup> Where nothing appears in the body of the note to indicate the maker, and it is signed by the name of an officer of a corporation, to which name is affixed his official corporate title, it is held the note is *prima facie* that of the person signing and not of the corporation; but this is a rebuttable presumption, and upon the ground of an existing ambiguity concerning the maker, evidence is admissible to show that it was intended or was not intended to be the note of the corporation.<sup>258</sup>

And where the question was whether the drawing of a certain check, by one who was cashier of a bank, was his individual act, or his official act as cashier, Mr. Justice Johnson said: "It is enough for the purposes of the defend-

<sup>255</sup> *Bean v. Pioneer Min. Co.*, 66 Cal. 451, 56 Am. Rep. 106.

<sup>256</sup> *Halle v. Peirce*, 32 Md. 327, 3 Am. Rep. 139.

<sup>257</sup> *Smith v. Alexander*, 31 Mo. 193. And see *Klosterman v. Loos*, 58 Mo. 294; *Turner v. Thomas*, 10 Mo. App. 342; *McClellan v. Reynolds*, 49 Mo. 314; *Washington Mut. F. Ins. Co. v. St. Mary's Seminary*, 52 Mo. 490.

<sup>258</sup> *Reeve v. First Nat. Bank of Glassboro*, 54 N. J. Law, 208, 33 Am. St. Rep. 675.

ant to establish that there existed on the face of the paper circumstances from which it might reasonably be inferred that it was either one or the other. In that case it became indispensable to resort to extrinsic evidence to remove the doubt."<sup>259</sup>

Where several bills of exchange were drawn to "F. D. Hager, Treas.," and across the face of the bills was written, "Accepted, F. D. Hager, Treas.," it was held that evidence was admissible to show that the acceptance was in an official capacity and was known to be so by the plaintiff.<sup>260</sup> As said by the court in this case: "If a bill of exchange is complete in itself, free from any latent ambiguity, obviously carrying its passport upon its face, there is no need of oral testimony to aid in its exposition. The clear and intelligible terms of such an instrument may not be explained by extrinsic evidence. This is a familiar rule of constant application in the interpretation of written contracts." But "where there is a latent ambiguity, as between the original parties to a bill of exchange and others affected with notice, especially where the name of the principal is in some manner disclosed upon the face of the instrument, we deem the true rule to be, that the real nature of the transaction may be investigated." The signature of a bill of exchange of a person, as president of a corporation, may import either an individual or a corporate obligation, according to the phraseology of the instrument itself. And where there is nothing in the body of the instrument to show the nature of the obligation, the signature is ambiguous, and parol evidence

<sup>259</sup> *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. (U. S.) 327, Huffc. Cas. 370.

<sup>260</sup> *Hager v. Rice*, 4 Colo. 90, 34 Am. Rep. 68. Overruling *Tannatt v. Rocky Mountain Nat. Bank*, 1 Colo. 278, 9 Am. Rep. 156, where it was held in reference to a bill of exchange signed, "T. R. T., agent for S. T.," and there was nothing in the body of the bill evincing an intent to bind the principal, that it was the bill of the agent and not of the principal, and that parol evidence was not admissible to show an intent to bind the principal. The court in the later case, in referring to this case, says: "We cannot assent to the doctrine there laid down—a doctrine whose tendency is to defeat rather than effectuate the intention of parties to written contracts."

is admissible to determine its true character.<sup>261</sup> So where a bill was drawn by a corporation, addressed to its treasurer as an individual and accepted by him with the addition of "treasurer," etc., it was held that parol evidence was admissible to show that his acceptance was designed only in his official capacity.<sup>262</sup> Likewise in an action on a bill of exchange drawn by H. and accepted by B., "agent of H.," parol evidence is admissible, between the parties to the bill, to show that the intent was not to charge B. personally, but to charge H., whose funds were in B.'s hands.<sup>263</sup> Where the president of a railroad company signs in his own name a due bill for "labor performed on cottage lot of the railroad company," parol evidence is admissible to ascertain whether the work was performed for the president or for the company.<sup>264</sup>

To prove that a note was intended to bind the agent, and not the principal, evidence that a suit thereon against the agent was prosecuted to judgment is admissible; but the effect of such evidence may be impaired or destroyed by proof that such suit was brought by mistake.<sup>265</sup>

*B. Parol Contracts Other Than Negotiable Instruments.*

**§ 331. In general.**

Much that has been said, in respect to the execution of negotiable instruments by an agent, also applies to the execution of other simple contracts; but in the latter the same observance as to form of execution is not required as in the former. In fact, in all simple contracts other than negotiable instruments, little attention is paid to the form of the contract if it fully expresses the intention of the parties

<sup>261</sup> *Kean v. Davis*, 21 N. J. Law, 683, 47 Am. Dec. 182; *Lazarus v. Shearer*, 2 Ala. 718; *Wetumpka & C. R. Co. v. Bingham*, 5 Ala. 657.

<sup>262</sup> *Laffin & R. Powder Co. v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472.

<sup>263</sup> *Hardy v. Pilcher*, 57 Miss. 18, 34 Am. Rep. 432. Compare *Robinson v. Kanawha Val. Bank*, 44 Ohio St. 441, 58 Am. Rep. 829.

<sup>264</sup> *Richmond, F. & P. R. Co. v. Snead*, 19 Grat. (Va.) 354, 100 Am. Dec. 670. And see *Early v. Wilkinson*, 9 Grat. (Va.) 68.

<sup>265</sup> *Clealand v. Walker*, 11 Ala. 1058, 46 Am. Dec. 238.



thereto. But as certain forms have been found to express the intention better than others, it would be better that such forms were followed in all cases to which they are applicable. For example, where the contract is intended to be binding on the principal, there are certain ways by which his name can be expressed therein that are considered better than others, and where practicable those forms should be used. And for this purpose the rules in reference to expressing the principal's name in a negotiable instrument will be found especially applicable to simple contracts of this class. But as will be seen in the following section, the intention of the parties is the governing rule in all cases, and if the contract fully expresses such intention, the fact that it is not written in any particular form, or is in fact very informal, is immaterial.

**§ 332. Intention of parties to govern.**

In all contracts of this sort, the intention of the parties thereto is the governing consideration in determining whether the contract, as executed, is binding on the principal or on the agent. The question in each of such cases, whether the agent is deemed to have contracted personally or on behalf of his principal, depends upon the intention of the parties as gathered from the terms of the written contract as a whole.<sup>266</sup> As has been said: "Where the question of agency in making a contract arises, there is a broad line of distinction between instruments under seal and stipulations

<sup>266</sup> *Bowes v. Shand*, 46 Law J. Q. B. 561; *Post v. Pearson*, 108 U. S. 418; *Whitney v. Wyman*, 101 U. S. 392; *Roney v. Winter*, 37 Ala. 278; *McDonald v. Bear River & A. Water & Min. Co.*, 13 Cal. 235; *Hovey v. Magill*, 2 Conn. 682; *Magill v. Hinsdale*, 6 Conn. 464a, 16 Am. Dec. 70; *Deming v. Bullitt*, 1 Blackf. (Ind.) 241; *Rogers v. March*, 33 Me. 106; *Winship v. Smith*, 61 Me. 118; *Dyer v. Burnham*, 25 Me. 9; *Cutler v. Ashland*, 121 Mass. 588; *Blanchard v. Blackstone*, 102 Mass. 343; *Bray v. Kettell*, 1 Allen (Mass.) 80; *Lyon v. Williams*, 5 Gray (Mass.) 557; *Rice v. Gove*, 22 Pick. (Mass.) 158, 33 Am. Dec. 724; *City of Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502; *Townsend v. Hubbard*, 4 Hill (N. Y.) 351; *Many v. Beekman Iron Co.*, 9 Paige (N. Y.) 188; *Evans v. Wells*, 22 Wend. (N. Y.) 324; *Fowle v. Kerchner*, 87 N. C. 49; *Roberts v. Button*, 14 Vt. 195.

in writing not under seal, or by parol. \* \* \* In the latter cases the question is always one of intent; and the court, being untrammelled by any other consideration, is bound to give it effect. \* \* \* If the contract be unsealed and the meaning clear, it matters not how it is phrased, nor how it is signed, whether by the agent for the principal or with the name of the principal by the agent or otherwise."<sup>267</sup>

**§ 333. When the contract is binding on the principal.**

In order to bind the principal, it is not required that the contract be executed in any particular form, if it indicates a ministerial act on the part of the agent, and shows an intention to bind the principal. Where, from all the circumstances, it is clearly apparent that the contract was intended to be binding on the principal, effect will be given to such intention. Although the agent may not have used exactly appropriate terms in executing the contract, yet if it can be gathered from the whole instrument that he acted in a representative capacity, and there is a clear intention to bind the principal, then the contract will be binding on the latter alone.<sup>268</sup> It has been said: "That in order to bind a principal, on a contract made by an agent, it must purport on its

<sup>267</sup> Mr. Justice Swayne, in *Whitney v. Wyman*, 101 U. S. 392.

<sup>268</sup> *Green v. Hopke*, 18 C. B. 549; *Bowen v. Morris*, 2 Taunt. 374; *Irvine v. Watson*, 5 Q. B. Div. 414, Wamb. Cas. 715; *Stringfellow v. Marriott*, 1 Ala. 573; *Hewitt v. Wheeler*, 22 Conn. 557; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Armstrong v. Borland*, 35 Iowa, 537; *Carson v. Lucas*, 13 B. Mon. (Ky.) 213; *Cook v. Gray*, 133 Mass. 106; *Goodenough v. Thayer*, 132 Mass. 152; *Cutler v. Ashland*, 121 Mass. 588; *Rice v. Gove*, 22 Pick. (Mass.) 158, 33 Am. Dec. 724; *Eastern R. Co. v. Benedict*, 5 Gray (Mass.) 561, 66 Am. Dec. 384; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314; *Deering v. Thom*, 29 Minn. 120; *Smith v. Alexander*, 31 Mo. 193; *McGee v. Larramore*, 50 Mo. 425; *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505; *Stanton v. Camp*, 4 Barb. (N. Y.) 274; *Hill v. Miller*, 76 N. Y. 32; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 562; *Lancaster v. Knickerbocker Ice Co.*, 153 Pa. 427; *Texas Land & Cattle Co. v. Carroll*, 63 Tex. 48; *Walker v. Christian*, 21 Grat. (Va.) 293. Even where he signs as "agent" for a foreign principal. *Hahn v. North German Pitwood Co.*, 8 Times Law R. 557.

face to be the contract of the principal; and his name must be inserted in it, and signed to it. It is not enough that the agent be described as such in the instrument."<sup>269</sup> But, "although the rule is thus strict as to sealed instruments, yet a more liberal rule obtains as to unsolemn instruments, especially commercial and maritime contracts. In such cases, in furtherance of the public policy of encouraging trade, if it can, upon the whole instrument, be collected, that the true object and intent of it are to bind the principal, and not merely the agent, courts of justice will adopt that construction of it, however informally it may be expressed."<sup>270</sup> Thus, an agreement signed A. B., agent for C. D., is, in construction of law, the agreement of C. D.<sup>271</sup> So a simple contract for building a school-house, signed by certain persons as a "committee," it appearing from the body of the contract that they were contracting for a school district, and they having authority to make the contract, is binding on the school district.<sup>272</sup> Likewise, a contract of guaranty signed, "Iowa National Bank, by William Daggett, V. P.," is the obligation of the bank and not of the signer, Daggett, notwithstanding the use of the pronouns "we" and "our" in the contract.<sup>273</sup> And a lease reciting that it is made by "M., agent of D.," and signed in the same manner, is held the contract of the principal.<sup>274</sup> A charter party which the

<sup>269</sup> *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 667; *Story*, Ag. § 147; *Traynham v. Jackson*, 15 Tex. 170, 65 Am. Dec. 152.

<sup>270</sup> *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665; *Story*, Ag. § 154; *Traynham v. Jackson*, 15 Tex. 170, 65 Am. Dec. 152; *Abbey v. Chase*, 6 Cush. (Mass.) 56.

<sup>271</sup> *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120.

<sup>272</sup> *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521.

<sup>273</sup> *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa, 357, 75 Am. St. Rep. 259.

<sup>274</sup> *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680. In this case, Elliott, J., says: "It is also true that mere descriptive words are regarded as simply describing the person. *Jackson School Tp. v. Farlow*, 75 Ind. 118; see authorities cited, p. 123. This doctrine applies to leases as well as to other instruments. *Woodf. Landl. & Ten.* 203. The rule is firmly engrafted in our law, but it is not easy to find any real ground for it in this country, where there are no titles, designating rank or condition in life. In England there was reason for the rule; here there is none. The better doctrine would

managing editor of a newspaper, named therein as the hirer, signed "Chester S. Lord for The Sun Printing & Publishing Association," binds the latter, if such editor had authority to make such a contract.<sup>275</sup>

**§ 334. Where the agent contracts in his own name.**

Although the agent may have contracted in his own name without any qualification, if it appears from the whole instrument that the intention was to bind the principal, such intention will be followed. If a contract is so made, the agent is deemed to have contracted personally, unless a contrary intention appears from other portions of the contract; but where an intention to act as agent and to bind the principal does plainly appear from the other parts of the contract, it will be binding on the latter notwithstanding the agent may not have added words to his name indicating his agency.<sup>276</sup> Thus, where a contract was in the following

be that the words annexed to the name may be explained by extrinsic evidence; but the rule has been too long and too firmly settled to be shaken now. While accepting the general rule to be that stated, the American authorities agree that if the contract itself shows that the words were not used as merely descriptive of the person, they will not be so regarded, but will be assigned their real meaning. In the instrument before us it clearly appears that Marshall was the agent of the lessor, and acted as such, for we find this recited: "That the said Marshall, agent as aforesaid, has rented to Madison and Monroe Avery." There are other provisions in the instrument clearly showing that Marshall executed the lease as agent of Dougherty, and we have no doubt that it should be treated as having been executed by him, and that the improper description of the lessor in the introductory clause of the lease must be attributed to the unskillfulness of the draftsman of the instrument."

<sup>275</sup> Sun Print. & Pub. Ass'n v. Moore, 183 U. S. 642.

<sup>276</sup> Hick v. Tweedy, 63 Law T. (N. S.) 765; Dutton v. Marsh, L. R. 6 Q. B. 361; Ogden v. Hall, 40 Law T. (N. S.) 751; Whitney v. Wyman, 101 U. S. 392; Haskell v. Cornish, 13 Cal. 45; McDonald v. Bear River & A. Water & Min. Co., 13 Cal. 220; Love v. Sierra Nev. Lake Water & Min. Co., 32 Cal. 639, 91 Am. Dec. 602; Edwards v. Gildemeister, 61 Kan. 141; McClernan v. Hall, 33 Md. 293; Key v. Parnham, 6 Har. & J. (Md.) 418; Lamson & G. Mfg. Co. v. Russell, 112 Mass. 387; State v. Cass County Com'rs, 60 Neb. 566; Underhill v. Gibson, 2 N. H. 352, 9 Am. Dec. 82; Stanton v. Camp, 4 Barb.

terms: "We have this day sold to you, on account of J. M. & Co., Valencia," etc., and was signed by the home agents in their own names without qualification, it was held that the agents were not personally liable, though the contract was made on behalf of foreign principals, the words "on account of" clearly showing that there was no intention to contract personally.<sup>277</sup> So where the agent described himself as contracting "on behalf of A. B., Roane," it was held that he was not liable, though he signed the contract in his own name without qualification.<sup>278</sup> And where a mortgage not required to be under seal was executed by the agents in their own names, under seals, the court said: "Though the indenture in this case is under the seals of the trustees, yet when considered as an agreement for a mortgage, it may be treated as a simple contract nevertheless; and we consider it clear from the authorities that it is not indispensable, in order to bind the principal at law even, that such contract should be executed in the name and as the act of the principal. On the contrary, it will be sufficient, if upon the whole instrument it can be gathered from the terms thereof that the party describes himself and acts as agent, and intends thereby to bind his principal, and not to bind himself."<sup>279</sup>

**§ 335. Where principal adopts agent's name as his own.**

It may be that, although the agent executes the contract in his own name, such name is in fact the name of the principal for business purposes. One may make the name and signature of another virtually his own, by using it or allowing it to be used in the course of his business; and where a party adopts a name, he will be holden by contracts executed in such name, whether the name so assumed be an artificial

(N. Y.) 274; *Fowle v. Kerchner*, 87 N. C. 49; *Wheeler v. Knaggs*, 8 Ohio, 169.

<sup>277</sup> *Gadd v. Houghton*, 1 Exch. Div. 357, Wamb. Cas. 578.

<sup>278</sup> *Ogden v. Hall*, 40 Law T. (N. S.) 751.

<sup>279</sup> *Love v. Sierra Nev. Lake Water & Min. Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Haskell v. Cornish*, 13 Cal. 45; *McDonald v. Bear River & A. Water & Min. Co.*, 13 Cal. 221. And see *Barbre v. Goodale*, 28 Or. 465.

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one or the proper name of a living person. In principle, there is no difference between assuming purely an artificial name, by which to transact business, and assuming the proper name of some other natural person; only this, that in the latter case the proof ought to be very clear to show that the contract was not designed to be the personal contract of such natural person.<sup>280</sup>

**§ 336. When the contract is binding on the agent.**

It is a rule well established by authorities, that although the agent might avoid personal liability by acting in the name and on behalf of his principal, still if the terms of the contract are such as plainly indicate an intention to bind himself personally, and he engages expressly in his own name to pay or to perform other obligations, he is personally responsible; and the mere fact that the agent is described as an agent, whether by words connected with or forming part of the signature, or in the body of the contract, and whether the principal is named or not, does not raise a conclusive presumption that the agent did not intend to assume responsibility.<sup>281</sup> Thus, one who executes a written contract of sale, which upon its face binds him personally, cannot relieve himself of responsibility thereunder by showing that he was acting simply as agent or broker for a principal; and whether

<sup>280</sup> *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225. See ante, §§ 317, 328.

<sup>281</sup> *Paice v. Walker*, 22 Law T. (N. S.) 547, L. R. 5 Exch. 173; *Hutcheson v. Eaton*, L. R. 13 Q. B. Div. 861; *Burrell v. Jones*, 3 Barn. & Ald. 47; *Duvall v. Craig*, 2 Wheat. (U. S.) 56; *Chauche v. Pare*, 75 Fed. 283; *Weil v. Defenbaugh*, 65 Ill. App. 489; *Miller v. Early*, 22 Ky. Law Rep. 825, 58 S. W. 789; *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; *Morell v. Coddington*, 4 Allen (Mass.) 403; *Guernsey v. Cook*, 117 Mass. 548; *Fiske v. Eldridge*, 12 Gray (Mass.) 474; *Stinson v. Lee*, 68 Miss. 113, 24 Am. St. Rep. 257; *Porter v. Merrill*, 138 Mo. 555; *Stone v. Wood*, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; *Argersinger v. Macnaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687; *Campbell v. Porter*, 46 App. Div. (N. Y.) 628; *Bourne v. Campbell*, 21 R. I. 490; *Matthews v. Jenkins*, 80 Va. 463; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 36 Am. St. Rep. 895.

such principal was disclosed or undisclosed is immaterial.<sup>282</sup> So a committee of a town executing a contract in their individual names, therein describing themselves as a committee of the town of W., and stipulating that "said committee are to pay," etc., are personally answerable on the contract. "Two things are here observable. The first is, that they do not profess to act in the name or behalf of the town, otherwise than as such an intention may be implied from describing themselves as a committee. But such description, although it may have some weight, is far from being conclusive, and in many of the cases cited, a similar designation was used, which was held to be a mere descriptio personarum, and designed to show for whose account the contract was made, and to whose account the amount paid under such contract should be charged. The second and more decisive circumstance respecting this contract is, that here is an express undertaking on the part of the committee to pay. 'Said committee are to pay said Simonds and Chaplin,' etc. Having described themselves as a committee, this undertaking is as strong and direct as if the names had been repeated, and Heard, Sherman, and Heard had promised to pay. The court are therefore of opinion, that by the terms of this contract, the committee intended to bind themselves, and did become personally responsible, and that the action is well brought against them."<sup>283</sup> Where an agent who entered into a written agreement to grant a lease of certain premises was described in the agreement as making it on behalf of the principal, but in a subsequent portion of the document it was provided that he, the agent, would execute the lease, it was held that the agent was personally liable on the agreement.<sup>284</sup> If one signs a submission to arbitration as agent without disclosing the name of his principal, the principal being unknown to the other party, the agent is personally bound by the submission.<sup>285</sup>

<sup>282</sup> Cream City Glass Co. v. Friedlander, 84 Wis. 53, 36 Am. St. Rep. 895.

<sup>283</sup> Simonds v. Heard, 23 Pick. (Mass.) 120, 34 Am. Dec. 41.

<sup>284</sup> Norton v. Herron, 1 Car. & P. 648; Tanner v. Christian, 4 El. & Bl. 591.

<sup>285</sup> Macdonald v. Bond, 195 Ill. 122.

A letter written by the cashier of a national bank, on the letter-head of his bank, to a bank in another state, to the effect that if the latter bank will sign a replevin bond for customers of the writer's bank, "we will stand between you and all harm," and signed by the writer as "cashier," constitutes an agreement, when acted upon, into which a national bank cannot legally enter, and binds the writer personally, in the absence of clear and unequivocal proof that he was claiming to act for his bank, and did not intend to bind himself.<sup>286</sup>

**§ 337. Agent's name need not appear on document.**

As in the case of negotiable instruments, it is not necessary that the agent's name appear on the instrument at all. If the writing is executed in the name of the principal throughout, and the intention to bind the principal plainly appears, it is not necessary that such writing be signed by the agent for or on behalf of his principal, or that his name or the fact of his agency appear any place in the instrument.<sup>287</sup>

**§ 338. Execution of simple contracts by public agents.**

There is an admitted exception to the above general rules, however, in the case of public agents. When public agents, in good faith, contract with parties, within the scope of their powers, they do not become individually liable on the contract, unless the intent to incur a personal responsibility is clearly apparent on the face of the contract, although it is executed in such a manner as would have made him personally liable had he been acting for a private person. In this as in all other cases, the intention of the parties governs, and when a person, known to be a public agent, contracts with reference to public matters committed to his charge, he is presumed to act in his representative capacity only, although the contract may not allude in terms to the character in which he acts, unless the agent by unmistakable

<sup>286</sup> *Knickerbocker v. Wilcox*, 83 Mich. 200, 21 Am. St. Rep. 595.

<sup>287</sup> *Human v. Cuniffe*, 32 Mo. 316; *Hunter v. Giddings*, 97 Mass. 41, 93 Am. Dec. 54. And see ante, § 321.



language assumes a personal liability, or is guilty of fraud or misrepresentation. Were the rule otherwise, few persons of responsibility would be found willing to serve the public in that large class of offices which requires a sacrifice of time and perhaps money. When, therefore, one contracts with a public agent, within the scope of his powers, he is presumed to contract upon the credit of the principal alone, and the agent, in the absence of express terms to that effect, incurs no liability, although such contract may have been so executed, that had the agent been acting for a private person, it would have been binding on the agent only,<sup>288</sup> and this is true although the contract is made in the name of the agent.<sup>289</sup>

But a committee of a town executing a contract in their individual names, therein describing themselves as a committee of the town of W., and stipulating that "said committee are to pay," etc., was held to be personally responsible on the contract; the above being held not applicable to this case, as it was not "a contract in behalf of the public, but, at most, of a corporation capable of making contracts and liable to an action on its contracts."<sup>290</sup> So an order for goods, signed by township trustees with the addition of their official description, but purporting in the body to be their

<sup>288</sup> *Rice v. Chute*, 1 East, 579; *Macbeath v. Haldimand*, 1 Term R. 172; *Hodgson v. Dexter*, 1 Cranch (U. S.) 345; *Parks v. Ross*, 11 How. (U. S.) 362; *Perry v. Hyde*, 10 Conn. 329; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Sparta School Tp. v. Mendell*, 138 Ind. 138; *Freeman v. Otis*, 9 Mass. 272, 6 Am. Dec. 66; *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502; *Balcombe v. Northup*, 9 Minn. 172; *Lapsley v. McKinstry*, 38 Mo. 245; *Underhill v. Gibson*, 2 N. H. 352, 9 Am. Dec. 82; *Stewart v. Johnson*, 1 N. J. Law, 27; *Walker v. Swartwout*, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334; *Hite v. Goodman*, 21 N. C. (1 Dev. & B. Eq.) 364; *Stanly's Ex'r v. Hawkins*, 1 N. C. (1 Mart. Dec. 55) 26; *Cook v. Irvine*, 5 Serg. & R. (Pa.) 492, 9 Am. Dec. 397; *Miller v. Ford*, 4 Rich. Law (S. C.) 376, 55 Am. Dec. 687; *Amison v. Ewing*, 2 Cold. (Tenn.) 366; *Tutt v. Lewis' Ex'rs*, 3 Call (Va.) 233. Compare *Brown v. Bradley*, 156 Mass. 28.

<sup>289</sup> *Hodgson v. Dexter*, 1 Cranch (U. S.) 345; *United States v. Blount*, 4 N. C. (2 Law Repos. 84) 181; *Balcombe v. Northup*, 9 Minn. 172. But see *Sheffield v. Watson*, 3 Caines (N. Y.) 69.

<sup>290</sup> *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41.

personal contract, the contract not being such as the town could legally make, binds the signers individually.<sup>291</sup>

**§ 339. Admission of parol evidence.**

(a) **Where contract is ambiguous.**—If the contract entered into by the agent is ambiguous or doubtful as to who was intended to be bound by the writing, parol evidence may be introduced to show to whom credit was intended to be given.<sup>292</sup> Thus, where the president of a railroad company signs in his own name a due bill for "labor performed on cottage lot of railroad company," parol evidence is admissible to ascertain whether the work was performed for the president or for the company.<sup>293</sup>

(b) **Admissible to charge principal.**—It is well settled, in respect to such contracts, where they appear to be executed by an agent, that parol evidence may be admitted to charge an unnamed or undisclosed principal on the contract,<sup>294</sup> or

<sup>291</sup> *Revolving Scraper Co. v. Tuttle*, 61 Iowa, 423, 47 Am. Rep. 816.

<sup>292</sup> *Southern Pac. Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368; *Rhone v. Powell*, 20 Colo. 41; *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665; *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521; *Arfridson v. Ladd*, 12 Mass. 173; *Ziegler v. Fallon*, 28 Mo. App. 295; *Blakely v. Bennecke*, 59 Mo. 193; *Gillig v. Lake Bigler Road Co.*, 2 Nev. 214; *Becker v. Lamont*, 13 How. Pr. (N. Y.) 23; *Roberts v. Button*, 14 Vt. 195; *Walker v. Christian*, 21 Grat. (Va.) 291.

<sup>293</sup> *Richmond, F. & P. R. Co. v. Snead*, 19 Grat. (Va.) 354, 100 Am. Dec. 670. And see *Early v. Wilkinson*, 9 Grat. (Va.) 68.

<sup>294</sup> *Higgins v. Senior*, 8 Mees. & W. 834, Huffc. Cas. 380, Wamb. Cas. 554; *Jones v. Littledale*, 6 Adol. & E. 486, Wamb. Cas. 552; *Nash v. Towne*, 5 Wall. (U. S.) 689; *McTyer v. Steele*, 26 Ala. 487; *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665; *Porter v. Day*, 44 Ill. App. 256; *Heywood Bros. & Wakefield Co. v. Andrews*, 89 Ill. App. 195; *Bryan v. Brazil*, 52 Iowa, 350; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 315, Wamb. Cas. 581; *Huntington v. Knox*, 7 Cush. (Mass.) 371, Wamb. Cas. 634; *Lerned v. Johns*, 9 Allen (Mass.) 419, Wamb. Cas. 645; *Hunter v. Giddings*, 97 Mass. 41, 93 Am. Dec. 54; *Bacon v. Rupert*, 39 Minn. 512; *Mantz v. Maguire*, 52 Mo. App. 136; *Ferris v. Thaw*, 72 Mo. 446; *Chandler v. Coe*, 54 N. H. 561, Wamb. Cas. 573; *Borcherling v. Katz*, 37 N. J. Eq. 150, Wamb. Cas. 649; *Yates v. Repetto*, 65 N. J. Law, 294; *Kayton v. Barnett*, 116 N. Y. 625, Huffc. Cas. 232; *Nicoll v. Burke*, 78 N. Y. 580; *Coleman v.*

in order to give him the benefit of the contract so as to enable him to sue thereon;<sup>295</sup> and this doctrine obtains as well in respect to contracts which are required to be in writing, as to those where a writing is not essential to their validity. This evidence in no way contradicts the written contract. "It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act

Elmira First Nat. Bank, 53 N. Y. 388; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617, Huffc. Cas. 248; *Brady v. Nally*, 151 N. Y. 258; *Anderton v. Shoup*, 17 Ohio St. 128; *Wilson v. Bailey*, 1 Handy (Ohio) 177; *Texas Land & Cattle Co. v. Carroll*, 63 Tex. 48; *Brewster v. Baxter*, 2 Wash. T. 135; *Deitz v. Providence Wash. Ins. Co.*, 31 W. Va. 851, 13 Am. St. Rep. 909.

In *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617, Andrews, J., says: "It is, doubtless, somewhat difficult to reconcile the doctrine here stated with the rule that parol evidence is inadmissible to change, enlarge or vary a written contract, and the argument upon which it is supported savors of subtlety and refinement. In some of the earlier cases the doctrine that a written contract of the agent could be enforced against the principal was stated, with the qualification that it applied, when it could be collected from the whole instrument, that the intention was to bind the principal. But it will appear, from an examination of the cases cited, that this qualification is no longer regarded as an essential part of the doctrine. Whatever ground there may have been originally to question the legal soundness of the doctrine referred to, it is now too firmly established to be overthrown, and I am of the opinion that the practical effect of the rule as now declared is to promote justice and fair dealing."

In *Chandler v. Coe*, 54 N. H. 561, Wamb. Cas. 573, Hibbard, J., says: "We are of the opinion that where a principal is sought to be charged upon a contract in writing, made in the name of his agent, the rule of evidence which prohibits the parties to a written contract from contradicting or varying its terms by parol testimony, applies if the principal was known, but not if he was unknown."

<sup>295</sup> *Higgins v. Senior*, 8 Mees. & W. 834, Huffc. Cas. 380, Wamb. Cas. 554; *Pacific Guano Co. v. Holleman*, 12 Fed. 61; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 667; *National L. Ins. Co. v. Allen*, 116 Mass. 398; *Nicoll v. Burke*, 78 N. Y. 580; *Rutland & B. R. Co. v. Cole*, 24 Vt. 33; *U. S. Nat. Bank v. Burton*, 58 Vt. 426.

of the principal.”<sup>296</sup> Thus, where words, such as “agent,” “trustee,” or the like, are affixed to the name of a party to a contract, which may be either descriptive of the person or indicative of the character in which he contracts, they are prima facie descriptive only, but it may be shown by extrinsic evidence that they were understood as determining the character in which he contracted.<sup>297</sup> So a non-negotiable instrument signed “Zelotes Terry, Trustee,” may be proved by parol to be the note of Zelotes Terry, Trustee for the East family of Shakers; for the words “Zelotes Terry, Trustee,” may mean something more than the mere name of the agent. They may be the corporate name of the community.<sup>298</sup> Such evidence may also be admitted to show that the agent intended to bind himself personally.<sup>299</sup>

This rule applies as well to contracts which are required by the Statute of Frauds to be in writing as to other simple contracts, other than negotiable instruments. As the authority of the agent to act for his principal may be shown by evidence aliunde so it is not necessary that the name of his principal or his relation to the transaction shall appear upon the writing itself, or in the form of the signature; and although the agent's signature may be in his own name, no principal's name or fact of the agency appearing in the memorandum, parol proof may be admitted to show the agency and hold the principal.<sup>300</sup> This rule also applies al-

<sup>296</sup> *Higgins v. Senior*, 8 Mees. & W. 834, Huffc. Cas. 381, Wamb. Cas. 554.

<sup>297</sup> *Pratt v. Beaupre*, 13 Minn. 177. And this rule has been followed in *Bingham v. Stewart*, 14 Minn. 153; *Deering v. Thom*, 29 Minn. 120; *Peterson v. Homan*, 44 Minn. 166, 20 Am. St. Rep. 564. It was also decided in *Pratt v. Beaupre*, supra, that when the word “agent” is affixed to the party's name, in order to show that he contracted as agent, he must prove the fact of agency. In other words, in order to show that he contracted in a representative capacity, he must first prove the existence of that capacity. The reason for that is apparent. The evidence is admitted, not to defeat the contract, but to show who is liable upon it,—whose contract it is.

<sup>298</sup> *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225.

<sup>299</sup> *Black River Lumber Co. v. Warner*, 93 Mo. 374; *Ferris v. Thaw*, 72 Mo. 446.

<sup>300</sup> *Neaves v. North State Min. Co.*, 90 N. C. 412, 47 Am. Rep. 529;

though the contract is under seal, if it is a contract that is not required to be under seal. Thus parol testimony is admissible to show that a contract which is not a negotiable instrument, and not required to be under seal, although so in fact, executed by and in the name of an agent, is the contract of the principal, although the principal is known to the other contracting party at the time of its execution.<sup>301</sup>

More cases, on this subject, will be found in a subsequent chapter, in treating of the rights and liabilities of an undisclosed principal.

(c) **Inadmissible to exonerate agent or principal.**—But where the agent signs such contract in his own name, as if he were the principal, parol evidence is not admissible for the purpose of discharging him from his liability on such contract.<sup>302</sup> To allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done. This rule has been stated: "Where an agent has entered into a written contract in which he appears as principal, parol evidence is inadmissible to show, with a view of exonerating him, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed."<sup>303</sup> And where a contract was signed by the defend-

*Sanborn v. Flagler*, 9 Allen (Mass.) 474; *Wilson v. Hart*, 7 Taunt. 295; *Borcherling v. Katz*, 37 N. J. Eq. 150, Wamb. Cas. 649.

<sup>301</sup> *Barbre v. Goodale*, 28 Or. 465. *See also* 14 N. J. 357

<sup>302</sup> *Higgins v. Senior*, 8 Mees. & W. 834, Wamb. Cas. 554, Huff. Cas. 380; *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665; *Bryan v. Brazil*, 52 Iowa, 350; *Mantz v. Maguire*, 52 Mo. App. 136; *Babbett v. Young*, 51 N. Y. 238; *Chappell v. Dann*, 21 Barb. (N. Y.) 17; *Auburn City Bank v. Leonard*, 40 Barb. (N. Y.) 119; *De Remer v. Brown*, 165 N. Y. 410; *Wilson v. Bailey*, 1 Handy (Ohio) 177; *Marx v. Luling Co-op. Ass'n*, 17 Tex. Civ. App. 408.

<sup>303</sup> In *Nash v. Towne*, 5 Wall. (U. S.) 689. And the court in concluding its opinion in this case, said: "Cases may be found, also, where it is held that the plaintiff may prove by parol that the other contracting party named in the contract was but the agent of an undisclosed principal, and in that state of the case he may have his remedy against either, at his election." Citing *Thomson v. Davenport*, 9 Barn. & C. 78. "Evidence to that effect will be

ant's clerk, *Ld. Denman, C. J.*, said: "There is no doubt that evidence is admissible, on behalf of one of the contracting parties, to show that the other was agent only, though contracting in his own name, and so to fix the real principal; but it is clear that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility."<sup>304</sup> So one who executes a written contract of sale, which upon its face binds him personally, cannot relieve himself of liability thereunder by showing that he was acting simply as agent or broker for another; and whether such principal was disclosed or undisclosed is immaterial.<sup>305</sup>

For the same reason, if the contract is executed in the name of the principal and signed in his name by another as agent, parol evidence is inadmissible to show that the contract was intended to be the contract of the latter.<sup>306</sup>

#### § 340. Execution of oral contracts.

Where an agent is duly authorized to enter into a mere verbal or oral contract on behalf of his principal, in order that such contract may be binding on his principal alone, and not on the agent, the latter should fully disclose to the other contracting party the nature and extent of his authority, the nature of the transaction into which he is authorized to enter, and the relation he bears to the person for whom he is acting. With these disclosures, the third party is fully aware of the agent's authority in the matter, and of the fact that all negotiations had between himself and the agent, are had with the view of making a contract between him and the principal. These contracts may be made by the agent in

admitted to charge the principal or to enable him to sue in his own name, but the agent who binds himself is never allowed to contradict the writing by proving that she contracted only as agent and not as principal." Citing *Jones v. Littledale*, 6 *Adol. & E.* 486. See, also, *Bulwinkle & Co. v. Cramer*, 27 *S. C.* 376, 13 *Am. St. Rep.* 645.

<sup>304</sup> *Jones v. Littledale*, 6 *Adol. & E.* 486, *Wamb. Cas.* 552.

<sup>305</sup> *Cream City Glass Co. v. Friedlander*, 84 *Wis.* 53, 36 *Am. St. Rep.* 395; *Weston v. McMillan*, 42 *Wis.* 567.

<sup>306</sup> *Brackenridge v. Claridge* (*Tex. Civ. App.*) 44 *S. W.* 819.

express words, or they may be implied from circumstances. By reason of the fact that there is no written evidence of such contracts there is a greater liberality in the rules of construction applicable to them than to written contracts; though here, as in written contracts, the main question is the intention of the parties as determined from the facts and circumstances of the case. If the agent has executed his authority in such a manner, that the exact language of the negotiations between him and the third party can be established by proof, the contract is an express one and its construction is a question of law for the court.<sup>307</sup> But where, as is often the case in such contracts, the exact language cannot be proven, and the facts and circumstances surrounding the case are in dispute, the construction of such facts is a question for the jury, the burden of proof of establishing the contract being on the party who alleges it. That is to say that if the facts are in dispute, whether such facts constitute a contract between the principal and third party is a question for the jury, but the legal effect of such contract, when established, is for the court to determine.<sup>308</sup> "Where the contract is by parol (that is oral) the terms of the agreement are of course a matter of fact, and if those terms be obscure, or equivocal, or are susceptible of explanation from extrinsic evidence, it is for the jury to find also the meaning of the terms employed; but the effect of a parol agreement, when its terms are given and its meaning fixed, is as much a question of law as the construction of a written agreement. \* \* \* The terms of an oral contract must necessarily be ascertained from the testimony of the witnesses, and it is the duty of the court to instruct the jury as to the law applicable to the various phases arising upon such testimony. But where the court presents to the jury a particular view of the facts, and this embodies the terms of a contract which

<sup>307</sup> See *Norton v. Higbee*, 38 Mo. App. 467.

<sup>308</sup> *Seaber v. Hawkes*, 5 Moore & P. 549; *Owen v. Gooch*, 2 Esp. 567; *Lakeman v. Mountstephen*, L. R. 7 H. L. 17; *Magee v. Atkinson*, 2 Mees. & W. 440; *Anderson v. Timberlake*, 114 Ala. 377, 62 Am. St. Rep. 105; *Steamship Bulgarian Co. v. Merchants' Despatch Transp. Co.*, 135 Mass. 421; *Hovey v. Pitcher*, 13 Mo. 191; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Spragins v. White*, 108 N. C. 449.

are in themselves precise and explicit, the court should declare their legal effect, and it would be error to leave this to be determined by the jury."<sup>309</sup> If the agent has executed the contract in such a manner that part is in writing and part verbal, whether such facts constitute a contract is a question for the jury.<sup>310</sup> Thus, where an agent buys goods at an auction sale, and gives his own name as buyer, it is a question of fact whether he contracted personally.<sup>311</sup> So where a broker sells goods at auction, and invoices them in his own name as seller, it is a question of fact for the jury whether the invoice was intended to be a contract. If it was, the broker is personally bound thereby. But if it was not, it is a question of fact whether he intended to contract personally.<sup>312</sup>

<sup>309</sup> *Spragins v. White*, 108 N. C. 449.

<sup>310</sup> *Scanlan v. Hodges*, 52 Fed. 354.

<sup>311</sup> *Williamson v. Barton*, 7 Hurl. & N. 899, 31 Law J. Exch. 170.

<sup>312</sup> *Jones v. Littledale*, 6 Adol. & E. 486; *Holding v. Elliott*, 5 Hurl. & N. 117, 29 Law J. Exch. 134.



## CHAPTER XII.

### DELEGATION OF AUTHORITY BY AGENT.

§ 341. In general.

342. General rule as to delegation of authority to a subagent.

343. Exceptions to general rule—In general.

344. Where authority to delegate is express.

345. Where authority to delegate is implied.

346. Application of these rules to particular classes of agents.

347. Effect of delegation.

§ 341. In general.

A delegation, according to the meaning assigned to it at common law, is the act of giving to another the power to do what one may do himself. Delegation, in its broadest sense, is of a two-fold classification. It may be either, (1) a delegation of original authority, as where a principal delegates authority to his agent, or (2) it may be a delegation of delegated authority, as where the agent delegates to another the authority which has been delegated to him by his principal. The first of these classifications has been considered heretofore in treating of the creation of the relation of principal and agent.

Generally, when one speaks of a delegation of authority, reference is had to the second class above noted,—delegation of authority by an agent to another, who is called a subagent. It will be the scope of this chapter, then, to treat only of the delegation of authority by an agent to a subagent, or in other words of the appointment of a subagent by the primary agent. By the appointment of a subagent is meant the appointment by an agent of another person (subagent) to act in his stead for the principal. Whether an agent may appoint a subagent, and the effect of such appointment with respect to the obligations of the agent to the principal and of the subagent to the principal and to the agent, are the subjects of the following sections.

Properly speaking "there are two questions involved in the problem as to the right of an agent to appoint a subagent. The first and simplest is whether the agent may use a subagent as a means of carrying out the purposes for which the agency is created, remaining himself solely liable to the principal for the manner in which the agency is executed. The second and more difficult is whether the agent may delegate to a subagent not only the power to act for the principal but also the obligations resting primarily on the agent, so that in case of disobedience or negligence the subagent shall be liable to the principal and the agent be absolved."<sup>1</sup> Whether or not an agent may delegate his duties to a subagent is a very different question from whether or not he may delegate or transfer his obligations to the principal so as to impose them on the subagent and relieve himself. The first question will be considered in the following sections and the latter in a subsequent chapter.

**§ 342. General rule as to delegation of authority to a subagent.**

It is often broadly stated as a general rule that an agent cannot delegate his authority to another, *delegatus non potest delegare*, or in other words, that an agent cannot delegate to another the powers conferred upon him by his principal so as to affect the latter's rights without the principal's express or implied consent.<sup>2</sup> But this is thought to be stating the general rule rather too broadly, for there are some duties given to an agent to perform which he may as well delegate to another as perform them himself. When he undertakes

<sup>1</sup> Huffcut, *Ag.* (1st Ed.) § 92.

<sup>2</sup> *Shankland v. Corporation of Wash.*, 5 Pet. (U. S.) 389; *Haralson v. Stein*, 50 Ala. 347; *Mound City Mut. L. Ins. Co. v. Huth*, 49 Ala. 530; *McCarty v. Fremont*, 23 Cal. 197; *Vescelius v. Martin*, 11 Colo. 391; *Ingraham v. Whitmore*, 75 Ill. 24; *Mason v. Wait*, 5 Ill. 127; *Loomis v. Simpson*, 13 Iowa, 532; *Mark v. Bowers*, 8 Mart. (La.) 50; *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699; *Wilson v. York & M. L. R. Co.*, 11 Gill & J. (Md.) 74; *Stone v. State*, 12 Mo. 400; *Furnas v. Frankman*, 6 Neb. 429; *Moor v. Wilson*, 26 N. H. 332; *Mechanics' Bank v. Fisher*, 1 Rawle (Pa.) 341; *McCormick v. Bush*, 38 Tex. 314; *Smith v. Lowther*, 35 W. Va. 309.

to do a particular thing for another, he may be responsible to that other for results only, whatever may be the methods or instrumentalities by which the results are accomplished.<sup>3</sup> But as a general rule an agent is appointed, particularly when the execution of the agency involves exercise of judgment, discretion, or skill, because of his personal character and fitness and because the principal places a special confidence in him, and in such a case the principal has a right to assume, in the absence of an agreement to the contrary, that the agent will himself perform the duties with which he is intrusted and not delegate them to some other person of whom the principal may not know or approve. The undertaking for which the agent is employed may be one requiring the exercise of a peculiar degree of knowledge and skill, or it may require the exercise of judgment or discretion, or there may be other circumstances which influence the principal in employing the agent as one especially fitted for the work in hand. It is on account of these personal qualifications that the principal confides in the particular agent and intrusts to him the business he wants transacted. In such cases the employment becomes one of personal trust and confidence and the authority is exclusively personal unless from the express language used, or from the fair presumptions growing out of the particular transaction, a broader power was intended to be conferred.

From these considerations the correct general rule may be said to be that when the execution of an agency involves the exercise, upon the part of the agent, of judgment, discretion, or skill, he cannot delegate his authority and the performance of his duties to another by the appointment of a subagent, unless the principal has authorized him to do so, or unless there is usage or custom from which the consent of the principal may be implied. If he does so, he not only confers no authority on the subagent to bind the principal, but he violates his duty to the principal. This rule is, what is really meant by the well known

<sup>3</sup> See *British Waggon Co. v. Lea*, L. R. 5 Q. B. Div. 149; *Rochester Lantern Co. v. Stiles & P. Press Co.*, 135 N. Y. 209; *Huffcut*, Ag. § 93.

maxim, *delegatus non potest delegare*.<sup>4</sup> As has been said, "It is undoubtedly the law that when a man appoints a person to do an act for him, the latter cannot delegate to another the authority conferred. But in the case in which this maxim has been applied, in which it has been held that an agent or trustee could not confer upon another person the right to discharge the trust or duty created by his appointment, there was something in the act involving personal confidence, or a trust in him, or in his skill, or which called for the exercise of his discretion, or of his judgment; something which the party clothing him with his representative character and authority was willing to intrust to him, but which it did not necessarily follow he was equally will-

<sup>4</sup> *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276; *Pendall v. Rench*, 4 McLean, 259, Fed. Cas. No. 10,917; *Warner v. Martin*, 11 How. (U. S.) 223; *City of New York v. Du Bois*, 86 Fed. 889; *Drum v. Harrison*, 83 Ala. 384; *Waldman v. North British & Mercantile Ins. Co.*, 91 Ala. 170, 24 Am. St. Rep. 883, 885; *Weaver v. Carnall*, 35 Ark. 198, 37 Am. Rep. 22, 26; *Dingley v. McDonald*, 124 Cal. 682; *Fairchild v. King*, 102 Cal. 320; *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Davis v. King*, 66 Conn. 465, 50 Am. St. Rep. 104; *McCroskey v. Hamilton*, 108 Ga. 640, 75 Am. St. Rep. 79; *O'Connor v. Arnold*, 53 Ind. 203; *Ruthven v. American F. Ins. Co.*, 92 Iowa, 316; *Cummins v. Heald*, 24 Kan. 600; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400; *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66; *Dorchester & M. Bank v. New England Bank*, 1 Cush. (Mass.) 177; *Connor v. Parker*, 114 Mass. 331; *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518, 64 Am. Dec. 92; *Hoag v. Graves*, 81 Mich. 628; *Mayer v. McLure*, 36 Miss. 390, 72 Am. Dec. 190; *Brown v. Railway Passenger Assur. Co.*, 45 Mo. 221; *Neiner v. Altemeyer*, 68 Mo. App. 243; *Paul v. Edwards*, 1 Mo. 30; *Underwood v. Birdsell*, 6 Mont. 142; *Gillis v. Bailey*, 21 N. H. 150; *Wright v. Boynton*, 37 N. H. 9, 72 Am. Dec. 319, *Huffc. Cas.* 190; *Titus v. Cairo & F. R. Co.*, 46 N. J. Law, 393, 418; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; *Commercial Bank v. Norton*, 1 Hill (N. Y.) 501, *Huffc. Cas.* 188; *Lewis v. Ingersoll*, 3 Abb. App. Dec. (N. Y.) 55; *Grinnell v. Buchanan*, 1 Daly (N. Y.) 538; *Planters' & Farmers' Nat. Bank v. First Nat. Bank*, 75 N. C. 534; *Bocock v. Pavey*, 8 Ohio St. 270; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716; *Silver Hook Road v. Greene*, 12 R. I. 164; *Fargo v. Cravens*, 9 S. D. 646; *Smith v. Sublett*, 28 Tex. 163; *Hunt v. Douglass*, 22 Vt. 128; *Rohrbough v. United States Exp. Co.*, 50 W. Va. 148, 88 Am. St. Rep. 849; *Kohl v. Beach*, 107 Wis. 409, 81 Am. St. Rep. 849.

ing to confer upon any other person whom the agent or trustee should think proper to appoint."<sup>5</sup> There are some exceptions to this rule, as will be seen in the following section.

Thus, an agency to buy or sell property involves the exercise of judgment and discretion, and the agent cannot delegate his duty to a subagent, unless his principal consents or there is some usage or custom from which his consent may be implied.<sup>6</sup> So an agent cannot delegate to another the power to make promissory notes binding on his principal,<sup>7</sup> or to sell or lease real estate.<sup>8</sup> Where an agent has been authorized to sell real estate, the principal has a right to the judgment and discretion of such agent in the sale, and neither he nor the agent is bound by the acts of one, who falsely assumes to be a subagent, in the absence of and without the knowledge of the agent, and sells the land.<sup>9</sup> Nor can an agent authorized to sell bonds procure a broker as a subagent and bind the principal to pay such broker's commission.<sup>10</sup> So a covenant under seal to do a particular thing requiring skill and judgment cannot be performed by another; and a parol agreement between the parties that it may be done by an agent does not affect the original contract.<sup>11</sup>

<sup>5</sup> *Grinnell v. Buchanan*, 1 Daly (N. Y.) 538.

<sup>6</sup> *Wright v. Boynton*, 37 N. H. 9, 72 Am. Dec. 319; *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385; *Hunt v. Douglass*, 22 Vt. 128. An attorney with whom another attorney leaves a set of law books to be sold cannot delegate his authority to sell to another. *Lucas v. Rader*, 29 Ind. App. 287.

<sup>7</sup> *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66; *Brewster v. Hobart*, 15 Pick. (Mass.) 302.

<sup>8</sup> *Drum v. Harrison*, 83 Ala. 384; *Bromley v. Aday*, 70 Ark. 351; *Fairchild v. King*, 102 Cal. 320; *Hanback v. Corrigan*, 7 Kan. App. 479; *Floyd v. Mackey*, 23 Ky. L. R. 2030, 66 S. W. 518; *Carroll v. Tucker*, 50 N. Y. St. Rep. 611; *Tynan v. Dullnig* (Tex. Civ. App.) 25 S. W. 465; *Hand v. Conger*, 71 Wis. 292. Compare *Delawder v. Jones*, 99 Ill. App. 301, where it was held that such rule would not be applied so as to work an injustice.

<sup>9</sup> *Barret v. Rhem*, 6 Bush (Ky.) 466.

<sup>10</sup> *Cockran v. Irlam*, 2 Maule & S. 301; *Solly v. Rathbone*, 2 Maule & S. 298; *Fudge v. Seckner Contracting Co.*, 80 Ill. App. 35.

<sup>11</sup> *Paul v. Edwards*, 1 Mo. 30.

An agent with plenary powers to collect a claim, cannot transfer it to a third person without the consent of his principal, so as to invest him with such title as will enable him to sue thereon.<sup>12</sup> But it has been held that the rule that an agency to collect and receive money is one of personal trust and confidence, and therefore cannot be delegated to another without authority, applies only to special agents, and not to an agency to take charge of and manage the business of a principal.<sup>13</sup> Where a power of attorney is given by a plaintiff in a pending suit which empowered the agent, "to carry on and conduct to final consummation, or to compromise," the case, the power given to compromise implies the exercise, by the agent, of his own judgment as to terms to be accepted, and cannot be delegated by him to any other person or tribunal.<sup>14</sup> And where a power is granted to two private agents jointly, one agent cannot delegate to another the power to execute his part of the contract.<sup>15</sup>

**§ 343. Exceptions to general rule.—In general.**

There are, however, several exceptions or qualifications to the above general rule. These exceptions or qualifications may be divided into two divisions: (1) Where the principal expressly authorizes, and (2) where he impliedly authorizes, such substitution. This latter division may again be subdivided into: (1) where the principal contemplates, or is aware that the agent intends to use a subagent and acquiesces therein: (2) where such substitution is authorized by custom, usage or course of trade; (3) where such substitution is authorized by necessity; and (4) where the acts to be performed are merely ministerial or mechanical.

**§ 344. Where authority to delegate is express.**

The contract of employment between the principal and his agent may contain an express stipulation authorizing the

<sup>12</sup> *Dingley v. McDonald*, 124 Cal. 682.

<sup>13</sup> *McConnell v. Mackin*, 22 App. Div. (N. Y.) 537; *Dingley v. McDonald*, 124 Cal. 682.

<sup>14</sup> *City of New York v. Du Bois*, 86 Fed. 889.

<sup>15</sup> *Loeb v. Drakeford*, 75 Ala. 464; *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699.

agent to appoint a subagent to perform or aid in performing the agent's duties; or such authority may be expressly given even after the relation has begun. Where such is the case the above general rule does not apply, and the agent may delegate his duties in accordance with such authority.<sup>16</sup> If a general agent is thus specially authorized to employ subagents to act in the name of his principal, he impliedly has further authority to bind his principal for their payment.<sup>17</sup>

**§ 345. Where authority to delegate is implied.**

(a) **Where substitution is contemplated or implied by acquiescence.**—Authority to appoint a subagent between whom and the principal a privity of contract will exist, may be implied when, from the conduct of the parties to the original contract of agency, or from the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to such contract originally contemplated that such authority should exist. Under such circumstances the agent may delegate his duties so as to create a privity of contract between the principal and the subagent.<sup>18</sup> Or where the principal, knowing that the agent contemplates or expects to employ a subagent, does not make any objection thereto, he is held to have impliedly authorized such appointment by his acquiescence.<sup>19</sup> But the fact that the principal knows that a subagent will be employed

<sup>16</sup> *Davis v. King*, 66 Conn. 465, 50 Am. St. Rep. 104; *Planters' & Farmers' Nat. Bank v. Wilmington First Nat. Bank*, 75 N. C. 534; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400; and see *Civ. Code Cal.* § 2349.

<sup>17</sup> *Furnas v. Frankman*, 6 Neb. 429.

<sup>18</sup> *De Bussche v. Alt*, L. R. 8 Ch. Div. 286, 310; *Wilson v. Smith*, 3 How. (U. S.) 763; *Gum v. Equitable Trust Co.*, 1 McCrary, 61, Fed. Cas. No. 5,867; *Johnson v. Cunningham*, 1 Ala. 249; *Davis v. King*, 66 Conn. 465, 50 Am. St. Rep. 104; *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518, 64 Am. Dec. 92; *Planters' & Farmers' Nat. Bank v. Wilmington First Nat. Bank*, 75 N. C. 534; *Krumm v. Jefferson Fire Ins. Co.*, 40 Ohio St. 229; *Duluth Nat. Bank v. Knoxville F. Ins. Co.*, 85 Tenn. 76, 4 Am. St. Rep. 744.

<sup>19</sup> *Planters' & Farmers' Nat. Bank v. Wilmington First Nat. Bank*, 75 N. C. 534.

does not relieve the primary agent from his liability to the principal.<sup>20</sup>

(b) **Where substitution is authorized by custom, usage, or course of trade.**—Again there may be a custom or usage of trade well known in the particular locality, which may impliedly authorize the agent to appoint a subagent. Where such is the case and the principal employs an agent to transact business, in reference to which there is such known and established custom or usage of substitution, he will be held to impliedly authorize such substitution.<sup>21</sup> Thus where goods are intrusted to a merchandise broker to sell, not below a certain price, and to deliver them and receive payment, and he deposited them, in accordance with the usage, with a commission merchant connected with an auctioneer, taking his notes for them, and some of the goods were afterwards sold below the price named, it was held that the deposit bound the principal and that he could not bring trover for the goods.<sup>22</sup> “Business to an immense amount has been transacted in this manner, and the usage being established, it follows that when the plaintiff authorized his broker to sell, he authorized him to sell according to the usage; and when the defendants dealt with the broker, even if they

<sup>20</sup> *Loomis, Conger & Co. v. Simpson*, 13 Iowa, 532.

<sup>21</sup> *Moon v. Guardians of Poor*, 3 Bing. N. C. 814; *Wilson v. Smith*, 3 How. (U. S.) 763; *Warner v. Martin*, 11 How. (U. S.) 220; *Johnson v. Cunningham*, 1 Ala. 249; *Drum v. Harrison*, 33 Ala. 384; Civ. Code Cal. § 2349; *Northern Cent. R. Co. v. Bastian*, 15 Md. 494; *Newson v. Douglass*, 7 Har. & J. (Md.) 418, 16 Am. Dec. 317; *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 318; *Darling v. Stanwood*, 14 Allen (Mass.) 504; *Buckland v. Conway*, 16 Mass. 396; *Breck v. Meeker* (Neb.) 93 N. W. 993; *Titus v. Cairo & Fulton R. Co.*, 46 N. J. Law, 393, 418; *Carpenter v. German American Ins. Co.*, 135 N. Y. 298, 302; *Lamson v. Sims*, 16 Jones & S. (N. Y.) 281; *Planters' & Farmers' Nat. Bank v. Wilmington First Nat. Bank*, 75 N. C. 534; *Laussatt v. Lippincott*, 6 Serg. & R. (Pa.) 386, 9 Am. Dec. 440; *Smith v. Sublett*, 28 Tex. 163.

<sup>22</sup> *Laussatt v. Lippincott*, 6 Serg. & R. (Pa.) 386, 9 Am. Dec. 440; *Trueman v. Loder*, 11 Adol. & E. 589; *Warner v. Martin*, 11 How. (U. S.) 220; *Wallace v. Bradshaw*, 6 Dana (Ky.) 383; *Jackson v. Union Bank*, 6 Har. & J. (Md.) 146; *Bilsborrow v. James*, 25 Hun (N. Y.) 18; *Patterson v. Keys*, 1 Cin. Super. Ct. Rep'r (Ohio) 94; *Strong v. Stewart*, 9 Helsk. (Tenn.) 147.



had known that the goods were not his own, they had a right to consider him as invested with power to deal according to the usage. If the plaintiff desired to keep any control over his property, he should have retained the possession of it, and not have suffered it to go into the hands of the broker, thus enabling him to exhibit to all the world all the emblems of full power."<sup>23</sup> So where a commission merchant is employed to buy goods in a distant market, and the custom of that market is for commission merchants to employ brokers to make such purchases, and this custom is understood by the principal, the commission merchant may properly employ a broker of experience and good reputation to make the purchases and in doing so he does not become liable for the broker's misconduct.<sup>24</sup>

A usage, however, in order to have this effect, must be reasonable and well established, and no usage will warrant an agent in departing from the positive instructions of his principal.<sup>25</sup> Nor can a usage have this effect if it is one which justifies an agent in violating the fundamental duties which he owes to his principal, or if it changes the intrinsic character of the contract existing between them, or if it contravenes a well established principle of law.<sup>26</sup> A custom of trade or business that can vary or modify the language of express instructions of the principal to his agent must be established by the most certain, clear, and satisfactory proof, and must be ancient, uniform, notorious, and reasonable.<sup>27</sup>

**(c) Where substitution is authorized by necessity.**—As has been seen in a former chapter, it is a well established principle of the law of agency that an agent's authority is always

<sup>23</sup> *Laussatt v. Lippincott*, 6 Serg. & R. (Pa.) 386, 9 Am. Dec. 442.

<sup>24</sup> *Darling v. Stanwood*, 14 Allen (Mass.) 504; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; *Allen v. McConihe*, 124 N. Y. 342; *Gheen v. Johnson*, 90 Pa. 38.

<sup>25</sup> *Barksdale v. Brown*, 1 Nott & McC. (S. C.) 517, 9 Am. Dec. 720; *Robinson v. Mollett*, L. R. 7 H. L. 802, 44 Law J. C. P. 362; *Parsons v. Martin*, 11 Gray (Mass.) 112; *Day v. Holmes*, 103 Mass. 306; *Hutchings v. Ladd*, 16 Mich. 493; *Breck v. Meeker* (Neb.) 93 N. W. 993; *Catlin v. Smith*, 24 Vt. 85; *Hall v. Storrs*, 7 Wis. 253.

<sup>26</sup> *Robinson v. Mollett*, L. R. 7 H. L. 802, 44 Law J. C. P. 362; *Minnesota Cent. R. Co. v. Morgan*, 52 Barb. (N. Y.) 217.

<sup>27</sup> *Hall v. Storrs*, 7 Wis. 253.

construed to include all the necessary and usual means of executing it.<sup>28</sup> It clearly follows from this rule, therefore, that if the principal has given to his agent certain instructions or duties which the latter cannot carry out or perform without the aid of a subagent, he may delegate to such subagent so much of his authority as is necessary for the purpose of carrying out such instructions, notwithstanding they involve the exercise of personal skill and judgment. There are many cases in which it is necessary that subagents be employed in order that the principal's business may be properly performed, and if they are not so appointed, the principal's interest will suffer. In such cases the authority to delegate duties or a part thereof to subagents will necessarily be implied.<sup>29</sup> Thus, if a note is sent to a bank for collection, and it becomes necessary for the protection of the principal to have the note protested, the bank will have implied authority to employ the proper officer to make such protest.<sup>30</sup> So where an agent is employed to collect a demand by suit, he is impliedly authorized to employ the nec-

<sup>28</sup> See ante, § 213; *Howard v. Baillie*, 2 H. Bl. 618, 620.

<sup>29</sup> *Gwilliam v. Twist* [1895] 1 Q. B. 557, 64 Law J. Q. B. Div. 474, *Huffc. Cas.* 121; *Rossiter v. Trafalgar Life Assur. Ass'n*, 27 Beav. 377; *Gum v. Equitable Trust Co.*, 1 McCrary, 51, *Fed. Cas. No.* 5,867; *Johnson v. Cunningham*, 1 Ala. 249; *North America Ins. Co. v. Thornton*, 130 Ala. 222, 89 Am. St. Rep. 30; *Phelps v. Shrader*, 14 Am. Law Rev. 799; *Loomis v. Simpson*, 13 Iowa, 532; *Commercial Bank v. Martin*, 1 La. Ann. 344, 45 Am. Dec. 87; *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 318; *Buckland v. Conway*, 16 Mass. 396; *Dorchester & M. Bank v. New England Bank*, 1 Cush. (Mass.) 177; *Fearn v. Mayers*, 53 Miss. 459; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648, 40 Am. Dec. 83; *Underwood v. Birdsell*, 6 Mont. 142; *Breck v. Meeker* (Neb.) 93 N. W. 993; *Gillis v. Bailey*, 21 N. H. 150; *Titus v. Cairo & F. R. Co.*, 46 N. J. Law, 393, 418; *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 167; *Wright v. Eldred*, 46 Hun (N. Y.) 12; *Planters' & Farmers' Nat. Bank v. Wilmington First Nat. Bank*, 75 N. C. 534; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137, 147; *Fritz v. Western Union Tel. Co.*, 25 Utah, 263; *Mickelson v. New East Tintic R. Co.*, 23 Utah, 42.

<sup>30</sup> *Britton v. Niccolls*, 104 U. S. 757; *Baldwin v. Louisiana Bank*, 1 La. Ann. 13, 45 Am. Dec. 72; *Warren Bank v. Suffolk Bank*, 10 Cush. (Mass.) 582; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648, 40 Am. Dec. 83; *Bowling v. Arthur*, 34 Miss. 41; *Smedes v.*

essary attorneys.<sup>31</sup> And where in such case the agent appoints a competent attorney at law, he will not be responsible for the opinions and directions of such attorney.<sup>32</sup> So if he is authorized to sell goods, he has implied power to employ the necessary brokers or auctioneers,<sup>33</sup> or if authorized to charter a vessel, to employ a vessel broker to assist him in securing the charter.<sup>34</sup> A master of a vessel who carries goods to a distant port with orders to dispose of them for the most he can obtain will be justified, if he is unable to find a purchaser, in placing the goods in the hands of a merchant of good standing to be sold for the owner's benefit.<sup>35</sup>

An insurance agent may employ the usual and necessary clerical assistants or subagents, who, when employed, may exercise the powers usually incident to their position.<sup>36</sup> "The maxim, 'Delegatus non potest delegare,' does not apply in such a case, though the service inherently is of a personal character, because authority to delegate delegated powers is found by implication from the extent and general nature of the business in the original authorization to the general agent. The power delegated to the agent in express terms, being such as to require the services of subagents, carries with it the power to appoint subagents, whatever the nature of the service in respect of being in itself a personal confidence may be."<sup>37</sup> Thus an insurance agent can authorize

Utica Bank, 20 Johns. (N. Y.) 372; *Bank v. Butler*, 41 Ohio St. 519, 52 Am. Rep. 94; *Bellemire v. Bank of U. S.*, 4 Whart. (Pa.) 105, 33 Am. Dec. 46; *Stacy v. Dane County Bank*, 12 Wis. 629.

<sup>31</sup> *Commercial Bank v. Martin*, 1 La. Ann. 344, 45 Am. Dec. 87; *Buckland v. Conway*, 16 Mass. 396.

<sup>32</sup> *Joor v. Sullivan*, 5 La. Ann. 177.

<sup>33</sup> *Harralson v. Stein*, 50 Ala. 347; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137, 147.

<sup>34</sup> *Saveland v. Green*, 40 Wis. 431.

<sup>35</sup> *Day v. Noble*, 2 Pick. (Mass.) 615, 13 Am. Dec. 463; *Stone v. Waitt*, 31 Me. 409, 52 Am. Dec. 621. And see *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 167.

<sup>36</sup> *Arff v. Star F. Ins. Co.*, 125 N. Y. 57, 21 Am. St. Rep. 721; *Deltz v. Providence Wash. Ins. Co.*, 33 W. Va. 526, 25 Am. St. Rep. 908; *Indiana Ins. Co. v. Hartwell*, 123 Ind. 178.

<sup>37</sup> *North America Ins. Co. v. Thornton*, 130 Ala. 222, 89 Am. St. Rep. 30.

such subagents or clerks to contract for risks, to deliver policies, to collect premiums, and to take in payment thereof cash or securities, and to give credit for premiums or to demand cash;<sup>38</sup> or he may delegate to the subagent power to agree that a policy to be issued shall contain certain conditions.<sup>39</sup> The act of the subagent is the act of the agent and binds the company in such cases, as effectually as if done by the agent in person,<sup>40</sup> when the company knew or should have known that other persons would be employed by and to act for the agent.<sup>41</sup> Notice of additional insurance, or to terminate a policy, given to a subagent, is ordinarily sufficient.<sup>42</sup> Where a proposal for a life policy was accepted on behalf of a London insurance company, by their agent in Australia, who acted in the transaction through the medium of a subagent, and the premium was paid, it was held binding on the company, although the agent had no express authority to appoint the subagent.<sup>43</sup>

The authority of a collecting bank to transmit the paper

<sup>38</sup> *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 123, 10 Am. Rep. 566; *Grady v. American Cent. Ins. Co.*, 60 Mo. 116; *Deitz v. Providence Wash. Ins. Co.*, 33 W. Va. 526, 25 Am. St. Rep. 908; *North America Ins. Co. v. Thornton*, 130 Ala. 222, 89 Am. St. Rep. 30; *Goode v. Georgia Home Ins. Co.*, 92 Va. 392, 53 Am. St. Rep. 817.

<sup>39</sup> *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121.

<sup>40</sup> *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566; *Arff v. Star F. Ins. Co.*, 125 N. Y. 57, 21 Am. St. Rep. 721; *Deitz v. Providence Wash. Ins. Co.*, 33 W. Va. 526, 25 Am. St. Rep. 908; *Fitzpatrick v. Hartford L. & Annuity Ins. Co.*, 56 Conn. 116, 7 Am. St. Rep. 288; *McGonigle v. Susquehanna Mut. F. Ins. Co.*, 168 Pa. 1.

<sup>41</sup> *Duluth Nat. Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76, 4 Am. St. Rep. 744.

<sup>42</sup> *Arff v. Star F. Ins. Co.*, 125 N. Y. 57, 21 Am. St. Rep. 721; *McEwen v. Montgomery Co. Mut. Ins. Co.*, 5 Hill (N. Y.) 101; *Fitzpatrick v. Hartford L. & Annuity Ins. Co.*, 56 Conn. 116, 7 Am. St. Rep. 288; *Grace v. American Cent. Ins. Co.*, 16 Blatchf. 433, Fed. Cas. No. 5,648. But see *Heath v. Springfield F. Ins. Co.*, 58 N. H. 414; *Waldman v. North British & Mercantile Ins. Co.*, 91 Ala. 170, 24 Am. St. Rep. 883; *Tate v. Citizens' Mut. F. Ins. Co.*, 13 Gray (Mass.) 79.

<sup>43</sup> *Rossiter v. Trafalgar Life Assur. Ass'n*, 27 Beav. 377.

to a correspondent bank, and the rights and liabilities growing out of the employment of such correspondent bank, will be fully treated in a subsequent chapter, and nothing more will be said on this subject here, than that the authorities are greatly in conflict as to whether such employment constitutes the correspondent bank the agent of the owner of the claim, or of the transmitting bank.

**(d) Where acts to be performed are ministerial only.—**

While as a general rule an agent cannot delegate powers or duties that require the exercise of personal skill, judgment, or discretion, and for the performance of which he was employed by reason of his possessing these qualifications; yet as to powers or duties that are merely ministerial or mechanical in their nature, and call for the exercise of no judgment or discretion, and have in them no element of personal trust or confidence, he may do so, in the absence of an express limitation requiring that such powers or duties should be performed by his own hand. In the absence of such limitation, such acts may be performed by the hand of another as well as by that of the agent, and he has an implied power to delegate their performance to a subagent.<sup>44</sup> This is spe-

<sup>44</sup> *Coles v. Trecothick*, 9 Ves. 234; *St. Margaret's Burial Board v. Thompson*, L. R. 6 C. P. 445, 40 Law J. C. P. 213; *Bennitt v. The Guiding Star*, 53 Fed. 936 (may appoint a subagent to sign bills of lading); *Drum v. Harrison*, 83 Ala. 384; *Weaver v. Carnall*, 35 Ark. 198, 37 Am. Rep. 22; *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Dingley v. McDonald*, 124 Cal. 682; *McCroskey v. Hamilton*, 108 Ga. 640, 75 Am. St. Rep. 79; *Eldridge v. Halway*, 18 Ill. 445; *Renwick v. Bancroft*, 56 Iowa, 527; *Page v. Hardin*, 8 B. Mon. (Ky.) 662; *Poree v. Bonneval*, 6 La. Ann. 386; *Achorn v. Matthews*, 38 Me. 173; *Williams v. Woods*, 16 Md. 220; *Commonwealth v. Harnden*, 19 Pick. (Mass.) 482; *Star Line v. Van Vliet*, 43 Mich. 364; *Grady v. American Cent. Ins. Co.*, 60 Mo. 116; *Neiner v. Altemeyer*, 68 Mo. App. 243; *Hanson v. Rowe*, 26 N. H. 327; *Titus v. Cairo & F. R. Co.*, 46 N. J. Law, 393, 418; *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; *People v. Bank of North America*, 75 N. Y. 547; *Gibson v. National Park Bank*, 98 N. Y. 87; *Newell v. Smith*, 49 Vt. 255; *Norwich University v. Denny*, 47 Vt. 13; *Rohrbough v. United States Exp. Co.*, 50 W. Va. 148, 88 Am. St. Rep. 849; *Chase v. Ostrom*, 50 Wis. 640; *McKinnon v. Volimar*, 75 Wis. 82, 17 Am. St. Rep. 178; *Kohl v. Beach*, 107 Wis. 409, 81 Am. St. Rep. 849

cially provided for by statute in some states.<sup>45</sup> "Having by his own judgment and discretion determined what should be done, he may authorize another to perform the ministerial acts necessary to carry into effect the purposes of his employment, but he cannot turn his principal's business over to the judgment and discretion of another, and bind the principal by the acts and conduct of the latter."<sup>46</sup>

It has been seen that in the case of acts requiring judgment and discretion, the agent could not delegate his duties because the principal employed him, by reason of the fact that he possesses those qualifications which fitted him for transacting the business in question. But where the duties are such that they require no personal skill or discretion, the rule no longer applies and the agent can delegate the performance of such mechanical or ministerial acts. Thus in many cases the portion of the duty requiring judgment and discretion may be separated from the mechanical portion, and in such cases if the agent directs the acts, or, being aware of the circumstances, adopts them as his own, it is sufficient.<sup>47</sup> Thus, where one has power to bind his principal by an accommodation acceptance, he may direct another to perform the mechanical portion of writing it, he having first determined the propriety of the act himself; and it will bind the principal though naming the delegate, and not the agent, as the one exercising the power.<sup>48</sup> So, if an agent is authorized by the owners to sell certain lands, exercising his own discretion as to price and terms of sale after an examination of the land, he may lawfully employ a subagent to find a purchaser, or do other ministerial acts.<sup>49</sup> A clerk in the agent's office may sign the agent's name to a contract as agent, the execution of such contracts being a por-

<sup>45</sup> Civ. Code Cal. § 2349; *Dingley v. McDonald*, 124 Cal. 682.

<sup>46</sup> *Titus v. Cairo & F. R. Co.*, 46 N. J. Law, 393, 418.

<sup>47</sup> *Grady v. American Cent. Ins. Co.*, 60 Mo. 116.

<sup>48</sup> *Commercial Bank v. Norton*, 1 Hill (N. Y.) 501, *Huffc. Cas.* 188.

<sup>49</sup> *Renwick v. Bancroft*, 56 Iowa, 527; *Barret v. Rhem*, 6 Bush (Ky.) 466; *McKinnon v. Vollmar*, 75 Wis. 82, 17 Am. St. Rep. 178. But see *Barnard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 443.

tion of the clerk's business;<sup>50</sup> or where an agent has authority to sign the name of another to a subscription paper, he may procure a third person to do it for him in his presence.<sup>51</sup> The same rule applies to agents employed to execute bills of exchange.<sup>52</sup> A broker having made a contract of sale may authorize his clerk to make and sign an entry or memorandum thereof under his direction and in his presence.<sup>53</sup>

An attorney in fact may, by another acting for him, serve a notice upon a party in possession as a foundation for a proceeding by forcible entry and detainer.<sup>54</sup> As was said in this case: "There is neither confidence, skill, discretion nor judgment required to deliver a written notice and make oath of it, which could prevent the employment of any one by an agent. The maxim withholding the power of subdelegation of authority only has place when there is an object and end to be gained—where the interest of the principal may be neglected or injured by substitution. When from the nature of the act to be done, there can be no difference, the principle cannot apply." So it has been held that the rule that an agent, public or private, cannot delegate his authority in cases requiring exercise of judgment and discretion, does not apply to indorsement of drafts by a deputy in the state treasurer's office, as it is not an act involving the exercise of judgment or discretion, and it is not one of the official duties prescribed by statute which must be performed by the treasurer in person.<sup>55</sup>

But in order for a mechanical or ministerial act, done by one professing to represent the agent, to be the act of the agent, it must be done with the approbation and under the authority and control of such agent;<sup>56</sup> and if done in his

<sup>50</sup> *Newell v. Smith*, 49 Vt. 255.

<sup>51</sup> *Norwich University v. Denny*, 47 Vt. 13.

<sup>52</sup> *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Brown v. Tombs* [1891] 1 Q. B. 253, 60 Law J. Q. B. 38; *Lord v. Hall*, 2 Car. & K. 698.

<sup>53</sup> *Williams v. Woods*, 16 Md. 220.

<sup>54</sup> *Eldridge v. Holway*, 18 Ill. 445.

<sup>55</sup> *People v. Bank of North America*, 75 N. Y. 556.

<sup>56</sup> *Barrett v. Rhem*, 6 Bush (Ky.) 466; *Williams v. Woods*, 16

absence or without his control and approbation, it is not the act of the agent.<sup>57</sup>

**§ 346. Application of these rules to particular classes of agents.**

These rules can perhaps be best illustrated by showing their application to particular classes of agents, in which they are probably most frequently called into question. But as some of these different classes will be more fully treated elsewhere it will only be attempted to give a general treatment of the application of these rules here.

(a) **To attorneys at law.**—The relation of attorney and client is one of special trust and confidence, and unless expressly or impliedly authorized to do so, an attorney cannot delegate his powers as to conducting and arguing a cause to another.<sup>58</sup> But where it is indispensable by law, in order to accomplish the end; or it is the ordinary course of trade; or it is understood by the parties to be the mode by which the particular business would or might be done, the authority to appoint a subattorney may be implied.<sup>59</sup> If, however, the attorney employed is a member of a firm, the retainer of him is the retainer of all in the absence of express stipulations to the contrary, and the duties may be delegated by him to another member or members of the firm.<sup>60</sup> Where an attorney is elected judge, he cannot complete the performance of his subsisting professional contracts, by means of another attorney substituted in his stead, although his

Md. 220; *Norwich University v. Denny*, 47 Vt. 13; *Grady v. American Cent. Ins. Co.*, 60 Mo. 116; *Rohrbough v. United States Exp. Co.*, 50 W. Va. 148, 88 Am. St. Rep. 849.

<sup>57</sup> *Barrett v. Rhem*, 6 Bush (Ky.) 466.

<sup>58</sup> *Hitchcock v. McGehee*, 7 Port. (Ala.) 556; *King v. Pope*, 28 Ala. 601; *Johnson v. Cunningham*, 1 Ala. 249; *Kellogg v. Norris*, 10 Ark. 18; *Danley v. Crawl*, 28 Ark. 95; *Engle v. Chipman*, 51 Mich. 524; *Eggleston v. Boardman*, 37 Mich. 14; *Dickson v. Wright*, 52 Miss. 588, 24 Am. Rep. 677; *Buckley v. Buckley*, 18 N. Y. Supp. 607; *Ratcliff v. Baird*, 14 Tex. 43; *Ellis v. Heptinstall*, 8 W. Va. 388. See post, § 651.

<sup>59</sup> *Johnson v. Cunningham*, 1 Ala. 249.

<sup>60</sup> *Eggleston v. Boardman*, 37 Mich. 14; *Smith v. Hill*, 13 Ark. 173. See post, § 651.



clients assent to the substitution; because what a person cannot do, in law, by himself he cannot do by another.<sup>61</sup>

But the above rule does not prevent an attorney from employing a third person to perform merely ministerial or mechanical services, which are required in the case.<sup>62</sup>

(b) **To private corporations.**—The above rules also apply to private corporations, and as a general rule, when powers involving the exercise of judgment and discretion are conferred upon the officers or agents of a corporation, they cannot delegate the same, unless expressly or impliedly authorized to do so. Where such powers are vested in the directors or trustees of a corporation, they cannot delegate those powers without the authority, express or implied, of the corporation;<sup>63</sup> but, in the absence of restrictions, they are impliedly authorized to appoint subordinate officers and agents, and delegate to them power to do any act which is necessary or proper in the usual course of business of the corporation.<sup>64</sup> Thus, they may appoint officers or agents as general managers of the business, or of particular parts of it, or authorize agents to sell and convey or mortgage property, or buy property, or make contracts, etc.<sup>65</sup>

<sup>61</sup> *Ratcliff v. Baird*, 14 Tex. 43.

<sup>62</sup> *Eggleston v. Boardman*, 37 Mich. 14. See ante, § 345 (d). See post, § 651.

<sup>63</sup> *In re Leeds Banking Co.*, L. R. 1 Ch. App. 561; *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 51 Fed. 309; *Tippets v. Walker*, 4 Mass. 596; *Burrill v. Nahant Bank*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436; *Gillis v. Bailey*, 21 N. H. 149; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 226, 37 Am. Dec. 203; *Farmers' Mut. F. Ins. Co. v. Chase*, 56 N. H. 341; *Sheridan Electric Light Co. v. Chatham Nat. Bank*, 127 N. Y. 517; *Crocker v. Crane*, 21 Wend. (N. Y.) 211; *Hoyt v. Thompson*, 19 N. Y. 207; *Silver Hook Road v. Greene*, 12 R. I. 164.

<sup>64</sup> *Hoyt v. Thompson*, 19 N. Y. 207; *Burden v. Burden*, 8 App. Div. 160, 159 N. Y. 287.

<sup>65</sup> *New Haven Sav. Bank v. Davis*, 8 Conn. 193; *Mitchell v. Deeds*, 49 Ill. 416, 95 Am. Dec. 621; *Stevens v. Hill*, 29 Me. 133; *Merrick v. Bank of Metropolis*, 8 Gill (Md.) 59; *Burrill v. Nahant Bank*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; *McNeill v. Boston Chamber of Commerce*, 154 Mass. 277; *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436; *Western Bank v. Gilstrap*, 45 Mo. 419; *Manchester*

Their authority in this respect, however, is not unlimited. As their authority to delegate is implied from the necessities in the management of the corporation, and from usage, so, also, it is limited by the same considerations. They cannot delegate entire supervision and control of the corporation to others, unless expressly authorized, for this is not only unnecessary and contrary to usage, but it is inconsistent with the charter or law, which requires that they shall have general supervision and control of the corporation.<sup>66</sup> Nor can they delegate to subordinate officers or agents the exercise of discretionary powers which by the charter, general laws, by-laws, vote of the stockholders, or usage is vested exclusively in themselves.<sup>67</sup> Thus they cannot delegate the power to make calls and assessments;<sup>68</sup> or to declare dividends;<sup>69</sup> or to purchase stock.<sup>70</sup>

But where the directors or trustees of a corporation have exercised their judgment and discretion in the matter, to whatever extent that may be necessary, it is well settled that they may authorize an agent or committee of their own number to perform the ministerial duties necessary to carry their resolution into effect. Thus, the directors or trustees, after they have met and determined to execute notes or

& *L. R. Co. v. Fisk*, 33 N. H. 297; *Metropolitan Tel. & Tel. Co. v. Domestic Tel. & Tel. Co.*, 43 N. J. Eq. 626; *Hoyt v. Thompson*, 19 N. Y. 207; *Burden v. Burden*, 8 App. Div. 160, 159 N. Y. 287; *Ridgway v. Farmers' Bank*, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681; *Leavitt v. Oxford & G. Silver Min. Co.*, 3 Utah, 265.

<sup>66</sup> *Tempel v. Dodge*, 89 Tex. 68; *Davis v. Flagstaff Silver Min. Co.*, 2 Utah, 74; *Flagstaff Silver Min. Co. v. Patrick*, 2 Utah, 304.

<sup>67</sup> *Cartmell's Case*, 9 Ch. App. 691; *Howard's Case*, 1 Ch. App. 561; *Bliss v. Kaweah Canal & Irrigation Co.*, 65 Cal. 502; *Bright v. Metairie Cemetery Ass'n*, 33 La. Ann. 58; *Percy v. Millaudon*, 8 Mart. (N. S., La.) 68, 3 La. (O. S.) 568; *Gillis v. Bailey*, 21 N. H. 149; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

<sup>68</sup> *Ex parte Winsor*, 3 Story, 411, Fed. Cas. No. 17,884; *Banet v. Alton & S. R. Co.*, 13 Ill. 504; *Monmouth Mut. F. Ins. Co. v. Lowell*, 59 Me. 504; *Pike v. Bangor & C. Shore Line R. Co.*, 68 Me. 445; *Farmers' Mut. F. Ins. Co. v. Chase*, 56 N. H. 341; *Silver Hook Road v. Greene*, 12 R. I. 164; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536. And see *York & C. R. Co. v. Ritchie*, 40 Me. 425.

<sup>69</sup> *Gratz v. Redd*, 4 B. Mon. (Ky.) 186.

<sup>70</sup> *Cartmell's Case*, 9 Ch. App. 691.

bonds, or make any other contract, or to execute a conveyance, mortgage, or assignment for the benefit of creditors, may direct or authorize an agent or committee to execute the contract, conveyance, or mortgage and affix the seal of the corporation.<sup>71</sup>

The same general rule also applies to subordinate officers or agents of a corporation, and unless authority to do so is expressly or impliedly given to them, they cannot delegate their powers, in so far as they involve the exercise of judgment and discretion;<sup>72</sup> but, in the absence of restrictions, a managing officer or agent has implied power to appoint usual and necessary subordinate agents to act under his supervision and control, although their acts may involve the exercise of judgment and discretion.<sup>73</sup>

This subject is properly one of corporations, and for a fuller treatment we refer the reader to works on corporations.<sup>74</sup>

(c) **To municipal corporations.**—Whenever a municipal corporation has duties to perform, which require the exercise of judgment and discretion, the officers or agents entrusted with the performance of such duties must exercise their authority in person; and unless authority to do so is given them by the municipality, they cannot delegate those powers to another or others.<sup>75</sup> For example the common council, or

<sup>71</sup> *Potts v. Wallace*, 146 U. S. 689; *Northampton Bank v. Pepoon*, 11 Mass. 288; *Patterson v. Portland Smelting Works*, 35 Or. 96; *Leavitt v. Oxford & G. Silver Min. Co.*, 3 Utah, 265; *Arms v. Conant*, 36 Vt. 744.

<sup>72</sup> *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66; *Caldwell v. Mutual Reserve Fund L. Ass'n*, 53 App. Div. (N. Y.) 245; *Middletown & H. Turnpike Road v. Watson*, 1 Rawle (Pa.) 330; *Central of Georgia R. Co. v. Price*, 106 Ga. 176, 71 Am. St. Rep. 246. The power of a local agent of a company to appoint sub-agents is not to be implied. *Breen v. Miehle P. P. & Mfg. Co.*, 8 Pa. Dist. R. 151, 22 Pa. Co. Ct. R. 275.

<sup>73</sup> *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66; *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Luttrell v. Martin*, 112 N. C. 593; *Louisville & N. R. Co. v. Tift*, 100 Ga. 86.

<sup>74</sup> See *Clark & M. Corp.* § 731 et seq.

<sup>75</sup> *Illinois & St. L. R. & Canal Co. v. St. Louis*, 2 Dill. 84, 92.

other board, of a municipal corporation, having authority to make some public improvement, cannot delegate to another, as the superintendent of streets, or city engineer, the authority to determine what improvements shall be made.<sup>76</sup> Nor can a city council pass an ordinance ratifying or confirming an act of an officer after it has been performed by him under a law which provided that the city council should provide for the execution of the act which was performed by the officer; being performed without authority, it is not binding, and cannot be made binding by the city council

Fed. Cas. No. 7,007; *Clark v. Washington*, 12 Wheat. (U. S.) 54; *Richardson v. Heydenfeldt*, 46 Cal. 68; *Oakland v. Carpentier*, 13 Cal. 540; *Meuser v. Risdon*, 36 Cal. 239; *Jackson County Com'rs v. Brush*, 77 Ill. 59; *East St. Louis v. Wehrung*, 50 Ill. 28; *Foss v. Chicago*, 56 Ill. 359; *Smith v. Duncan*, 77 Ind. 95; *State v. Hauser*, 63 Ind. 155; *Indianapolis v. Indianapolis Gas-Light & Coke Co.*, 66 Ind. 396; *Hydes v. Joyes*, 4 Bush (Ky.) 464, 96 Am. Dec. 311 (power to pass ordinances for improving, grading and paving streets cannot be delegated); *Coffin v. Nantucket*, 5 Cush. (Mass.) 269; *Com. v. Smith*, 143 Mass. 169; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453; *Darling v. St. Paul*, 19 Minn. 389; *Sheehan v. Gleeson*, 46 Mo. 100; *St. Louis v. Russell*, 116 Mo. 248; *Matthews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776; *Thomson v. Boonville*, 61 Mo. 282; *St. Louis v. Clemens*, 43 Mo. 395; *Danforth v. City of Paterson*, 34 N. J. Law, 168; *State v. Trenton*, 51 N. J. Law, 498; *Thompson v. Schermerhorn*, 6 N. Y. 92, 55 Am. Dec. 385 (power of taxation cannot be delegated); *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105; *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *Lyth v. Buffalo*, 48 Hun (N. Y.) 175; *State v. Bell*, 34 Ohio St. 194; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716; *State v. Fiske*, 9 R. I. 94; *Whyte v. Nashville*, 2 Swan (Tenn.) 364; *Beal v. Roanoke*, 90 Va. 77; *Lauenstein v. Fond du Lac*, 28 Wis. 336; *Lord v. Oconto*, 47 Wis. 386.

<sup>76</sup> *Stockton v. Creanor*, 45 Cal. 643; *Richardson v. Heydenfeldt*, 46 Cal. 68; *Wright v. Chicago*, 60 Ill. 312; *Bryan v. Chicago*, 60 Ill. 507; *McDonnell v. Chicago*, 60 Ill. 350; *Foss v. Chicago*, 56 Ill. 354; *Zable v. Baptist Orphans' Home*, 92 Ky. 89; *Hydes v. Joyes*, 4 Bush (Ky.) 464, 96 Am. Dec. 311; *Boylston Market Ass'n v. Boston*, 113 Mass. 528; *Thomson v. Boonville*, 61 Mo. 282; *St. Joseph v. Wiltshire*, 47 Mo. App. 125; *St. Louis v. Clemmens*, 43 Mo. 395; *Ruggles v. Collier*, 43 Mo. 355; *Danforth v. City of Paterson*, 34 N. J. Law, 163; *Thompson v. Schermerhorn*, 6 N. Y. 92, 55 Am. Dec. 385; *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105; *McCrowell v. Bristol*, 89 Va. 652.

afterwards by an ordinance unauthorized by law.<sup>77</sup> So the board of education and common council cannot delegate the power of purchasing a school house site to a board of commissioners of said city without an express grant from the legislature of authority to do so.<sup>78</sup> But where the common council of a city has decided to lease rooms for city purposes, it may confer upon a committee appointed by it the power to arrange the rooms or procure the necessary furniture therefor.<sup>79</sup> So a tax list made up by one who is not a member of the taxing body, but who acts under its direction and as its agent, is not thereby made invalid.<sup>80</sup>

The agents of a town, appointed to prosecute a suit, have general authority to conduct the suit, unless restricted by the town as to the manner of executing their trust. And agents so appointed, by a vote to choose agents, have the power of substitution or delegation, so far as to appoint attorneys and employ counsel, who, when they have become such of record, have the same power, in relation to anything to be done in the progress of the suit, as the agents themselves.<sup>81</sup>

(d) **To public agents.**—And the same rules also apply in the case of public agents. If powers involving the exercise of judgment and discretion are conferred upon them, they cannot delegate such powers to others, unless authorized to do so. Thus judges, especially, have duties calling for the exercise of judgment and learning, and they cannot delegate their powers to others;<sup>82</sup> nor can sheriffs;<sup>83</sup> nor justices of

<sup>77</sup> *City of Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec. 686; *Horn v. Mayor*, 30 Md. 222.

<sup>78</sup> *Lauenstein v. Fond du Lac*, 28 Wis. 336.

<sup>79</sup> *Edwards v. Watertown*, 24 Hun (N. Y.) 426; *Kramrath v. Albany*, 53 Hun (N. Y.) 206.

<sup>80</sup> *Covington v. Rockingham*, 93 N. C. 134.

<sup>81</sup> *Buckland v. Conway*, 16 Mass. 396.

<sup>82</sup> *Seymour Woollen Factory Co. v. Brodhecker*, 130 Ind. 389; *Smith v. Frisbie*, 7 Iowa, 486; *Jacquemine v. State*, 48 Miss. 280; *State v. Jefferson*, 66 N. C. 309; *Bradley Fertilizer Co. v. Taylor*, 112 N. C. 141; *Strickland v. Cox*, 102 N. C. 411; *Darling v. Gill*, *Wright* (Ohio) 73. Nor can such authority be delegated by agreement of parties to the suit. *Wright v. Boon*, 2 G. Green (Iowa) 458; *Michales v. Hine*, 3 G. Greene (Iowa) 470.

the peace;<sup>84</sup> nor clerks of court.<sup>85</sup> Nor can a keeper of goods taken under attachment, having authority from the sheriff, turn the trust over to another.<sup>86</sup> Nor can a commissioner appointed by the court to make a sale of property delegate his power to another, although he may employ an auctioneer to cry the sale.<sup>87</sup>

So the statutory authority conferred upon boards of supervisors to regulate the bridging of navigable streams is a trust that must be executed by themselves; they cannot delegate it to others, especially to parties concerned in any details requiring the exercise of their judgment, such as the location or character of the bridge.<sup>88</sup> Nor can canal commissioners delegate to an engineer or other subordinate the authority conferred upon them by statute to enter upon lands of citizens and take and use their property "as they may think proper" in constructing the canal, that authority being

<sup>83</sup> *Wilson v. Thorpe*, 6 Mees. & W. 721; *Perkins v. Reed*, 14 Ala. 536; *McGuffie v. State*, 17 Ga. 508. But the sheriff may authorize his assistant to summon jurors. *McGuffie v. State*, 17 Ga. 508. Or to certify a copy of a warrant of attachment, and give notice thereof. *Gibson v. National Park Bank*, 17 Jones & S. (N. Y.) 429.

<sup>84</sup> *Entick v. Carrington*, 19 State Tr. 1063; *Borrodalle v. Leek*, 9 Barb. (N. Y.) 611. They cannot delegate authority to issue writs. *Borrodalle v. Leek*, 9 Barb. (N. Y.) 611. Nor can they delegate to another the power to fill up blank in writs, out of their presence. *People v. Smith*, 20 Johns. (N. Y.) 63; *Ex parte Kellogg*, 6 Vt. 509; *Kirkwood v. Smith*, 9 Lea (Tenn.) 228. It would be otherwise, however, if done in their presence and under their direction. *Borrodalle v. Leek*, 9 Barb. (N. Y.) 611; *Kirkwood v. Smith*, 9 Lea (Tenn.) 228; *Hanson v. Rowe*, 26 N. H. 327; *Achorn v. Matthews*, 38 Me. 173.

<sup>85</sup> *Piland v. Taylor*, 113 N. C. 1; *Jackson v. Buchanan*, 89 N. C. 74. But see *Abrams v. Ervin*, 9 Iowa, 87, where it was held that the clerk of the district court was a ministerial officer, and a deputy appointed under the act of July 31, 1840, was authorized to do any act which his principal might do.

<sup>86</sup> *Connor v. Parker*, 114 Mass. 331.

<sup>87</sup> *Blossom v. Milwaukee & C. R. Co.*, 3 Wall. (U. S.) 196; *Chambers v. Jones*, 72 Ill. 275; *Noland v. Noland*, 12 Bush (Ky.) 426; *Meyer v. Patterson*, 28 N. J. Eq. 239; *Meyer v. Bishop*, 27 N. J. Eq. 141; *Heyer v. Deaves*, 2 Johns. Ch. (N. Y.) 154.

<sup>88</sup> *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453.

discretionary in its nature, and thus personal to the commissioners.<sup>89</sup>

(e) **To factors.**—So in the case of factors there exists a relation of trust and confidence between them and their employers, their duties requiring the exercise of judgment and discretion. For this reason unless authority to substitute another in his stead was expressly or impliedly conferred upon him by his principal, a factor must execute his authority personally and cannot delegate it to another.<sup>90</sup> Thus, where goods are consigned to a factor and he, without his principal's consent, delegates his authority to sell to a third person who sells the goods, such sale amounts to conversion of the goods by the factor;<sup>91</sup> and the principal may either sue in trover basing his action on the tort, or waive the tort and recover the value of the goods in an action of assumpsit based upon the breach of an implied contract.<sup>92</sup> But of course the above rule may be relaxed and a subagent be employed where such is the usual course of business in like cases, or where the usual course of the management of the principal's concerns in the employment of the subagent has been pursued for a length of time, and been recognized by the owner of the property.<sup>93</sup> It has been held that the legal maxim that an agent cannot delegate his authority to a subagent is not of universal application to factors and commission merchants and can only be invoked by the principal in such cases when he is sought to be charged by the act of the subagent.<sup>94</sup>

<sup>89</sup> *Lyon v. Jerome*, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; *Inhabitants of Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236.

<sup>90</sup> *Catlin v. Bell*, 4 Camp. 183; *Schmaling v. Thomlinson*, 6 Taunt. 147; *Warner v. Martin*, 11 How. (U. S.) 209; *Loomis v. Simpson*, 13 Iowa, 532; *Mark v. Bowers*, 4 Mart. (N. S., La.) 95; *Toland v. Murray*, 18 Johns. (N. Y.) 24; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520; *Campbell v. Reeves*, 3 Head (Tenn.) 226. And see post, § 840.

<sup>91</sup> *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520; *Campbell v. Reeves*, 3 Head (Tenn.) 226.

<sup>92</sup> *Campbell v. Reeves*, 3 Head (Tenn.) 226; *Solly v. Rathbone*, 2 Maule & S. 298.

<sup>93</sup> *Warner v. Martin*, 11 How. (U. S.) 209, 223.

<sup>94</sup> *Harralson v. Stein*, 50 Ala. 347.

(f) **To brokers.**—For the same reason, as a general rule, a broker cannot delegate his duties to another, without the consent, express or implied, of his principal.<sup>95</sup> But such consent of the principal may be implied from the usages of trade, or from the necessities of the case, in the absence of express directions to the contrary, as has been seen in previous sections. Thus, where a broker has an order for stock from a customer, who gives him no express directions as to place or mode of purchase, or price to be paid, he may purchase them in a distant city through correspondents, brokers, or subagents, doing business in that city.<sup>96</sup> It is the implied understanding in all cases where a broker is employed to make a purchase, that the purchaser looks to his broker, the broker to his correspondent, and the latter to the party who sells to him.<sup>97</sup> A broker, however, may delegate the performance of mere ministerial or mechanical acts to a sub-agent.<sup>98</sup>

(g) **To collecting agents.**—Where a collecting agency receives a claim for collection and then transmits it to its attorney, the latter is not the agent of the owner of the claim who employed the collecting agency, but of the agency who employed him;<sup>99</sup> and such agency is liable for any neglect or misconduct of its attorney unless there is an express stipulation to the contrary in the receipt given for the claim.<sup>100</sup>

<sup>95</sup> *Cockran v. Irlam*, 2 Maule & S. 301; *Henderson v. Barnewall*, 1 Younge & J. 387; *Fairchild v. King*, 102 Cal. 320; *Gheen v. Johnson*, 90 Pa. 38. And see *Loomis v. Simpson*, 13 Iowa, 532.

<sup>96</sup> *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; *Allen v. McConihe*, 124 N. Y. 342; *Gheen v. Johnson*, 90 Pa. 38.

<sup>97</sup> *Gregory v. Wendell*, 40 Mich. 432, 442.

<sup>98</sup> *Williams v. Woods*, 16 Md. 220. And see post, § 759.

<sup>99</sup> *Hoover v. Wise*, 91 U. S. 308, 315; *Lewis v. Peck*, 10 Ala. 142; *Cobb v. Becke*, 6 Q. B. 930.

<sup>100</sup> *Bradstreet v. Everson*, 72 Pa. 124, 13 Am. Rep. 665; *Morgan v. Tener*, 83 Pa. 305.

As was said in *Bradstreet v. Everson*, supra: "From the very nature of such ramified institutions we must conclude that the public impression will be, that the agency invited customers on the very ground of its facilities of making distant collections. It must be presumed from its business connections at remote points,



Of course, the collection agency may expressly contract that it will not be liable for the acts of the second agent or attorney. Thus, where the receipt given by it to the owner of the claim and signed by him contains a stipulation that the claim is to be transmitted at his risk and on his account, by mail for collection or adjustment, to an attorney, the proceeds to be paid over or accounted for to him, when received by the agency from the attorney, and the creditor also signed a similar agreement in the agency's book, these instruments constituted the contract and the agency would not be liable for the acts of the attorney, in the absence of proof of negligence on its part in selecting him.<sup>101</sup> It has been held, however, that the rule that an agency to collect and receive money is one of personal trust and confidence, and is not to be delegated to another without authority, is applicable only to a special agency, and not to a general agency, to take charge of and manage the business of the property, including the collection and receipt of money.<sup>102</sup> Thus a special agent with general power for the collection of a claim cannot delegate his authority by assignment so as to invest his assignee with power to sue thereon.<sup>103</sup>

(h) **Guardians, executors, public trustees, etc.**—These rules are also frequently applied to guardians, executors, public trustees, and other fiduciaries. These cannot, properly speaking, be classified as cases of agency, but they are cases in which the element of trust and confidence is specially present, and unless such fiduciaries are expressly authorized to do so, they cannot delegate their discretionary and fidu-

and its knowledge of the agents chosen, the agency intends to undertake the performance of the service which the individual customer is unable to perform for himself. There is good reason therefore to hold, that such an agency is liable for collections made by its own agents, when it undertakes the collection by the express terms of the receipt. If it does not so intend, it has it in its power to limit the responsibility by the terms of the receipt."

<sup>101</sup> *Sanger v. Dun*, 47 Wis. 615, 32 Am. Rep. 789.

<sup>102</sup> *McConnell v. Mackin*, 22 App. Div. (N. Y.) 537. But see *Grinnell v. Buchanan*, 1 Daly (N. Y.) 539; *Dingley v. McDonald*, 124 Cal. 682. See, also, *Fargo v. Cravens*, 9 S. D. 646.

<sup>103</sup> *Dingley v. McDonald*, 124 Cal. 682.

ciary powers to others.<sup>104</sup> And where power is given to two trustees or representatives jointly, one cannot delegate his power to the other, so as to enable the other to act alone.<sup>105</sup> A sale of land by an agent of a trustee passes no title to the purchaser when there is nothing on the face of the deed authorizing the trustee to appoint an agent to make the sale for him.<sup>106</sup> But a trustee may employ brokers and agents in cases in which they are employed in the ordinary course of business.<sup>107</sup>

Such fiduciaries, however, may delegate the performance of mere mechanical acts to others. Thus, a trustee may delegate to a subagent the ministerial or mechanical acts connected with the making of a sale, such as advertising, posting notices, receiving bids, and acting as auctioneer.<sup>108</sup> So an executor or trustee, to whom a power has been given by a will, may not delegate his judgment and discretion in the

<sup>104</sup> *Cole v. Wade*, 16 Ves. 27; *Pearson v. Jamison*, 1 McLean, 197, Fed. Cas. No. 10,879; *The California*, 1 Sawy. 603, Fed. Cas. No. 2,313; *Saunders v. Webber*, 39 Cal. 287; *Neal v. Patten*, 47 Ga. 73; *Atkinson v. Central Ga. A. & Mfg. Co.*, 58 Ga. 227; *Skipwith v. Robinson*, 24 Miss. 688; *Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401; *Spurlock v. Sproule*, 72 Mo. 503; *Gates v. Dudgeon*, 173 N. Y. 426, 93 Am. St. Rep. 608; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258; *Hawley v. James*, 5 Paige (N. Y.) 318; *Curtis v. Leavitt*, 15 N. Y. 190; *Woddrop v. Weed*, 154 Pa. 307, 35 Am. St. Rep. 832; *McCormick v. Bush*, 38 Tex. 314; *Fuller v. O'Neal*, 69 Tex. 349, 5 Am. St. Rep. 59. *Treasurer. People v. Bank of North America*, 75 N. Y. 547. *County commissioner. State v. Shaw*, 64 Me. 263. *Board of health. Young v. Blackhawk County*, 66 Iowa, 460. A committee appointed to make alterations of a private fishery grant have a personal authority which cannot be delegated. *Inhabitants of Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236.

<sup>105</sup> *Cook v. Ward*, 36 Law T. (N. S.) 893; *Berger v. Duff*, 4 Johns. Ch. (N. Y.) 369; *Williams v. Mattocks*, 3 Vt. 189; *Floyd v. Johnson*, 2 Litt. (Ky.) 109, 13 Am. Dec. 255.

<sup>106</sup> *Fuller v. O'Neal*, 69 Tex. 349, 5 Am. St. Rep. 59. And see cases cited *supra*, note 104.

<sup>107</sup> *Speight v. Gaunt*, L. R. 22 Ch. Div. 727; *Carpenter v. Carpenter*, 12 R. I. 544.

<sup>108</sup> *Gibson's Case*, 1 Bland's Ch. (Md.) 138, 17 Am. Dec. 257; *Swan v. Smith*, 58 Miss. 875; *Tyler v. Herring*, 67 Miss. 169, 19 Am. St. Rep. 263.

execution of the power, but having exercised the judgment and discretion with which he has been invested, he may delegate the performance of his determination.<sup>109</sup>

(i) **To arbitrators.**—So the above rules apply with special force to arbitrators, although these are not properly speaking agents. The duties that devolve upon them especially require the exercise of judgment and discretion, and having been selected by reason of their particular ability to exercise such in the matters intrusted to them, they cannot delegate their powers or a portion thereof to others.<sup>110</sup> If they do so the award is totally void.<sup>111</sup> Nor can they call in others to act with them.<sup>112</sup> If parties have submitted their suit to arbitration by laymen, it is legal misconduct for one of the arbitrators to have an attorney in order to assist him with his advice and to regulate the conduct of the arbitration throughout the proceedings; especially if one of the arbitrators objects thereto.<sup>113</sup> This rule, however, does not prevent the arbitrators from consulting outside disinterested parties of acknowledged skill in scientific or technical matters in which the arbitrators are not versed, for the purpose of obtaining such information in respect thereto as will aid them in coming to a correct conclusion on such questions, if they do not receive such information or opinions as final and the award is the result of their own judgment and discretion.<sup>114</sup> Nor does such rule preclude them from em-

<sup>109</sup> *Gates v. Dudgeon*, 173 N. Y. 426, 93 Am. St. Rep. 608; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89.

<sup>110</sup> *Lingood v. Eade*, 2 Atk. 501, 505; *Little v. Newton*, 2 Scott, N. R. 509; *Eads v. Williams*, 4 De Gex, M. & G. 674; *Whitmore v. Smith*, 5 Hurl. & N. 824; *Haigh v. Haigh*, 31 Law J. Ch. 420, 8 Jur. (N. S.) 983; *Eastern Counties R. Co. v. Eastern Union R. Co.*, 3 De Gex, J. & S. 610.

<sup>111</sup> *Lingood v. Eade*, 2 Atk. 501, 505.

<sup>112</sup> *Lingood v. Eade*, 2 Atk. 501; *In re Hare*, 8 Scott, 367; *In re Underwood*, 11 C. B. (N. S.) 442, 103 E. C. L. 442; *Lyon v. Blossom*, 4 Duer (N. Y.) 319.

<sup>113</sup> *Proctor v. Williams*, 8 C. B. (N. S.) 386, 390.

<sup>114</sup> *Eads v. Williams*, 4 De Gex, M. & G. 674; *Soulsby v. Hodgson*, 3 Burrow, 1474; *Anderson v. Wallace*, 3 Clark & F. 26.

playing such ministerial or mechanical assistance as their duties may require.<sup>115</sup>

§ 347. **Effect of delegation.**

The effect of a delegation of authority from an agent to a subagent will be more fully considered in subsequent chapters in treating of the rights, duties, and liabilities arising out of the relation of principal and agent, but it will be well to give here a general statement of such effect. Where an agent has appointed a subagent for his principal with the latter's consent, express or implied, in the absence of an express limitation to the contrary, a privity of contract thereby arises between the principal and such subagent, the subagent becoming his agent and directly liable to him for his acts or conduct;<sup>116</sup> and the principal is responsible to him for his compensation, reimbursement, or indemnification.<sup>117</sup> In such case, if the agent has acted in good faith in selecting the subagent, he is relieved from all liability for the acts of the latter.<sup>118</sup> But if the agent had no authority, express or implied, to appoint a subagent, and appointed him on his own account and responsibility, a privity of contract exists only between the subagent and the original agent, and not between subagent and principal. In such case the subagent is the agent of the original agent, and is responsible to him for his conduct, the agent alone being liable to the principal for the conduct of the business, whether by himself or by the subagent.<sup>119</sup> And even where an agent is author-

<sup>115</sup> *Thorp v. Cole*, 2 Crompt. M. & R. 367; *Moore v. Barnett*, 17 Ind. 349.

<sup>116</sup> See post, §§ 446, 447.

<sup>117</sup> See post, §§ 382, 383.

<sup>118</sup> *Davis v. King*, 66 Conn. 465, 50 Am. St. Rep. 104; *Loomis v. Simpson*, 13 Iowa, 532; *Warren Bank v. Suffolk Bank*, 10 Cush. (Mass.) 582; *Darling v. Stanwood*, 14 Allen (Mass.) 504; *McCants v. Wells*, 4 S. C. 381; *Campbell v. Reeves*, 3 Head (Tenn.) 226; *Commercial & Agricultural Bank v. Jones*, 18 Tex. 811. And see post, § 436 et seq.

<sup>119</sup> *Stephens v. Badcock*, 3 Barn. & Adol. 354; *Davis v. King*, 66 Conn. 465, 50 Am. St. Rep. 104; *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518, 64 Am. Dec. 92; *Barnard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 443; *Pownall v. Blair*, 78 Pa. 403; *Fargo v. Cravens*,

ized to appoint a subagent, it is not in every case that a privity of contract will arise between the principal and subagent, and the agent be relieved from responsibility for the subagent's acts, for the authority to appoint the subagent may be such as to authorize the appointment on the agent's behalf or responsibility only. In such case, although the appointment is authorized, there is no privity of contract between the principal and subagent, though the former is bound by the acts of the latter in the course of his employment. The agent is responsible for the acts of the subagent in such cases because it was intended from the authority given that he should be responsible therefor. For example a contract between an insurance company and its general agent, for certain territory, authorized the latter to appoint and employ any and all subagents "reasonably necessary for the proper transaction of the business contemplated by this contract and for the fulfillment of his agreements hereunder; but it is expressly understood and agreed that said agent \* \* \* is and shall be directly accountable to \* \* \* said company for all moneys, premiums," etc., "belonging to said company, \* \* \* and shall be directly liable to this company for and in respect of all acts, doings and agreements" of the subagents, and all salaries, commissions and compensations of such subagents "shall be paid by said agent, and said company shall under no circumstances nor in any manner be liable for the same or any part thereof." Under this contract, a contract by the general agent appointing a subagent, who was required to account to him alone, did not create a privity of contract between the subagent and the company which could be enforced against the latter after the general agent's authority had been terminated.<sup>120</sup> Whether, then, as between a principal and subagent, the relation of principal and agent arises by the employment of such subagent by an agent depends upon the nature of the authority given to the agent. And the same principles apply

9 S. D. 646; *Campbell v. Reeves*, 3 Head (Tenn.) 226; *Commercial & Agricultural Bank v. Jones*, 18 Tex. 811. And see post, § 436 et seq.

<sup>120</sup> *Union Casualty & Surety Co. v. Gray*, 114 Fed. 422.

where a principal ratifies his agent's unauthorized appointment of a subagent. If the principal understands that the subagent is employed as his agent, then his acts might be held to be a ratification of his employment, and equivalent to an authority to the agent to employ the subagent as the agent of the principal. But if the principal understands that his agent employed the subagent as his (the agent's) agent to assist him in transacting the business which he had undertaken, then the acts of the principal might only show that he was willing that his agent might transact the business by means of subagents, for whom the agent should be responsible.<sup>121</sup>

<sup>121</sup> *Barnard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 443.

# BOOK III.

## LEGAL RIGHTS, DUTIES, AND LIABILITIES ARISING OUT OF THE RELATION.

### CHAPTER XIII.

#### OBLIGATIONS OF PRINCIPAL TO AGENT.

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- 352. Amount of compensation.
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### I. COMPENSATION OF AGENT.

#### § 348. In general.

When an agent performs services for his principal, ordinarily he is entitled to compensation therefor, unless there are circumstances in the case repelling this right. In accordance with this principle, the principal is under the obligation to compensate his agent by paying him such commission or reward for services rendered as may have been expressly or impliedly agreed upon between them, provided, of course, the agent has not been guilty of such misconduct as to forfeit his right to compensation, as will hereafter be explained. An agent's compensation may be indicated by various terms, depending to a great extent upon the manner in which it is fixed or ascertained. Thus, in the case of factors, brokers, auctioneers, and agents generally, it is ordinarily termed a "commission," and is usually determined by taking a percentage of the amount involved, or of the value of the business done. If the factor or other agent



guaranties that the debt growing out of a transaction will be paid to his principal, by reason of which he receives a larger compensation than he would otherwise, it is termed a "del credere commission." An attorney's compensation is usually called his "fees" although it may also be called "commissions," as in the case of collections or settlements. Other terms also may be used for indicating an agent's compensation, as "salary," "wages," etc., but whatever the term used, it is merely to indicate the remuneration the agent is to receive for his services.

**§ 349. Express contract for compensation.**

Where there is an express contract between the principal and his agent, with respect to compensation, it is controlling, and will determine the agent's right to compensation; and no promise can be implied, nor custom or usage shown, which is inconsistent with its terms.<sup>1</sup> Thus, where the parties had agreed that the agent should receive a commission on all sales effected or orders executed by him, the agent was entitled to a commission on all sales effected by him, including those resulting in bad debts, notwithstanding a custom that no commission was payable in respect to bad debts, such custom being inconsistent with the terms of the contract.<sup>2</sup> So where an agent appointed to sell goods is to receive as his compensation a sum equal to the difference between the list and trade prices of the articles, and no distinction is made between sales for cash and sales on credit, he is entitled to

<sup>1</sup> *Wallace v. Floyd*, 29 Pa. 184, 72 Am. Dec. 620; *Bower v. Jones*, 8 Bing. 65; *Steinbach v. Montpelier Carriage Co.*, 37 Fed. 760; *Maze v. Gordon*, 96 Cal. 61; *Crane v. McCormick*, 92 Cal. 179; *Neilson v. Lee*, 60 Cal. 555; *Irby v. Lawshe*, 62 Ga. 216; *Hoyt v. Shipherd*, 70 Ill. 309; *Pierce v. Powell*, 57 Ill. 323; *Williams Harvester Co. v. Pope*, 69 Iowa, 523; *Hayner v. Trott*, 4 Kan. App. 679; *Robinson v. Kindley*, 36 Kan. 157; *Huber Mfg. Co. v. Watson*, 19 Ky. L. R. 864, 42 S. W. 110; *Lalande v. Breaux*, 5 La. Ann. 505; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Pearson v. Mason*, 120 Mass. 53; *Wyckoff v. Bishop*, 115 Mich. 414; *Plano Mfg. Co. v. Buxton*, 36 Minn. 203; *Woods v. Stephens*, 46 Mo. 555; *Singer Mfg. Co. v. Doggett*, 16 Neb. 609; *Taylor v. Enoch Morgan's Sons Co.*, 124 N. Y. 184.

<sup>2</sup> *Bower v. Jones*, 8 Bing. 65.

compensation on sales on credit, though the purchase price has not been collected,<sup>3</sup> and if he is to receive a percentage of cash payments, and of notes, when paid, but not of unpaid notes, when goods were returned to or taken back by the principal, he is entitled to commissions on a partial payment of a note made before goods were taken back by the principal.<sup>4</sup> And where he is to be paid a certain commission on accrued or secured profits, he can recover no commissions on profits that are not fixed or payable.<sup>5</sup> If the contract of agency provides that the agent shall refund certain commissions allowed in case the transaction or notes taken therein prove worthless, it is binding, and the principal may recover back the commissions received by the agent on such transactions or notes.<sup>6</sup>

### § 350. Implied contract for compensation.

But to entitle an agent to compensation for his services, it is not necessary for him to show an express agreement or promise on the part of the principal to pay. Such a promise may be implied, as where a person requests another to perform services for him as agent, and the latter performs the services as requested, unless the relation of the parties or other circumstances are such as to rebut the presumption that the parties so intended.<sup>7</sup> Thus, if an agent is called upon to perform services within the line of his business or profession, the presumption is that there was an intention to pay him for such services, and he may recover therefor, un-

<sup>3</sup> *Sherman v. Consolidated Dental Mfg. Co.*, 202 Pa. 451.

<sup>4</sup> *Baskerville v. Gaar*, 15 S. D. 211.

<sup>5</sup> *Allen v. Armstrong*, 58 App. Div. (N. Y.) 427.

<sup>6</sup> *Hayner v. Trott*, 4 Kan. App. 679.

<sup>7</sup> *Van Arman v. Byington*, 38 Ill. 443; *McCrary v. Ruddick*, 33 Iowa, 521; *Weston v. Davis*, 24 Me. 374; *Dougherty v. Whitehead*, 31 Mo. 255; *Coston v. Morris*, 21 N. Y. St. Rep. 967; *Harrison v. Long*, 4 De Saus. (S. C.) 110. Although the services were rendered in expectation of a legacy. *Roberts v. Swift*, 1 Yeates (Pa.) 209, 1 Am. Dec. 295. Such promise, however, is implied only when there does not appear to have been an express agreement or employment. *Weston v. Davis*, 24 Me. 374.

less this presumption is rebutted by other evidence.<sup>8</sup> The same is true even where there is no express request on the part of the principal, if he has knowledge and consents to or acquiesces in the agent's services, and the circumstances were such as to show that the agent expected to be paid for them.<sup>9</sup> Thus, if an attorney is employed to conduct a suit by a special contract with his client, and he, with the knowledge of his client, employs assistant counsel who have no knowledge of such special contract, there will arise an implied promise on the part of the client to pay the assistant counsel what his services were reasonably worth, although the first attorney had agreed with his client to pay for such services himself.<sup>10</sup> So if a surgeon employed to attend a patient calls in a consulting surgeon with the consent of the patient, there is an implied promise on the part of the patient to pay for such services, although the attending surgeon had agreed with the patient to pay therefor, the consulting surgeon being ignorant of such agreement.<sup>11</sup> The promise is implied in these cases as a matter of fact, because it is presumed that such was the intention, and no promise will be implied, therefore, where the circumstances are such as to show, or to raise the presumption, that no compensation was intended or expected.<sup>12</sup>

<sup>8</sup> *Martin v. Roberts*, 36 Fed. 217, and see cases cited in preceding note.

<sup>9</sup> *Paynter v. Williams*, 1 Crompt. & M. 810; *Seals v. Edmondson*, 73 Ala. 295, 49 Am. Rep. 51; *Wood v. Brewer*, 66 Ala. 570; *Huck v. Flentye*, 80 Ill. 258; *Lockwood v. Robbins*, 125 Ind. 398; *Scully v. Scully's Ex'r*, 28 Iowa, 548; *McCrary v. Ruddick*, 33 Iowa, 521; *Shelton v. Johnson*, 40 Iowa, 84; *Muscott v. Stubbs*, 24 Kan. 520; *Waterman v. Gibson*, 5 La. Ann. 672; *Weston v. Davis*, 24 Me. 374; *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347; *Trustees v. Allen*, 14 Mass. 175; *Dougherty v. Whitehead*, 31 Mo. 255; *Hatch v. Purcell*, 21 N. H. 544; *Lewis v. Trickey*, 20 Barb. (N. Y.) 387; *Blount v. Guthrie*, 99 N. C. 93; *Curry v. Curry*, 114 Pa. 367; *Tucker v. Preston*, 60 Vt. 473; *Garrey v. Stadler*, 67 Wis. 512, 58 Am. Rep. 877.

<sup>10</sup> *McCrary v. Ruddick*, 33 Iowa, 521. And see *Muscott v. Stubbs*, 24 Kan. 521; *Yerger v. Aiken*, 7 Baxt. (Tenn.) 539.

<sup>11</sup> *Garrey v. Stadler*, 67 Wis. 512, 58 Am. Rep. 877; *Shelton v. Johnson*, 40 Iowa, 84.

<sup>12</sup> *Taylor v. Laird*, 1 Hurl. & N. 266, 25 Law J. Exch. 329; *Mor-*

Such a promise will not be implied, however, from the mere fact that the agent has performed services for the principal; there must be present other circumstances from which a promise may be implied. Thus no promise of compensation will be implied when a person performs services for another without any request, and without his knowledge, and the other cannot be held liable, however valuable the services, unless he consents.<sup>13</sup> "No man can do another an unsolicited kindness and make it a matter of claim against him; and it makes no difference whether the act was done from mere good will or in the expectation of compensation. Unless the party benefited has done some act from which his assent to pay for the services may be fairly inferred, he is not bound to pay."<sup>14</sup> Even when services are rendered on request or with knowledge, no promise of compensation will be implied if the principal supposed, and as a reasonable man had a right to suppose,

row v. Allison, 39 Ala. 70; Muscott v. Stubbs, 24 Kan. 520; Ploton's Succession, 36 La. Ann. 211; White v. Jones, 14 La. Ann. 681; Bantz v. Bantz, 52 Md. 686; Westgate v. Munroe, 100 Mass. 227; Scott v. Maier, 56 Mich. 554, 56 Am. Rep. 402; Chadwick v. Knox, 31 N. H. 226, 64 Am. Dec. 329; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; Brennan v. Chapin, 46 N. Y. St. Rep. 768; Hill v. Williams, 59 N. C. (6 Jones Eq.) 242; Hertzog v. Hertzog, 29 Pa. 465; Burrows v. Ward, 15 R. I. 346; James v. O'Driscoll, 2 Bay (S. C.) 101, 1 Am. Dec. 632; Hall v. Finch, 29 Wis. 278, 9 Am. Rep. 559; and other cases in the notes following.

<sup>13</sup> Taylor v. Laird, 1 Hurl. & N. 266, 25 Law J. Exch. 329; Wood v. Brewer, 66 Ala. 570; Lange v. Kaiser, 34 Mich. 318; Wood v. Ayres, 39 Mich. 345, 33 Am. Rep. 396; Chadwick v. Knox, 31 N. H. 226, 64 Am. Dec. 329; Ehle v. Judson, 24 Wend. (N. Y.) 97; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; James v. O'Driscoll, 2 Bay (S. C.) 101, 1 Am. Dec. 632. In Lewis v. Trickey, 20 Barb. (N. Y.) 387, where it appeared that services were rendered at the request of the principal, the court said: "Where one person performs labor for another, the law presumes a request, and a promise to pay what such labor is reasonably worth, unless it is understood that it is to be performed gratuitously, or if it is performed under circumstances which repel the presumption of a promise that compensation shall be made." But although this is true under the particular circumstances of that case, it is incorrect as a general proposition, as is seen in the text above.

<sup>14</sup> Chadwick v. Knox, 31 N. H. 226, 64 Am. Dec. 329.

that the services were intended to be gratuitous.<sup>15</sup> "The test is as to whether a reasonable man would understand that the agent intended to be paid for his services."<sup>16</sup> Where an agent is requested to do something which it is his legal duty to do without such request, it is not reasonable to suppose that the one making such request intended to pay therefor. Thus, where a prosecuting attorney appears before a magistrate, at the request of a citizen, and prosecutes one charged with the commission of a felony, there is no implied contract that such citizen will pay him for such services.<sup>17</sup>

The above rules also apply in the case of preliminary services rendered by architects and mechanics in furnishing plans, estimates, etc., in the hope of procuring the contract for carrying out the work. If such plans and estimates are furnished without any request or specific agreement, or without the knowledge of the customer, the architect or mechanic cannot recover compensation therefor; but it would be otherwise if the customer had called upon the architect or mechanic to furnish plans and estimates, which were accepted.<sup>18</sup>

Whether or not a promise to pay compensation can be implied from facts in the case is a question of fact for the jury to determine.<sup>19</sup>

**§ 351. Compensation for services rendered by member of family.**

If services are rendered by a husband for his wife, or child for his parent, or vice versa, or otherwise by one mem-

<sup>15</sup> *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347; *Scott v. Maler*, 56 Mich. 554, 56 Am. Rep. 402; *Woods v. Ayres*, 39 Mich. 345, 33 Am. Rep. 396; *St. Jude's Church v. Van Denberg*, 31 Mich. 287; *Livingston v. Ackeston*, 5 Cow. (N. Y.) 531; *Hertzog v. Hertzog*, 29 Pa. 465; *Hall v. Finch*, 29 Wis. 278, 9 Am. Rep. 559.

<sup>16</sup> *Huffc. Ag.* (1st Ed.) § 12; *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347.

<sup>17</sup> *Railroad Co. v. Lee*, 37 Ohio St. 479.

<sup>18</sup> *Scott v. Maler*, 56 Mich. 554, 56 Am. Rep. 402; *Palmer v. Haverrhill*, 98 Mass. 487.

<sup>19</sup> *Oatfield v. Waring*, 14 Johns. (N. Y.) 188; *Hatch v. Purcell*, 21 N. H. 544.

C. & S.—51.

ber of a family, or person occupying the position of a member of the family, for another, even by request or with knowledge, and are such as are usually rendered without expectation of compensation, no promise to pay therefor will be implied from the mere performance of the services, for the presumption is that compensation was not expected or intended; and if it is attempted to rebut this presumption and show that the services were to be paid for, the burden of proof is upon the party denying such presumption to show an agreement, express or implied, to pay for such services.<sup>20</sup>

<sup>20</sup> *California*: *Murdock v. Murdock*, 7 Cal. 511; *Friermuth v. Friermuth*, 46 Cal. 42.

*Georgia*: *O'Kelly v. Faulkner*, 92 Ga. 521; *Hudson v. Hudson*, 90 Ga. 581.

*Illinois*: *Collar v. Patterson*, 137 Ill. 403; *Faloon v. McIntyre*, 118 Ill. 292; *Byers v. Thompson*, 66 Ill. 421; *Miller v. Miller*, 16 Ill. 296; *Neeley v. Rich*, 7 Ill. App. 116.

*Indiana*: *Hill v. Hill*, 121 Ind. 255; *Hays v. McConnell*, 42 Ind. 285; *Smith v. Denman*, 48 Ind. 65.

*Iowa*: *Scully v. Scully's Ex'r*, 28 Iowa, 548; *Keegan v. Malone*, 62 Iowa, 208; *McGarvy v. Roads*, 73 Iowa, 363; *Cowan v. Musgrave*, 73 Iowa, 384; *Wilson v. Wilson*, 52 Iowa, 44.

*Kansas*: *Ayres v. Hull*, 5 Kan. 419.

*Kentucky*: *Weir v. Weir*, 3 B. Mon. 645, 39 Am. Dec. 487.

*Massachusetts*: *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721.

*Michigan*: *Thorp v. Bateman*, 37 Mich. 68, 26 Am. Rep. 497; *Coe v. Wager*, 42 Mich. 49; *Allen v. Allen*, 60 Mich. 635; *Howe v. North*, 69 Mich. 272; *Harris v. Smith*, 79 Mich. 54.

*Missouri*: *Morris v. Barnes*, 35 Mo. 412.

*New Hampshire*: *Hall v. Hall*, 44 N. H. 293.

*New Jersey*: *Disbrow v. Durand*, 54 N. J. Law, 343, 33 Am. St. Rep. 678.

*New York*: *Davis v. Gallagher*, 55 Hun, 593; *Dye v. Kerr*, 15 Barb. 444; *Williams v. Hutchinson*, 3 N. Y. 312, 53 Am. Dec. 301; *Carpenter v. Weller*, 15 Hun, 134.

*Pennsylvania*: *Duffey v. Duffey*, 44 Pa. 399; *Houck's Ex'rs v. Houck*, 99 Pa. 552; *Hertzog v. Hertzog*, 29 Pa. 465; *Young's Estate*, 148 Pa. 575; *Zimmerman v. Zimmerman*, 129 Pa. 229; *Curry v. Curry*, 114 Pa. 367; *Wall's Appeal*, 111 Pa. 460, 56 Am. Rep. 288.

*South Carolina*: *Kirkpatrick v. Gallagher*, 34 S. C. 255.

*Tennessee*: *Taylor v. Taylor*, 1 Lea, 83.

*Vermont*: *Briggs v. Briggs*, 46 Vt. 571; *Sawyer v. Hebard*, 58 Vt. 375; *Ormsby v. Rhoades*, 59 Vt. 505.

Thus, in the absence of an express contract for compensation, or circumstances from which such a contract could be implied, a niece cannot recover for services rendered to her uncle, where she lives in his family as a member thereof;<sup>21</sup> and the fact that she expected to become an object of bounty by the will of the deceased will not entitle her to recover against the estate as upon a contract<sup>22</sup> unless it had been expressly understood that she should receive a legacy or bequest in consideration of her services; though even in such a case, unless the promise was in writing, she could not recover upon it, but only upon an implied promise to pay the reasonable value of her services, the unenforceable oral promise indicating that the services were not to be performed gratuitously.<sup>23</sup>

The above presumption will not usually arise, however, from the fact of relationship alone, where the parties are no closer related than parent and child.<sup>24</sup> But there may be other circumstances in the case giving rise to this presumption, although the parties are not near of kin, and even though they are not related at all. Thus, if a person is taken into a family as one of its members, maintenance and support

*Wisconsin:* *Kaye v. Crawford*, 22 Wis. 322; *Pritchard v. Pritchard*, 69 Wis. 373; *Hall v. Finch*, 29 Wis. 278, 9 Am. Rep. 559.

Most of the cases in which this question has arisen have been cases of master and servant, in which a child or other member of a family claimed compensation for services rendered about the household. See the cases collected in *Hammon*, Cont., 55.

<sup>21</sup> *Hays v. McConnell*, 42 Ind. 285; *Collar v. Patterson*, 137 Ill. 403; *Starkie v. Perry*, 71 Cal. 495. Nor a nephew. *Neeley v. Rich*, 7 Ill. App. 116; *Ormsby v. Rhoades*, 59 Vt. 505.

<sup>22</sup> *Collar v. Patterson*, 137 Ill. 403.

<sup>23</sup> *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222. And the same has been held true as to a son-in-law. *Martin v. Wright's Adm'rs*, 13 Wend. (N. Y.) 460, 28 Am. Dec. 468. Or son. *Davison v. Davison*, 13 N. J. Eq. 246. And see *Wall's Appeal*, 111 Pa. 460, 56 Am. Rep. 288.

<sup>24</sup> *Curry v. Curry*, 114 Pa. 367; *Hauser v. Sain*, 74 N. C. 552; *Gallagher v. Vought*, 8 Hun (N. Y.) 87; *Neal's Ex'rs v. Gilmore*, 79 Pa. 421. It does not arise from relationship alone, in the case of mother-in-law and son-in-law. *Gerz v. Weber*, 151 Pa. 396; *Wence v. Wykoff*, 52 Iowa, 644. Nor in the case of stepfather and stepchild. *Brush v. Blanchard*, 18 Ill. 46; *Harris v. Smith*, 79 Mich. 54.

being furnished to him, it would be sufficient to raise the presumption that he was not to receive other compensation for his services, in the absence of facts showing a contrary intention.<sup>25</sup> The presumption always is, when a child is taken into a family and treated as one of its members, that neither support nor services are expected to be compensated, except as the one compensates the other; the child for the time being is considered in substantially the same position as a member of the family by nature.<sup>26</sup> This presumption does not apply, however, if the child, although living in a family, provides its own clothes, receives no education, and is required to work continuously, or there are other circumstances which show that it was not treated as one of the family.<sup>27</sup> Thus, where an orphan minor enters the service of another, and is not cared for or treated as a member of the employer's family, and performs labor at his request, he is entitled to recover what his services are reasonably worth, less board, clothing, etc., furnished him, although there was no contract for his remuneration.<sup>28</sup>

Nor will this presumption arise even in case of a child and parent, or one occupying that position, where the former has been emancipated or has reached his majority, and is no longer a member of the immediate family; and the child may recover for services rendered thereafter, unless it is shown that they were intended to be rendered gratuitously.<sup>29</sup> Thus, where a minor of eleven years of age is taken into the

<sup>25</sup> *Hogg v. Laster*, 56 Ark. 382; *Brush v. Blanchard*, 18 Ill. 46; *Collar v. Patterson*, 137 Ill. 403; *Reeves v. Moore*, 4 Ind. App. 492; *Hays v. McConnell*, 42 Ind. 285; *Medsker v. Richardson*, 72 Ind. 323; *Wyley v. Bull*, 41 Kan. 206; *Neal's Ex'rs v. Gilmore*, 79 Pa. 421; *Harris v. Smith*, 79 Mich. 54; *Andrus v. Foster*, 17 Vt. 556. For cases showing a promise to pay, see *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222; *Shane v. Smith*, 37 Kan. 55; *Martin v. Wright's Adm'rs*, 13 Wend. (N. Y.) 460, 28 Am. Dec. 468.

<sup>26</sup> *Thorp v. Bateman*, 37 Mich. 68, 26 Am. Rep. 497.

<sup>27</sup> *Doremus v. Lott*, 49 Hun (N. Y.) 284. And see *Shane v. Smith*, 37 Kan. 55.

<sup>28</sup> *Lockwood v. Robbins*, 125 Ind. 398.

<sup>29</sup> *Morton v. Rainey*, 82 Ill. 215, 25 Am. Rep. 311; *Parker's Heirs v. Parker's Adm'r*, 33 Ala. 459; *Hall v. Hall*, 44 N. H. 293; *Ulrich v. Ulrich*, 136 N. Y. 120 (by express contract).



family of his uncle, and remains there until he is of age, receiving his board, clothing, and medical attendance from the uncle, and after he becomes of age continues to reside with his uncle, but furnishes his own board and pays his own medical bills, there would be an implied contract on the part of the uncle to pay him what his services were reasonably worth.<sup>30</sup> But if the child remains with its parent, or other person standing in the position of a parent, after he has attained his majority, and remains in the same apparent relation as when a minor, the presumption is that the parties do not contemplate payment of wages for services rendered, and, in the absence of a special agreement or circumstances showing a contrary intent, the child will not be allowed to recover for services rendered.<sup>31</sup>

**§ 352. Amount of compensation.**

A contract of agency may expressly fix the amount of compensation, and may also fix the mode of payment and the conditions on the happening of which it shall be deemed to have been earned, and when this is the case the express terms of the contract are controlling. In other words an express agreement as to compensation, if there is no breach of contract by the principal, will exclude any implied contract or custom, to pay compensation otherwise than as agreed,<sup>32</sup> and

<sup>30</sup> *Morton v. Rainey*, 82 Ill. 215, 25 Am. Rep. 311.

<sup>31</sup> *Cohen v. Cohen's Ex'rs*, 2 Mackey (D. C.) 227; *Guffin v. First Nat. Bank of Morrison*, 74 Ill. 259; *Stock v. Stoltz*, 137 Ill. 349; *Miller v. Miller*, 16 Ill. 296; *Morton v. Rainey*, 82 Ill. 215, 25 Am. Rep. 311; *Story v. Story*, 1 Ind. App. 284; *McCormick v. McCormick*, 1 Ind. App. 594; *Wilson v. Wilson*, 52 Iowa, 44; *Allen v. Allen*, 60 Mich. 635; *Harris v. Smith*, 79 Mich. 54; *Green v. Roberts*, 47 Barb. (N. Y.) 521; *Young v. Herman*, 97 N. C. 280; *Lovet v. Price*, *Wright (Ohio)* 89; *Houck's Ex'rs v. Houck*, 99 Pa. 552; *Hertzog v. Hertzog*, 29 Pa. 465; *Putnam v. Town*, 34 Vt. 429; *Byrnes v. Clark*, 57 Wis. 13; *Kaye v. Crawford*, 22 Wis. 320.

<sup>32</sup> *Bower v. Jones*, 8 Bing. 65; *America L. Ass'n v. Ferrill*, 60 Ga. 414; *Pierce v. Powell*, 57 Ill. 323; *Frick v. Larned*, 50 Kan. 776; *Webber v. Dunn*, 71 Me. 331; *State v. Chase*, 3 Har. & J. (Md.) 182; *Zerrahn v. Ditson*, 117 Mass. 553; *Hamilton v. Frothingham*, 59 Mich. 253; *Rosenfield v. Fortier*, 94 Mich. 29; *Gray v. Josselyn*, 117 Mich. 23; *Clark v. Gaar, Scott & Co.*, 78 Minn. 492; *Northwestern Implement Co. v. Rowell*, 52 Minn. 326; *Butler v. Winona*

the agent cannot recover on a quantum meruit under such a contract.<sup>33</sup> There is "no standard of value that could be more satisfactory than that which the parties fix for themselves, and where there is a special contract, fixing the terms and conditions on which one party shall serve another, in the absence of proof rescinding and altering it, it is conclusive."<sup>34</sup> Thus, if the contract provides that the principal shall pay the agent what the principal thinks right after the services are performed, the compensation fixed by the principal is conclusive, in the absence of fraud or bad faith, although considerably less than the reasonable value of the services.<sup>35</sup> If the contract stipulates for a given commission for collecting a claim, such commission is to be reckoned on the amount actually collected and not on the face value of the claim.<sup>36</sup>

If there is no express agreement as to the amount of compensation the agent is to receive, and the circumstances are such as to show that some compensation was intended, the law will imply a contract to pay what, under all the circumstances, the services rendered were reasonably worth.<sup>37</sup> Thus

Mill Co., 28 Minn. 205, 41 Am. Rep. 277; *Buffington v. Brand Stove Co.*, 86 Mo. App. 160; *Singer Mfg. Co. v. Doggett*, 16 Neb. 609; *Vandyke v. Brown*, 8 N. J. Eq. 657; *Wight v. Wood*, 85 N. Y. 402; *Ashley v. Wrought Iron Bridge Co.*, 26 N. Y. St. Rep. 757; *Wallace v. Floyd*, 29 Pa. 184, 72 Am. Dec. 620; *McCormick v. Bush*, 47 Tex. 191; *Heidenheimer v. Walthew*, 2 Tex. Civ. App. 501.

<sup>33</sup> *Alta Inv. Co. v. Worden*, 25 Colo. 215. And see cases cited in preceding note.

<sup>34</sup> *Wallace v. Floyd*, 29 Pa. 184, 72 Am. Dec. 620.

<sup>35</sup> *Butler v. Winona Mill Co.*, 28 Minn. 205, 41 Am. Rep. 277. But in *Millar v. Cuddy*, 43 Mich. 273, 38 Am. Rep. 181, it is held that such an agreement binds the principal to pay what the services are reasonably worth.

<sup>36</sup> *Shead v. Hinman*, 122 Cal. 70. Where the agents were to receive a sum equal to a certain per cent of the gross sales made by them, such percentage was to be reckoned on the amount actually received on such sales, and not on the apparent, or nominal, gross sales, allowance being made for the discount which the principal gave their customers. *Seven Sutherland Sisters v. McInnery*, 24 Misc. (N. Y.) 720.

<sup>37</sup> *Stanton v. Embrey*, 93 U. S. 548; *Martin v. Roberts*, 36 Fed. 217; *Spence v. Whitaker*, 3 Port. (Ala.) 297; *Taylor Mfg. Co. v.*

a husband, in the absence of a special contract, will be entitled to a reasonable compensation for his services while acting as agent on behalf of his wife's separate estate.<sup>38</sup>

**§ 353. Proof of value of services.**

What is a reasonable value for services, where they are rendered without any special contract fixing compensation, is a question of fact to be determined by the jury, taking into consideration all the facts and circumstances of the case,<sup>39</sup> such as the nature of the services performed; the skill, reputation, and ability of the agent; the amount of preparation and labor required; the time consumed; the responsibility imposed upon the agent; the expenses incurred; the amount involved; and the success attained by the agent.<sup>40</sup>

Custom and usage may also enter into and form an important element in determining the amount of an agent's compensation; and especially is this true in some particular classes of agents, as brokers, factors, attorneys, etc., as we shall see in subsequent chapters.<sup>41</sup> Thus, where parties enter into a contract of agency, for the performance of certain services, in respect to which there exists a custom or usage

Key, 86 Ala. 212; *Spearman v. Texarkana*, 58 Ark. 348; *Toomy v. Dunphy*, 86 Cal. 639; *Montgomery v. Montgomery*, 2 Hawaii, 677; *Patten v. Patten*, 75 Ill. 446; *Van Arman v. Byington*, 38 Ill. 443; *Lockwood v. Robbins*, 125 Ind. 398; *McCrary v. Ruddick*, 33 Iowa, 521; *Shelton v. Johnson*, 40 Iowa, 84; *Jones v. School Dist.*, 8 Kan. 362; *Krekeler's Succession*, 44 La. Ann. 726; *Stockbridge v. Crooker*, 34 Me. 349, 56 Am. Dec. 662; *Weston v. Davis*, 24 Me. 374; *Montross v. Eddy*, 94 Mich. 100; *Millar v. Cuddy*, 43 Mich. 273, 38 Am. Rep. 181; *Eggleston v. Boardman*, 37 Mich. 14; *Ruckman v. Bergholz*, 38 N. J. Law, 531; *Erben v. Lorillard*, 2 Keyes (N. Y.) 567; *Cranmer v. Building & Loan Ass'n*, 6 S. D. 341; *Arrington v. Cary*, 5 Baxt. (Tenn.) 609; *Vilas v. Downer*, 21 Vt. 419; *Nauman v. Zoerhlaut*, 21 Wis. 466.

<sup>38</sup> *Patten v. Patten*, 75 Ill. 446.

<sup>39</sup> *Ruckman v. Bergholz*, 38 N. J. Law, 531; *Best v. Sinz*, 73 Wis. 243; *Eggleston v. Boardman*, 37 Mich. 14; *Kentucky Bank v. Combs*, 7 Pa. 543.

<sup>40</sup> *Stockbridge v. Crooker*, 34 Me. 350, 56 Am. Dec. 662; *Eggleston v. Boardman*, 37 Mich. 14; *Kentucky Bank v. Combs*, 7 Pa. 543; *Vilas v. Downer*, 21 Vt. 419.

<sup>41</sup> See post, chapters 19, 20, 21, 22.

as to the amount of compensation usually received by others in the same line of business, in the same locality, for similar services; whether such custom or usage is expressly or impliedly made a part of the contract, evidence of it may be introduced to aid in determining what compensation the agent is entitled to in a particular case.<sup>42</sup>

Witnesses, who are familiar with the amounts paid for similar services, may also be introduced to give their opinion as to the value of the services in question.<sup>43</sup> In such cases, the witness may give his opinion upon a hypothetical case put to him upon the witness stand, and it is not necessary that he should be personally familiar with the agent or the services; nor is it necessary that he should have knowledge of what others charge for similar services in like cases, if he testifies as an expert as to the value of the services in question.<sup>44</sup> The testimony of a witness, however, as to what he himself would have charged for similar services, cannot be admitted in determining the reasonable value of an agent's services.<sup>45</sup> Nor can evidence of the amount of compensation received by an agent, in a particular case, be introduced as tending to show what compensation should be received by another agent in the same case, though acting for a different principal,<sup>46</sup> or even for the same principal.<sup>47</sup>

<sup>42</sup> *Stanton v. Embrey*, 93 U. S. 548; *Elting v. Sturtevant*, 41 Conn. 180; *Eggleston v. Boardman*, 37 Mich. 14; *Vilas v. Downer*, 21 Vt. 419; *Kelly v. Phelps*, 57 Wis. 425.

<sup>43</sup> *Parker's Heirs v. Parker's Adm'r*, 33 Ala. 459; *Marion County v. Chambers*, 75 Ind. 409; *Bowen v. Bowen*, 74 Ind. 470; *Johnson v. Thompson*, 72 Ind. 167, 37 Am. Rep. 152; *Lewis v. Trickey*, 20 Barb. (N. Y.) 387.

<sup>44</sup> *Marion County v. Chambers*, 75 Ind. 409.

<sup>45</sup> *Fairchild v. Michigan Cent. R. Co.*, 8 Ill. App. 591. But if the answer given by a witness tends to show the price usually charged for such services by others in that line of business, in the same vicinity, the fact that he was asked what he himself would have charged for certain services is immaterial, and does not preclude the testimony. *Elting v. Sturtevant*, 41 Conn. 180.

<sup>46</sup> *Eggleston v. Boardman*, 37 Mich. 14.

<sup>47</sup> *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77.

**§ 354. Compensation of agent continuing in service after stipulated time.**

Where an agent has been employed for a specified time at a specified compensation, and after his term of employment has expired continues to render services to his principal, in the same line of business as formerly, in the absence of a special agreement otherwise, it will be presumed that he intended to continue in the service at the previous rate of compensation, and he will not be permitted to recover on a quantum meruit.<sup>48</sup> But if the agent does not continue in the principal's service after the stipulated time, the fact that part of the transaction, in which he has been engaged, extends over that time, does not entitle him to compensation for such part. Thus, an agent employed for a stipulated time to solicit applications for shares and collect monthly dues thereon, on which he is to receive a commission, cannot recover the stipulated commissions on dues, after the stipulated time, where there is no claim that the contract has been renewed, or that he has been illegally discharged, or any other breach by the principal.<sup>49</sup>

**§ 355. Agent's compensation for sales of goods delivered after the agency is terminated.**

Where it is customary to pay an agent his commissions for the sale of goods after the delivery of the goods, the agent is entitled to his commissions for sales made by him for his principal before the termination of the agency, although the delivery of the goods is not made until after its termination, according to agreement.<sup>50</sup>

**§ 356. Compensation of agent, having exclusive agency, upon breach of contract by the principal.**

If an agent is given exclusive power to make sales within a designated territory, at a fixed commission, and the prin-

<sup>48</sup> *Wallace v. Floyd*, 29 Pa. 184, 72 Am. Dec. 620; *Ranck v. Albright*, 36 Pa. 367; *New Hampshire Iron Factory Co. v. Richardson*, 5 N. H. 294; *Doty v. Case & W. Thresher Co.*, 50 Hun (N. Y.) 595; *Cotton v. Rand*, 93 Tex. 7; *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56.

<sup>49</sup> *Crum v. Murray*, 102 Fed. 92.

<sup>50</sup> *Jacquin v. Boutard*, 89 Hun (N. Y.) 437, 157 N. Y. 686.

principal breaks the contract, as by making sales within such territory himself, the agent's measure of damages is the amount that will compensate him for the approximate detriment sustained by the breach of the contract, and not the commission agreed upon on such sales; and in the absence of evidence tending to show that otherwise he would have made the sale himself or that he performed any act with reference thereto, he would be entitled to no more than nominal damages.<sup>51</sup> Where, however, it appears from the terms of the contract, that it was the principal's intention to pay the agent a commission upon all goods sold within his territory, whether sold by him or by another, the agent is entitled to commissions upon sales made by the principal within his territory.<sup>52</sup>

**§ 357. Compensation of agent for additional services.**

Where an agent has been employed at a specified rate of compensation, and during the course of his employment he is called upon to assume additional duties and exercise extended powers, merely as an incident to his original employment, he cannot recover extra compensation for such additional services unless there is a custom or usage, or a special agreement, to that effect.<sup>53</sup> Thus, where a person appointed as a pound-master is also appointed as a special policeman, merely as an incident to the first office, he is not entitled to recover anything for his services as policeman.<sup>54</sup> So where

<sup>51</sup> *Roberts v. Minneapolis Threshing Mach. Co.*, 8 S. D. 579, 59 Am. St. Rep. 777.

<sup>52</sup> *Taylor v. Enoch Morgan's Sons Co.*, 48 Hun (N. Y.) 483, 124 N. Y. 184.

<sup>53</sup> *Sidway v. South Park Com'rs*, 120 Ill. 496; *Decatur v. Vermillion*, 77 Ill. 315; *Fraser's Case*, 16 Ct. Cl. (U. S.) 507; *U. S. v. Macdaniel*, 7 Pet. (U. S.) 1; *U. S. v. Fillebrown*, 7 Pet. (U. S.) 28. See *Jordan v. Jordan*, 65 Ga. 351; *Guthrie v. Merrill*, 4 Kan. 187; *Moreau v. Dumagene*, 20 La. Ann. 230; *Pew v. Gloucester First Nat. Bank*, 130 Mass. 391; *Fish v. Hodsdon*, 40 N. Y. St. Rep. 869; *Carr v. Chartiers Coal Co.*, 25 Pa. 337. Where an agent agreed to work for a stipulated price per month, the contract being silent as to extra services, he cannot recover for extra work done on Sundays, in the absence of other proof. *Guthrie v. Merrill*, supra

<sup>54</sup> *Decatur v. Vermillion*, 77 Ill. 315.

one is employed as a general agent by an insurance company at a stipulated compensation, the fact that he was directed by the company to designate himself upon the stationery as "general manager," or that he was to perform some services as general manager different from those usually performed by a general agent, does not establish an implied promise on the part of the company to pay him for his services as general manager in addition to the commissions fixed by the contract.<sup>55</sup> And where a real estate agent, appointed to take charge of an apartment house without any special agreement as to compensation, renders to his principal monthly statements in which he credits himself with a five per cent commission upon the gross amount collected as compensation for his services, he is not entitled to recover upon a quantum meruit a further sum upon the ground that the five per cent only represented his charge for renting the property, and collecting rents, and did not include services rendered by him in connection with the making of repairs, placing of insurance, and hiring janitors and other employes, or purchasing supplies.<sup>56</sup>

This rule would not apply, however, if the additional services were wholly without and beyond the scope of his original employment, as in a different line of business; for in such a case he would in fact be acting as a new agent, for another purpose, and could recover for his services as in other cases of agency. Thus, where the contract between the principal and agent provides that the principal shall not be liable for any charges, disbursements, or commissions for his services in making loans on bonds and mortgages and collecting money becoming payable, it does not relieve the principal from liability to the agent for services rendered at the former's request, in foreclosing mortgages and collecting money by legal proceedings, looking after repairs to and caring for property bought in by the principal upon foreclosure of its mortgages, for renting and collecting rents of such property, and looking after the payment of taxes, and keeping up insurance thereon, and other like services.<sup>57</sup>

<sup>55</sup> *Montgomery v. Aetna L. Ins. Co.*, 97 Fed. 913.

<sup>56</sup> *Carruthers v. Diefendorf*, 66 App. Div. (N. Y.) 31.

<sup>57</sup> *U. S. Mortg. Co. v. Henderson*, 111 Ind. 24.

**§ 358. Promise to pay for past services.**

As a general rule, a past consideration will not support a promise, and therefore, when a person renders services for another, without his request or knowledge, or on request but with the understanding that they are gratuitous, a subsequent promise to pay for them without any new consideration is not binding.<sup>58</sup> This rule, however, does not apply where services are rendered by request or with the knowledge of the party for whom they are rendered, and not under such circumstances as show that they were intended to be gratuitous. In such a case the law will imply a promise to pay what the services are reasonably worth, and by reason of this liability, it is held that a subsequent express promise to pay what the services are reasonably worth, or to pay a fixed compensation, has a sufficient consideration to support it, and is binding.<sup>59</sup>

— **Compensation for unauthorized acts.** There is a distinction between a principal's promise to pay an agent for past services and the ratification of an agent's unauthor-

<sup>58</sup> *Allen v. Bryson*, 67 Iowa, 591, 56 Am. Rep. 358; *Mills v. Wyman*, 3 Pick. (Mass.) 207; *Dearborn v. Bowman*, 3 Metc. (Mass.) 155; *Osier v. Hobbs*, 33 Ark. 215; *Ellicott v. Peterson*, 4 Md. 476. See *Hammon, Cont.*, 650. This principle has been repeatedly applied to a subsequent promise to pay officers of a corporation for services rendered under circumstances imposing no liability upon the corporation to pay therefor. *Accommodation Loan & Sav. Fund Ass'n v. Stonemetz*, 29 Pa. 534; *Martindale v. Wilson-Cass Co.*, 134 Pa. 348, 19 Am. St. Rep. 706; *Ellis v. Ward*, 137 Ill. 509; *State v. Peoples' Mut. Ben. Ass'n*, 42 Ohio St. 579; *Wood v. Lost Lake Mfg. Co.*, 23 Or. 20, 37 Am. St. Rep. 651. And see *Clark & M. Corp.* 2067.

<sup>59</sup> *Lampleigh v. Brathwait*, Hob. 105, 1 Smith's Lead. Cas. 67; *Dearborn v. Bowman*, 3 Metc. (Mass.) 155; *Comstock v. Smith*, 7 Johns. (N. Y.) 87; *Hicks v. Burhans*, 10 Johns. (N. Y.) 243; *Oatfield v. Waring*, 14 Johns. (N. Y.) 188; *Pool v. Horner*, 64 Md. 131; *Wilson v. Edmonds*, 24 N. H. 517; *Allen v. Woodward*, 22 N. H. 544; *Lonsdale v. Brown*, 4 Wash. C. C. 148, Fed. Cas. No. 8,494; *National Loan & Inv. Co. v. Rockland Co.*, 36 C. C. A. 370, 94 Fed. 335; *Boothe v. Fitzpatrick*, 36 Vt. 681; *Carson v. Clark*, 2 Ill. 113, 25 Am. Dec. 79; *Goldsby v. Robertson*, 1 Blackf. (Ind.) 247; *Little v. Dawson*, 4 Dall. (Pa.) 111; *Davison v. Davison*, 13 N. J. Eq. 246.



ized acts. In the former case, as we have seen, the principal's promise is without a consideration, and hence the agent cannot recover on such promise, with the exceptions above noted; but in the case of a ratification, although no new consideration is given, it is held that the consideration given in the unauthorized contract is sufficient to support the ratification, and the agent may then recover for services rendered, although previously unauthorized.

Of course an agent cannot recover compensation for unauthorized acts, unless the principal has ratified them.<sup>60</sup> But if a person performs unauthorized acts for another, and the latter afterwards ratifies such acts and accepts the benefit of the services, it is the same as if there had been authority in the first instance, and the agent may recover compensation,<sup>61</sup> with these qualifications: There must have been a ratification of acts done with the expectation of payment for the service, and not merely a promise to pay for past services rendered gratuitously.<sup>62</sup> And the adoption of the unauthorized act must have been intended as a ratification, and not merely as an attempt to avoid loss by reason thereof.<sup>63</sup>

### § 359. Compensation for illegal services.

If an agent is employed to perform services which are illegal, either because they are prohibited by some express statutory provision, or because they are contrary to public policy, the contract of agency is illegal and void, and the agent cannot recover either the compensation agreed upon or what the services were reasonably worth. In such a case the maxim *ex dolo malo non oritur actio* applies.<sup>64</sup> The

<sup>60</sup> *Triggs v. Jones*, 46 Minn. 277.

<sup>61</sup> *Frixione v. Tagliaferro*, 10 Moore, P. C. 175; *Gelatt v. Ridge*, 117 Mo. 553, 38 Am. St. Rep. 683; *U. S. Mortgage Co. v. Henderson*, 111 Ind. 24; *Wilson v. Dame*, 58 N. H. 392; *Kentucky Bank v. Combs*, 7 Pa. 543; *Smith v. Martin Anti-Fire Car Heater Co.*, 47 N. Y. St. Rep. 26.

<sup>62</sup> *Allen v. Bryson*, 67 Iowa, 591, *Huffc. Cas.* 154.

<sup>63</sup> *Huffc. Ag.* (1st Ed.) § 77; *Triggs v. Jones*, 46 Minn. 277.

<sup>64</sup> *Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Trist v. Child*, 21 Wall. (U. S.) 441; *Irwin v. Willmar*, 110 U. S. 499; *Duval v. Wellman*,

question as to what contracts of agency are illegal has been considered at length in a former chapter, and numerous cases are there cited, many of them cases in which it was sought to recover compensation for illegal services.<sup>65</sup> A reference to that chapter, and the cases there cited, will show that there can be no recovery of compensation for services rendered under a lobbying contract which is contrary to public policy,<sup>66</sup> or under a contract involving or tending to the improper influencing of public officers,<sup>67</sup> or under a contract between a broker and customer for dealing in futures,<sup>68</sup> or under a marriage brokerage contract.<sup>69</sup> The same is true of contracts of agency which involve or tend to a breach of trust or the perpetration of a fraud upon third persons, and which for that reason are contrary to public policy.<sup>70</sup> The rule also applies to contracts of agency which are in violation of an express statutory prohibition, as a contract by a broker to act as such without a license required by statute,<sup>71</sup> or a contract by an attorney to perform services in violation

124 N. Y. 156; *Rose v. Truax*, 21 Barb. (N. Y.) 361; *Buckley v. Humason*, 50 Minn. 195, 36 Am. St. Rep. 637; *Byrd v. Hughes*, 84 Ill. 174, 25 Am. Rep. 442; *Samuels v. Oliver*, 130 Ill. 73; *Fuller v. Dame*, 18 Pick. (Mass.) 472; *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213; *Bixby v. Moor*, 51 N. H. 402; *Nash v. Kerr-Murray Mfg. Co.*, 19 Mo. App. 1; *Clippinger v. Hepbaugh*, 5 Watts & S. (Pa.) 315, 40 Am. Dec. 519.

<sup>65</sup> Ante, § 39.

<sup>66</sup> *Trist v. Child*, 21 Wall. (U. S.) 441; *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314; *Clippinger v. Hepbaugh*, 5 Watts & S. (Pa.) 315, 40 Am. Dec. 519; *Harris v. Roof's Ex'rs*, 10 Barb. (N. Y.) 489; *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213; *Rose v. Truax*, 21 Barb. (N. Y.) 361. And see ante, § 39 (f).

<sup>67</sup> *Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Gray v. Hook*, 4 N. Y. 449. And see ante, § 39 (g).

<sup>68</sup> *Irwin v. Williar*, 110 U. S. 499; *Fareira v. Gabell*, 89 Pa. 89; *Samuels v. Oliver*, 130 Ill. 73. And see ante, § 39 (n). Post, § 782.

<sup>69</sup> *Duval v. Wellman*, 124 N. Y. 156. And see ante, § 39 (o).

<sup>70</sup> *Scott v. Brown* [1892] 2 Q. B. Div. 724; *Clement's Appeal*, 52 Conn. 464; *Materne v. Horwitz*, 101 N. Y. 469. And see ante, § 39 (k).

<sup>71</sup> *Buckley v. Humason*, 50 Minn. 195, 36 Am. St. Rep. 637. And see ante, § 39 (b); post, § 780.

of a statute.<sup>72</sup> The illegality of contracts of attorneys on the ground of champerty is considered in a subsequent chapter.<sup>73</sup>

But if the agent's services may be legally performed, and are so performed, although the general subject-matter of the agency is illegal, the agent is entitled to his compensation.<sup>74</sup>

**§ 360. When an agent is entitled to compensation—In general.**

As a general rule an agent has earned and is entitled to his compensation, when he has fully and faithfully performed all the duties and services required of him by the contract of employment;<sup>75</sup> although the services were of no benefit to the principal, or were not as beneficial as he expected they would be.<sup>76</sup> If the agent has performed the services for which he was employed, the principal takes upon himself the risk of those services not turning out as successfully as he intended, and he cannot excuse himself from paying for such services by showing that they were of no

<sup>72</sup> *Comfort v. Graham*, 87 Iowa, 295. Or a physician. *Orr v. Meek*, 111 Ind. 40; *Commissioners v. Cole*, 9 Ind. App. 474. It would be otherwise, however, where the physician is called upon to render services in a county in which he has not procured a license to practice, if the services are rendered under a pressing emergency and urgent necessity, such as would not admit of the delay necessary to procure the proper license, and in such a case he may recover for services rendered. *Commissioners v. Cole*, 9 Ind. App. 474.

<sup>73</sup> See post, § 699 et seq.

<sup>74</sup> *Haines v. Busk*, 5 Taunt. 521.

<sup>75</sup> *Broad v. Thomas*, 7 Bing. 99; *McGavock v. Woodlief*, 20 How. (U. S.) 221; *Wadsworth v. Adams*, 138 U. S. 380; *Hyams v. Miller*, 71 Ga. 608; *Hoyt v. Shipherd*, 70 Ill. 309; *Harvey v. Cook*, 24 Ill. App. 134; *Thomas v. Lincoln*, 71 Ind. 41; *Gottschalk v. Jennings*, 1 La. Ann. 5, 45 Am. Dec. 70; *Stumore v. Shaw*, 68 Md. 11, 6 Am. St. Rep. 412; *Harkness v. Briscoe*, 47 Mo. App. 196; *Coffin v. Coke*, 3 Hun (N. Y.) 396; *Zurn v. Noedel*, 113 Pa. 236; *Sherman v. Port Huron Engine & T. Co.*, 13 S. D. 95; *Winchester v. Slatter*, 2 Helsk. (Tenn.) 65; *Warner v. Cuckow*, 90 Wis. 291; *Merriman v. McCormick Harvesting Mach. Co.*, 101 Wis. 619.

<sup>76</sup> *Lockwood v. Levick*, 8 C. B. (N. S.) 603; *Harris v. Petherick*, 39 Law T. (N. S.) 543.

benefit to him, unless they had specially agreed that compensation was to be paid only in the case of success.<sup>77</sup> And if the agent has fully performed his services, it is immaterial that the principal also performed services, not caused by the agent's default, in order to complete the transaction. Thus, if an agent is employed to sell machines on commissions, and he takes orders therefor, he is entitled to his commissions, notwithstanding the principal had had the customers execute new written orders before filling some of them.<sup>78</sup> There may be cases, however, as shall presently be seen, in which he is entitled to his compensation for services performed, although he has not fully performed the services required by his contract, as where he is excused or prevented from performing the whole services or duties by some act or fault of the principal, or by some act of Providence.

**§ 361. Conditions precedent to right to compensation.**

Where the parties expressly agree that the agent's right to compensation shall depend upon certain contingencies or conditions precedent, an agent cannot recover compensation for his services, unless all such contingencies have or have not happened, according to the agreement, or all conditions precedent prescribed by the contract have been performed or fulfilled.<sup>79</sup> Thus, where a proposal was sent to a broker that "if you send, or cause to be sent, to me, by advertisement or otherwise, any party with whom I may see fit and

<sup>77</sup> See post, § 361.

<sup>78</sup> *Merriman v. McCormick Harvesting Mach. Co.*, 101 Wis. 619.

<sup>79</sup> *Bull v. Price*, 7 Bing. 237; *Roberts v. Jackson*, 2 Starkie, 225; *Moffatt v. Laurie*, 15 C. B. 583; *McPhall v. Buell*, 87 Cal. 115; *Gilbert v. Judson*, 85 Cal. 105; *Irby v. Lawshe*, 62 Ga. 216; *Spear v. Gardner*, 16 La. Ann. 383; *Jones v. Adler*, 34 Md. 440; *Walker v. Tirrel*, 101 Mass. 257, 3 Am. Rep. 352; *Zerrahn v. Ditson*, 117 Mass. 553; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Hinds v. Henry*, 36 N. J. Law, 328; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Franklin v. Robinson*, 1 Johns. Ch. (N. Y.) 157; *Fowler v. Callan*, 102 N. Y. 395. Where an agent is to be paid a gratuity upon certain conditions, before such gratuity can be recovered it must appear from the evidence that the conditions have happened as provided by the offer. *Metropolitan L. Ins. Co. v. Strohmborg*, 65 Ill. App. 288.

proper to effect a sale or exchange of my real estate above described, I will pay you the sum of \$200," although the broker found a person who offered to purchase the property, but did not find one with whom the principal saw fit and proper to effect a sale or exchange, he was not entitled to compensation.<sup>80</sup> So where an agent is not to be paid commission unless he sells the property at a stipulated price, a sale by him at such a price is a condition precedent to his right to compensation, unless pending the negotiations, and before his agency is revoked, the principal consents to a sale at a different price.<sup>81</sup>

**§ 362. Compensation notwithstanding principal's default.**

When an agent has performed the services for which he was employed, and all the conditions of the contract of employment have been complied with, his right to the agreed compensation becomes fixed, and is not defeated by the fact that the principal refuses to avail himself of the services.<sup>82</sup> Thus, if an agent is employed to obtain a purchaser of land, and he does obtain a purchaser who is able, willing, and ready to purchase upon the terms prescribed by the principal, he is entitled to his compensation notwithstanding the principal may refuse to sell.<sup>83</sup> So if an agent employed to procure a loan finds a person who is willing, ready, and able to make the loan on the terms fixed by the principal, he is entitled to his compensation, notwithstanding the principal refuses to accept the loan.<sup>84</sup> If the agent was to receive his compensation out of a particular fund, the principal cannot bargain away his right to that fund and thus deprive the

<sup>80</sup> *Walker v. Tirrel*, 101 Mass. 257, 3 Am. Rep. 352.

<sup>81</sup> *Jones v. Adler*, 34 Md. 440.

<sup>82</sup> *Long v. Saufley*, 79 Cal. 260.

<sup>83</sup> *Moses v. Bierling*, 31 N. Y. 462; *Reyman v. Mosher*, 71 Ind. 596; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192; *Lockwood v. Rose*, 125 Ind. 588; *Walker v. Tirrel*, 101 Mass. 257, 3 Am. Rep. 352; *Wyllie v. Marine Nat. Bank*, 61 N. Y. 415; *Mooney v. Elder*, 56 N. Y. 238. As to real estate broker's compensation see post, § 767 et seq.

<sup>84</sup> *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447.

agent of his compensation.<sup>85</sup> Nor can he, by an arbitrary refusal to deliver, postpone the agent's right to demand commissions, where such commissions were payable only on delivery of the goods sold by the agent.<sup>86</sup> It being admitted that the orders upon which commissions are claimed were approved by the principal, the agent has no concern with either the refusal of the vendee to accept or the vendor to deliver, nor with questions arising as to quality, etc. And the question whether commissions were due upon the acceptance of an order or delivery of the goods, the contract between the principal and agent being in parol, is for the jury.<sup>87</sup>

**§ 363. Conduct of agent forfeiting or waiving the right to compensation.**

An agent may deprive himself of his right to the compensation agreed upon between himself and the principal, by some fraud, breach of contract, or other misconduct forfeiting his right, or by acts waiving his right to compensation. If the agent has been so unskillful, so negligent, or guilty of such misconduct in the performance of his duties that the services are of little or no benefit to his principal, he will forfeit all right to compensation.<sup>88</sup> Thus, a principal cannot be held liable for commissions to an agent to sell goods, who sold to irresponsible or insolvent parties;<sup>89</sup> or where he sells for less than he was authorized.<sup>90</sup> Slight negligence or slight omissions of duty, however, will not usually have this effect; and if the principal has been benefited by the services rendered, the fact that the agent has

<sup>85</sup> *Hix v. Edison Elec. Light Co.*, 10 App. Div. (N. Y.) 75; *Reed v. Union Cent. L. Ins. Co.*, 21 Utah, 295.

<sup>86</sup> *Aikins v. Thackara Mfg. Co.*, 15 Pa. Super. Ct. 250.

<sup>87</sup> *Aikins v. Thackara Mfg. Co.*, 15 Pa. Super. Ct. 250.

<sup>88</sup> *Denew v. Daverell*, 3 Camp. 451; *Shaw v. Arden*, 9 Bing. 287; *Bracey v. Carter*, 12 Adol. & E. 373; *Prescott v. White*, 18 Ill. App. 322; *Fisher v. Dynes*, 62 Ind. 348; *Porter v. Silvers*, 35 Ind. 295; *Dodge v. Tileston*, 12 Pick. (Mass.) 328; *Harkness v. Briscoe*, 47 Mo. App. 196; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62.

<sup>89</sup> *Aikins v. Thackara Mfg. Co.*, 15 Pa. Super. Ct. 250.

<sup>90</sup> *Howell v. Denton* (Tex. Civ. App.) 68 S. W. 1002.

been guilty of misconduct or negligence will not cause him to forfeit all his compensation, but he may recover what his services were reasonably worth, less the loss sustained by the principal, unless there is a special contract between the parties providing otherwise.<sup>91</sup> Nor will mere errors of judgment on the part of the agent, while managing his principal's business, or omissions which do not amount to misconduct or culpable negligence, work a forfeiture of the agent's right to compensation for services.<sup>92</sup>

As we shall see in a subsequent chapter, it is one of the duties of an agent to keep and render a full and faithful account of the business transacted by him on behalf of his principal.<sup>93</sup> If, therefore, an agent is guilty of such negligence or misconduct in keeping and rendering accounts that his principal suffers a total or considerable loss thereby, he will forfeit all his compensation for services rendered in such transaction.<sup>94</sup> Thus, if an agent is employed to perform certain services for a fixed salary and he neglects to keep proper accounts, by reason of which the principal loses considerable sums, he cannot recover any salary for the years in which he renders improper accounts.<sup>95</sup> But if the agent's negligence or misconduct in this respect was only slight, or could not be considered as gross negligence or misconduct, he will not forfeit his entire compensation, but will be entitled to the reasonable value of his services, less the loss sustained by the principal.<sup>96</sup>

So the agent will forfeit his right to compensation if he perpetrates a fraud against his principal during the course

<sup>91</sup> *Farnsworth v. Garrard*, 1 Camp. 38; *Mobile & M. R. Co. v. Clanton*, 59 Ala. 392, 31 Am. Rep. 15; *Lee v. Clements*, 48 Ga. 128; *Rochester v. Levering*, 104 Ind. 562; *Steeple v. Newton*, 7 Or. 110, 33 Am. Rep. 705; *Kelly v. Bradford*, 33 Vt. 35.

<sup>92</sup> *Rochester v. Levering*, 104 Ind. 562.

<sup>93</sup> See post, § 420.

<sup>94</sup> *White v. Lincoln*, 8 Ves. 363; *Motley v. Motley*, 42 N. C. (7 Ired. Eq.) 211; *Smith v. Crews*, 2 Mo. App. 269.

<sup>95</sup> *Ridgeway v. Ludlam*, 7 N. J. Eq. 123. Compare *Sampson v. Somerset Iron Works Co.*, 6 Gray (Mass.) 120.

<sup>96</sup> *Lee v. Clements*, 48 Ga. 128; *Jones v. Hoyt*, 25 Conn. 374; *Gallup v. Merrill*, 40 Vt. 137; *Walker v. Norton*, 29 Vt. 226.

of his employment;<sup>97</sup> as where he acts adversely to his principal's interest without the latter's knowledge or consent;<sup>98</sup> or where he fraudulently appropriates funds or property that comes into his hands during the course of the agency.<sup>99</sup> And if the principal pays the agent his compensation before he discovers the latter's fraud or misconduct, he may recover it in an action for money had and received.<sup>100</sup> But this rule does not apply to an agent acquiring an interest in the principal's property after the termination of the agency.<sup>101</sup>

An agent may also expressly or impliedly waive his right to compensation or commissions. Thus, if he had disobeyed instructions not to take a contract for less than a certain price, and the contract was accepted by the principal on the condition that the agent would waive his commissions, to which the agent assented, and the agent, after leaving the principal's employment, wrote letters claiming commissions on another contract, but containing no claim for the one in question, he unconditionally waives his right to commissions on that contract.<sup>102</sup>

<sup>97</sup> *The Taranto*, 1 Sprague, 170, Fed. Cas. No. 13,751; *Wadsworth v. Adams*, 138 U. S. 380; *Shaeffer v. Blair*, 149 U. S. 248; *Prescott v. White*, 18 Ill. App. 322; *Cleveland & St. L. R. Co. v. Pattison*, 15 Ind. 70; *Porter v. Silvers*, 35 Ind. 295; *Vennum v. Gregory*, 21 Iowa, 326; *Jansen v. Williams*, 36 Neb. 869; *Quinn v. Le Duc* (N. J. Eq.) 51 Atl. 199; *Martin v. Bliss*, 57 Hun (N. Y.) 157; *Sea v. Carpenter*, 16 Ohio, 412; *Millingar v. Hartupée*, 53 Pa. 362.

<sup>98</sup> *Hurst v. Holding*, 3 Taunt. 32; *Salomons v. Pender*, 3 Hurl. & C. 639; *Hoffin v. Moss*, 67 Fed. 440; *Shaeffer v. Blair*, 149 U. S. 248; *McGar v. Adams*, 65 Ala. 106; *Larey v. Baker*, 86 Ga. 468; *Hobson v. Peake*, 44 La. Ann. 383; *Jansen v. Williams*, 36 Neb. 869; *Quinn v. Le Duc* (N. J. Eq.) 51 Atl. 199; *Murray v. Beard*, 102 N. Y. 505; *Martin v. Bliss*, 57 Hun (N. Y.) 157; *Carman v. Beach*, 63 N. Y. 97.

<sup>99</sup> *Myers v. Walker*, 31 Ill. 354; *Brannan v. Strauss*, 75 Ill. 234; *Sumner v. Reicheniker*, 9 Kan. 320; *Millingar v. Hartupée*, 53 Pa. 362; *Segar v. Parrish*, 20 Grat. (Va.) 672.

<sup>100</sup> *McGar v. Adams*, 65 Ala. 106; *Morison v. Thompson*, L. R. 9 Q. B. 480.

<sup>101</sup> *McGar v. Adams*, 65 Ala. 106.

<sup>102</sup> *Flack v. Condict*, 66 N. J. Law, 351.



**§ 364. Right to compensation when agent acts for both parties.**

Whether an agent is entitled to compensation when it appears that he has acted for both parties depends upon the circumstances. On this question the following principles may be regarded as established: When a person is employed to act as agent for another in dealings with a third person, and the nature of the employment is such that he is required to exercise judgment, discretion, or personal influence in the execution of the agency, he cannot act also as agent of the third party in the transaction without the knowledge and consent of his principal, for he would thus occupy a position inconsistent with the trust reposed in him by his principal. If, therefore, a person employed to act as agent of another in dealings with a third person involving the exercise of judgment, discretion, or personal influence, acts also as agent of such third person, without the knowledge of either, he cannot recover compensation from either; and if he so acts with the knowledge and consent of one only, he cannot recover compensation from the other.<sup>108</sup> If compensation is paid to an agent by his prin-

<sup>108</sup> *Morison v. Thompson*, L. R. 9 Q. B. 480; *Hunsaker v. Sturgis*, 29 Cal. 142; *Alta Inv. Co. v. Worden*, 25 Colo. 215; *Lewis v. Denison*, 2 App. D. C. 387; *Boyd v. Dullaghan*, 33 Ill. App. 266; *Kronenberger v. Fricke*, 22 Ill. App. 550; *Cleveland & St. L. R. Co. v. Pattison*, 15 Ind. 70; *Lloyd v. Colston*, 5 Bush (Ky.) 587; *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Follansbee v. O'Reilly*, 135 Mass. 80; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756; *McDonald v. Maltz*, 94 Mich. 172, 34 Am. St. Rep. 331; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541; *Hannan v. Prentiss*, 124 Mich. 417; *Webb v. Paxton*, 36 Minn. 532; *De Steiger v. Hallington*, 17 Mo. App. 382; *Harkness v. Briccoe*, 47 Mo. App. 196; *Smith v. Tyler*, 57 Mo. App. 668; *Cannell v. Smith*, 142 Pa. 25; *Everhart v. Searle*, 71 Pa. 256; *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458; *In re Evans*, 22 Utah, 366; *Meyer v. Hanchett*, 39 Wis. 419, 43 Wis. 246; *Barry v. Schmidt*, 57 Wis. 172, 46 Am. Rep. 35. And see post, § 781. And see *Duesman v. Hale*, 55 Neb. 577; *Martin v. Roberts*, 36 Fed. 217. Where an agent sues to recover compensation for selling land, the fact that he subsequently acts as attorney for the purchaser, to resist the

principal in such a case in ignorance of the fact that he was acting for both parties, it may be recovered back.<sup>104</sup>

Some cases go further than this and hold that an agent acting for two principals at the same time, and in the same transaction, can recover no compensation from either of them unless his double agency is known and assented to by both parties. In other words, if one of the principals knows of his double agency and the other does not, he cannot recover compensation from either of them.<sup>105</sup> These cases base their decisions on the ground that he cannot recover compensation from the principal who is ignorant of the double agency, because his so acting is fraudulent as against such principal; and he cannot recover from the one who knows of the double agency, because as the second employer knew of the first employment, his contract of employment is void, as in fraud of the rights of the first employer.<sup>106</sup>

enforcement of the contract of sale, is a good defense. *Asher v. Beckner*, 19 Ky. L. R. 521, 41 S. W. 35.

<sup>104</sup> *Cannell v. Smith*, 142 Pa. 25; *Morison v. Thompson*, L. R. 9 Q. B. 480; *Lewis v. Denison*, 2 App. D. C. 387.

<sup>105</sup> *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Finnerty v. Fritz*, 5 Colo. 174; *Bollman v. Loomis*, 41 Conn. 581; *Sessions v. Payne*, 113 Ga. 955; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Capener v. Hogan*, 40 Ohio St. 203; *Everhart v. Searle*, 71 Pa. 256; *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458.

<sup>106</sup> As was said in *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 529: "Unless the principal contracts for less, the agent is bound to serve him with all his skill, judgment and discretion. The agent cannot divide this duty and give part to another. Therefore by engaging with the second he forfeits his right to compensation from the one who first employed him. By the second engagement, the agent, if he does not in fact disable himself from rendering to the first employer the full quantum of service contracted for, at least tempts himself not to do so. And for the same reason he cannot recover from the second employer who is ignorant of the first engagement. And if the second employer has knowledge of the first engagement, then both he and the agent are guilty of the wrong committed against the first employer, and the law will not enforce an executory contract entered into in fraud of the rights of the first employer. It is no answer to say that the second employer having knowledge of the first employment should be held liable on his promise, because he could not be defrauded in the transac-

But there is nothing to prevent a person from acting as agent for both parties in a transaction, even though it may involve the exercise of judgment, discretion, or personal influence, if he does so in good faith and with the knowledge and consent of both parties. In such a case, he may recover compensation from both.<sup>107</sup>

The rule that an agent cannot act for both parties without the knowledge and consent of his principal, and that, if he does so, he cannot recover compensation, does not apply where the nature and object of the agency is such that acting for both parties is not inconsistent therewith, as where the agent is not employed to make a contract for the parties or either of them, or to advise them or either of them, but is employed merely to bring them together, so that they may deal with each other personally, or where the agent is employed to do a specific act which does not involve the exercise of any judgment, discretion or personal influence on his part.<sup>108</sup>

tion. The contract itself is void as against public policy and good morals and both parties thereto being in pari delicto, the law will leave them as it finds them. *Ex dolo malo non oritur actio.*"

<sup>107</sup> *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Alexander v. University*, 57 Ind. 466; *Adams Min. Co. v. Senter*, 26 Mich. 73; *De Steiger v. Hollington*, 17 Mo. App. 382; *Joslin v. Cowee*, 56 N. Y. 626; *Pugsley v. Murray*, 4 E. D. Smith (N. Y.) 245; *Ferguson v. Gooch*, 94 Va. 1; *Stewart v. Mather*, 32 Wis. 344; *Meyer v. Hanchett*, 39 Wis. 419, 43 Wis. 246.

"It is necessary that it should appear that knowledge of every circumstance connected with his employment by either should be communicated to the other; but where that is done and free assent is given by each principal to the double relation of the agent, the right of such agent to compensation cannot be denied on any just principle of morals or of law." *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528.

<sup>108</sup> *Montross v. Eddy*, 94 Mich. 100, 34 Am. St. Rep. 323; *Ranney v. Donovan*, 78 Mich. 318; *Terry v. Birmingham Nat. Bank*, 99 Ala. 566; *Rupp v. Sampson*, 16 Gray (Mass.) 398, 77 Am. Dec. 416; *Siegel v. Gould*, 7 Lans. (N. Y.) 177. And see post, § 781. An agent to sell lands, having found a purchaser, and having with the vendor's knowledge signed the contract of purchase on behalf of the vendee, may still recover his commissions from the vendor. *Barry v. Schmidt*, 57 Wis. 172, 46 Am. Rep. 35.

When it is sought to show that the principal had knowledge of the agent's dual character, such knowledge should be established, not by mere inference, but by evidence of a full disclosure or positive proof of knowledge, so that the seller or the buyer, as the case may be, may be advised of the exact relation of the agent to the other parties to the transactions.<sup>109</sup>

**§ 365. Right to compensation on revocation of agency by the principal.**

(a) **When the principal has a right to revoke.**—In determining an agent's rights with respect to compensation on revocation of the agency by the principal, the first question is whether the revocation was a breach of the contract or not. If, under the express or implied terms of the contract of agency, it was revocable by the principal so that there has been no breach of contract on his part, the agent can recover nothing more than such compensation, if any, as was earned prior to the revocation and notice thereof.<sup>110</sup> And the same is true when a principal revokes the agency because of a breach by the agent.<sup>111</sup> In such cases, however, the agent is entitled to recover compensation for the services actually rendered by him prior to the revocation,<sup>112</sup> unless this would be contrary to the terms of the contract, as when he is to be paid only in the event of success or upon

<sup>109</sup> *Frankel v. Wathen*, 58 Hun (N. Y.) 543; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528.

<sup>110</sup> *United States v. Jarvis, Daveis*, 274, Fed. Cas. No. 15,468; *Aetna L. Ins. Co. v. Nexsen*, 84 Ind. 347, 43 Am. Rep. 91; *Strong v. West*, 110 Ga. 382.

<sup>111</sup> *Lawrence v. Gullifer*, 38 Me. 532; *Congregation v. Peres*, 2 Cold. (Tenn.) 620; *Massey v. Taylor*, 5 Cold. (Tenn.) 447, 98 Am. Dec. 429; *Kessee v. Mayfield*, 14 La. Ann. 90; *Eaken v. Harrison*, 4 McCord (S. C.) 249.

<sup>112</sup> *Lawrence v. Gullifer*, 38 Me. 532; *Strong v. West*, 110 Ga. 382; *Robinson v. Sanders*, 24 Miss. 391; *Aetna L. Ins. Co. v. Nexsen*, 84 Ind. 347, 43 Am. Rep. 91; *Eaken v. Harrison*, 4 McCord (S. C.) 249; *Urquhart v. Scottish-American Mortg. Co.*, 85 Minn. 69; *Congregation v. Peres*, 2 Cold. (Tenn.) 620; *Massey v. Taylor*, 5 Cold. (Tenn.) 447, 98 Am. Dec. 429; *Merriman v. McCormick Harvesting Mach. Co.*, 96 Wis. 600; *Id.*, 101 Wis. 619.

some other contingency;<sup>113</sup> or unless he has been guilty of such misconduct that the services rendered by him are of little or no value to the principal.<sup>114</sup> It has been held that if the agent is employed for a stipulated term, and before the expiration of such term is discharged by reason of his own fault or misconduct, he can recover no wages or compensation for the services already rendered.<sup>115</sup> But, in other cases, it is held that although he cannot recover the stipulated wages upon the express contract, he may sue for and recover compensation for the services actually rendered during the term, and prior to the discharge, to the extent such services were reasonably valuable to the employer, not, however, exceeding the rate of compensation stipulated by the express contract.<sup>116</sup> What the agent's services are reasonably worth, under such circumstances, is a question of fact to be determined by the jury under proper instructions from the court.<sup>117</sup>

Where the principal has the right to revoke the agency at any time, the agent cannot recover what compensation he might have earned had the authority not been revoked, nor damages for its withdrawal, although the principal revoked the authority without a reasonable cause.<sup>118</sup>

<sup>113</sup> *Spear v. Gardner*, 16 La. Ann. 383; *Hotchkiss v. Gretna Gin & Compress Co.*, 36 La. Ann. 517; *Chambers v. Seay*, 73 Ala. 372.

<sup>114</sup> *Spain v. Arnott*, 2 Starkie, 256; *Porter v. Silvers*, 35 Ind. 295; *Cleveland & St. L. R. Co. v. Pattison*, 15 Ind. 70; *Vennum v. Gregory*, 21 Iowa, 326; *Sumner v. Reichenker*, 9 Kan. 320; *Sea v. Carpenter*, 16 Ohio, 412. As where he appropriates the property or funds to himself. *Brannan v. Strauss*, 75 Ill. 234; *Myers v. Walker*, 31 Ill. 354.

<sup>115</sup> *Libhart v. Wood*, 1 Watts & S. (Pa.) 265, 37 Am. Dec. 461; *Posey v. Garth*, 7 Mo. 94, 37 Am. Dec. 183; *Waters v. Davies*, 23 Jones & S. (N. Y.) 40.

<sup>116</sup> *Jones v. Jones*, 2 Swan (Tenn.) 605; *Congregation v. Peres*, 2 Cold. (Tenn.) 620; *Massey v. Taylor*, 5 Cold. (Tenn.) 447, 98 Am. Dec. 429.

<sup>117</sup> *Massey v. Taylor*, 5 Cold. (Tenn.) 447, 98 Am. Dec. 429.

<sup>118</sup> *Orr v. Ward*, 73 Ill. 318; *Jacobs v. Warfield*, 23 La. Ann. 395; *Morrison v. Ogdensburgh & L. C. R. Co.*, 52 Barb. (N. Y.) 173; *Spring v. Ansonia Clock Co.*, 24 Hun (N. Y.) 175; *North Carolina State L. Ins. Co. v. Williams*, 91 N. C. 69, 49 Am. Rep. 637; *Coffin*

And this is also true where the agency is revoked by reason of the fault or misconduct of the agent.<sup>119</sup>

(b) **When the agency is wrongfully revoked.**—If a contract of agency is for a fixed period, or until the performance of certain services, and no right to revoke the agency has been reserved, there is a breach of contract if the principal revokes the agency before the expiration of the term for performance of the services, as the case may be, and without any breach by the agent; and the agent is entitled to recover such unpaid compensation, if any, as he may have earned prior to the breach, and, in addition to this, such damages as he may have sustained by reason of the breach.<sup>120</sup>

(c) **Same—Remedies of agent—Measure of damages.**—When an agent's authority is thus revoked by the principal in breach of the contract of employment, the agent has an election of two remedies by which he may obtain redress for the wrongful discharge: (1) He may treat the contract as rescinded and sue at once, on a quantum meruit, for the services actually rendered by him prior to the revocation and notice thereof;<sup>121</sup> or (2) he may treat the contract of employment as continuing, though broken by the principal, and sue, on the breach, for damages. In the latter case, he may ei-

*v. Landis*, 46 Pa. 426; *Kirk v. Hartman*, 63 Pa. 97; *Rightmire v. Hirner*, 188 Pa. 325.

<sup>119</sup> *DuQuoin Star Coal Min. Co. v. Thorwell*, 3 Ill. App. 394; *Kessee v. Mayfield*, 14 La. Ann. 90; *Murdock v. Phillips Academy*, 12 Pick. (Mass.) 244; *Tyler v. Ames*, 6 Lans. (N. Y.) 280.

<sup>120</sup> *Smith v. Hayward*, 7 Adol. & E. 544; *Goodman v. Pocock*, 15 Q. B. 576; *Gardenhire v. Smith*, 39 Ark. 280; *Saxonia Min. & Reduction Co. v. Cook*, 7 Colo. 569; *Richardson v. Eagle Mach. Works*, 78 Ind. 422, 41 Am. Rep. 584; *Sutherland v. Wyer*, 67 Me. 64; *Cutter v. Gillette*, 163 Mass. 95; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Weed v. Burt*, 78 N. Y. 192; *Hand v. Clearfield Coal Co.*, 143 Pa. 408.

<sup>121</sup> *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560; *Rogers v. Parham*, 8 Ga. 190; *Britt v. Hays*, 21 Ga. 157; *Richardson v. Eagle Mach. Works*, 78 Ind. 422, 41 Am. Rep. 584; *Booge v. Pacific R. Co.*, 33 Mo. 215, 82 Am. Dec. 160; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Colburn v. Woodworth*, 31 Barb. (N. Y.) 381; *Derby v. Johnson*, 21 Vt. 17. And see cases cited in post, note 129.

ther sue, for damages, at once upon the breach of the contract,<sup>122</sup> or wait until the expiration of the term of service fixed by the contract and then sue for damages.<sup>123</sup> But he cannot pursue all of these remedies, and if he recovers under one, it is a bar to his recovery on the other.<sup>124</sup> He cannot recover upon a quantum meruit for the services actually rendered, and also have an action for damages; because, by bringing the first action, he treats the contract as rescinded, and because he can have but one action where the claims have all accrued and all grow out of the same contract;<sup>125</sup> and having brought and prosecuted to final judgment one action for the principal's breach of the contract, his remedy for that breach is exhausted.<sup>126</sup>

<sup>122</sup> *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Saxonia Min. & Reduction Co. v. Cook*, 7 Colo. 569; *Britt v. Hays*, 21 Ga. 157; *Rogers v. Parham*, 8 Ga. 190; *Sutherland v. Wyer*, 67 Me. 64; *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509; *Cutter v. Gillette*, 163 Mass. 95; *Booge v. Pacific R. Co.*, 33 Mo. 215, 82 Am. Dec. 160; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Colburn v. Woodworth*, 31 Barb. (N. Y.) 381; *Everson v. Powers*, 89 N. Y. 527, 42 Am. Rep. 319; *Greenberg v. American Technical Book Co.*, 33 Misc. (N. Y.) 786; *Brinkley v. Swicegood*, 65 N. C. 626; *Gordon v. Brewster*, 7 Wis. 355.

<sup>123</sup> *Saxonia Min. & Reduction Co. v. Cook*, 7 Colo. 569; *Ricks v. Yates*, 5 Ind. 115; *Sutherland v. Wyer*, 67 Me. 64; *Horn v. Western Land Ass'n*, 22 Minn. 233; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Helm v. Wolf*, 1 E. D. Smith (N. Y.) 70; *Everson v. Powers*, 89 N. Y. 527, 42 Am. Rep. 319; *Colburn v. Woodworth*, 31 Barb. (N. Y.) 381; *Gordon v. Brewster*, 7 Wis. 355.

<sup>124</sup> *Richardson v. Eagle Mach. Works*, 78 Ind. 422, 41 Am. Rep. 584; *Booge v. Pacific R. Co.*, 33 Mo. 212, 82 Am. Dec. 160; *Colburn v. Woodworth*, 31 Barb. (N. Y.) 381; *Moody v. Leverich*, 4 Daly (N. Y.) 401; *James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821. But it has been held that this rule does not apply where the agent's compensation is payable in regular instalments, as where it is payable monthly, and the agent may sue for each instalment as it becomes due; and the first judgment will not be a bar to another action for an instalment subsequently becoming due. *Huntington v. Ogdensburgh & L. C. R. Co.*, 33 How. Pr. (N. Y.) 416; *Isaacs v. Davies*, 68 Ga. 169.

<sup>125</sup> *Moody v. Leverich*, 4 Daly (N. Y.) 401.

<sup>126</sup> *Richardson v. Eagle Mach. Works*, 78 Ind. 422, 41 Am. Rep. 584; *Booge v. Pacific R. Co.*, 33 Mo. 212, 82 Am. Dec. 160.

If the agent elects to treat the contract as rescinded, and sues upon a quantum meruit for the value of services actually rendered by him up to the time of revocation and notice thereof, the amount of his recovery would be the value of such services, less any amount that had been already paid to him on their account.<sup>127</sup> If, on the other hand, he elects to treat the contract as continuing, but broken by the principal, and sues at once for the breach, he is entitled to recover the amount of compensation, if any, earned by him prior to the breach, and remaining unpaid, and, in addition to this, the probable damages sustained by him by reason of the breach.<sup>128</sup> Such damages are *prima facie* the whole amount of unearned compensation which he would have earned if allowed to carry out the contract, but the principal may reduce such amount of damage by showing affirmatively, the burden of proof being on him, that the agent will probably find similar employment during the remainder of the term fixed by the contract.<sup>129</sup> But if, instead of su-

<sup>127</sup> *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560; *Rogers v. Parham*, 8 Ga. 190; *Britt v. Hays*, 21 Ga. 157; *Moody v. Leverich*, 4 Daly (N. Y.) 401; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Brinkley v. Swicegood*, 65 N. C. 626.

<sup>128</sup> *Cutter v. Gillette*, 163 Mass. 95; *Rogers v. Parham*, 8 Ga. 190; *Britt v. Hays*, 21 Ga. 157; *Booge v. Pacific R. Co.*, 33 Mo. 215, 82 Am. Dec. 160; *Moody v. Leverich*, 4 Daly (N. Y.) 401; *Brinkley v. Swicegood*, 65 N. C. 626; *Derby v. Johnson*, 21 Vt. 17.

<sup>129</sup> *Callo v. Brouncker*, 4 Car. & P. 518; *Utter v. Chapman*, 38 Cal. 659; *Ansley v. Jordan*, 61 Ga. 482; *Gazette Print. Co. v. Morss*, 60 Ind. 153; *Richardson v. Eagle Mach. Works*, 78 Ind. 422, 41 Am. Rep. 584; *Sutherland v. Wyer*, 67 Me. 64; *Cumberland & P. R. Co. v. Slack*, 45 Md. 161; *Jaffray v. King*, 34 Md. 217; *Horn v. Western Land Ass'n*, 22 Minn. 233; *Hunt v. Crane*, 33 Miss. 669, 69 Am. Dec. 381; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Cox v. Adams*, 1 Nott & McC. (S. C.) 284.

Where the agent is employed to sell certain lands, within a time limited, and his compensation is to be a share of the profits arising from the proceeds of the sale, and the principal revokes the contract without any reason or excuse, the agent is entitled to recover such compensation in damages as would be equal in amount to his share of the profits which would have resulted had the lands been sold by him. *Durkee v. Gunn*, 41 Kan. 496, 13 Am. St. Rep. 300; *Hawley v. Smith*, 45 Ind. 183.



ing at once on the breach of the contract, he elects to wait until the expiration of the term of service fixed by the contract of employment, and then sue for damages for breach of the contract, he is entitled to recover the compensation, if any, earned prior to the breach by the principal, and remaining unpaid, and also damages sustained by him by reason of the breach. Such damages are *prima facie* the amount of unearned compensation, but this may be reduced by the principal, the burden of proof being on him, by showing what the agent has earned between the breach of the contract and the expiration of the term of employment fixed by the contract, or what he might have earned in similar employment if he had acted with ordinary prudence and made reasonable effort to obtain such employment.<sup>130</sup> The damages recovered by the agent, however, cannot exceed the amount of the stipulated compensation.<sup>131</sup>

<sup>130</sup> *Emmens v. Elderton*, 13 C. B. 508; *Leatherberry v. Odell*, 7 Fed. 641; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Utter v. Chapman*, 38 Cal. 659; *Saxonia Min. & Reduction Co. v. Cook*, 7 Colo. 569; *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520; *Ansley v. Jordan*, 61 Ga. 482; *Putney v. Swift*, 54 Ga. 266; *Williams v. Chicago Coal Co.*, 60 Ill. 149; *Gazette Printing Co. v. Morss*, 60 Ind. 153; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289; *Hinchcliffe v. Koontz*, 121 Ind. 422, 16 Am. St. Rep. 403; *Sutherland v. Wyer*, 67 Me. 64; *Cumberland & P. R. Co. v. Slack*, 45 Md. 161; *Williams v. Anderson*, 9 Minn. 50; *Horn v. Western Land Ass'n*, 22 Minn. 233; *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534; *Squire v. Wright*, 1 Mo. App. 172; *Hunt v. Crane*, 33 Miss. 669, 69 Am. Dec. 381; *Costigan v. Mohawk & H. R. Co.*, 2 Denio (N. Y.) 609, 43 Am. Dec. 758; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Heim v. Wolf*, 1 E. D. Smith (N. Y.) 70; *Kirk v. Hartman*, 63 Pa. 97; *King v. Steiren*, 44 Pa. 99, 84 Am. Dec. 419; *Congregation v. Peres*, 2 Cold. (Tenn.) 620; *Barker v. Knickerbocker L. Ins. Co.*, 24 Wis. 630. If he engages in a business of a different character, requiring harder labor and more capital, the damages should not be reduced the full amount of his earnings in such business. *Williams v. Chicago Coal Co.*, 60 Ill. 149. It has been held that where the agent fails to obtain other similar employment, the burden is on him to show that he used due diligence in his search for such, in order that he might recover for the time he was out of employment. *Prichard v. Martin*, 27 Miss. 306; *Hunt v. Crane*, 33 Miss. 669, 69 Am. Dec. 381.

<sup>131</sup> *Saxonia Min. & Reduction Co. v. Cooke*, 7 Colo. 569; *Utter v. Chapman*, 38 Cal. 659.

When an agent has notice of his wrongful discharge, it is not necessary that he should tender his services or keep himself in readiness to re-enter his principal's employment, in order that he may have an action for damages. All that is necessary is that he was ready and willing to continue in such employment at the time of his discharge; and his readiness and willingness is a question of fact to be determined by the jury from all the facts and circumstances in the case.<sup>132</sup>

(d) **Same—Duty of agent to seek other employment.**—When an agent's authority is thus wrongfully revoked, it is his duty to use a reasonable degree of prudence and diligence in seeking other similar employment, so as to make his damages as small as possible.<sup>133</sup> But while he is bound to seek other employment after a breach of the contract of agency by the principal, such duty only requires that he shall make reasonable efforts to obtain similar employment in the same locality. His *prima facie* damages, the amount of compensation which he would have earned if allowed to carry out the contract, cannot be reduced by showing what he might have earned in a different employment<sup>134</sup> or in an employment in a different locality.<sup>135</sup> And if he has made reason-

<sup>132</sup> *Wallis v. Warren*, 4 Exch. 361; *Hinchcliffe v. Koontz*, 121 Ind. 422, 16 Am. St. Rep. 403; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Huntington v. Ogdensburgh & L. C. R. Co.*, 33 How. Pr. (N. Y.) 419.

<sup>133</sup> *Emmens v. Elderton*, 13 C. B. 508; *Utter v. Chapman*, 38 Cal. 659; *Saxonia Min. & Reduction Co. v. Cook*, 7 Colo. 569; *Williams v. Chicago Coal Co.*, 60 Ill. 149; *Hinchcliffe v. Koontz*, 121 Ind. 422, 16 Am. St. Rep. 403; *Stone v. Vimont*, 7 Mo. App. 277; *Shannon v. Comstock*, 21 Wend. (N. Y.) 457; *King v. Steiren*, 44 Pa. 99, 84 Am. Dec. 419; *Chamberlin v. Morgan*, 68 Pa. 168. He cannot willfully remain idle until the end of the term and then sue for the whole amount of stipulated compensation. Such a rule would be contrary to public policy and the principles of political economy, as encouraging idleness.

<sup>134</sup> *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Hinchcliffe v. Koontz*, 121 Ind. 422, 16 Am. St. Rep. 403; *Squire v. Wright*, 1 Mo. App. 172; *Costigan v. Mohawk & H. R. Co.*, 2 Denio (N. Y.) 609, 43 Am. Dec. 758; *Wolf v. Studebaker*, 65 Pa. 459.

<sup>135</sup> *Sheffield v. Page*, 1 Sprague, 285, Fed. Cas. No. 12,743; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Harrington v. Gies*, 45

able efforts to obtain similar employment in the vicinity where he resided and failed, he cannot be charged with the value of labor performed for himself.<sup>136</sup> Nor can the damages be reduced by showing that the agent might have obtained employment with a person against whom there were reasonable objections.<sup>137</sup>

(e) **Same—Doctrine of “constructive services”**—It was formerly held that where an agent, employed for a definite period or for the performance of specific services, was wrongfully discharged, and he held himself in readiness to perform the services until the end of the term, or until each instalment was due, if the compensation was so payable, he could recover his wages, as for constructive services, for that part of the term of employment which was unexpired when he was so discharged;<sup>138</sup> and this doctrine is still recognized in some jurisdictions.<sup>139</sup> But it is now generally repudiated, and what under such doctrine might have been denominated constructive compensation is now included under the general head of damages resulting from the principal's breach of the contract of employment.<sup>140</sup> These mod-

Mich. 374; *Costigan v. Mohawk & H. R. Co.*, 2 Denio (N. Y.) 609., 43 Am. Dec. 758.

<sup>136</sup> *Harrington v. Gies*, 45 Mich. 374; *Stone v. Vimont*, 7 Mo. App. 277.

<sup>137</sup> *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Dec. 8.

<sup>138</sup> *Gandell v. Pontigny*, 4 Camp. 375.

<sup>139</sup> *Davis v. Ayres*, 9 Ala. 292; *Ramey v. Holcomb*, 21 Ala. 567; *Fowler v. Armour*, 24 Ala. 194; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Gardenhire v. Smith*, 39 Ark. 287; *Armfield v. Nash*, 31 Miss. 361. This doctrine was recognized in two earlier New York cases. *Huntington v. Ogdensburgh & L. C. R. Co.*, 33 How. Pr. (N. Y.) 416; and *Thompson v. Wood*, 1 Hilt. (N. Y.) 96. But they have been repudiated by later cases in that state. See cases cited in next note.

<sup>140</sup> *Archard v. Horner*, 3 Car. & P. 349; *Smith v. Hayward*, 7 Adol. & E. 544; *Ricks v. Yates*, 5 Ind. 115; *Richardson v. Eagle Mach. Works*, 78 Ind. 422, 41 Am. Rep. 586; *Whitaker v. Sandifer*, 1 Duv. (Ky.) 261; *Stone v. Vimont*, 7 Mo. App. 277; *Miller v. Goddard*, 34 Me. 102; *Moody v. Leverich*, 4 Daly (N. Y.) 401; *Weed v. Burt*, 78 N. Y. 191; *Clark v. Marsiglia*, 1 Denio (N. Y.) 317; *Durkee v. Mott*, 8 Barb. (N. Y.) 423; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *James v. Allen County*, 44 Ohio St. 226, 58 Am.

ern cases hold, in substance, that if an agent be wrongfully discharged, he has no action for wages, except for past services rendered. As far as any other claim on the contract is concerned, he must sue for the injury he has sustained by his discharge, in not being allowed to serve and earn the wages agreed upon.<sup>141</sup>

The theory of the doctrine of constructive services seems to be that inasmuch as the agent holds himself ready to do the work, therefore he has done the work; that readiness is, for all purposes, equivalent to performance.<sup>142</sup> But this claim is based upon a fiction. There is no acceptance of the services, and no delivery of them, and in order that the agent may recover under such doctrine, it is necessary that he should not only be willing to perform on his part, but should hold himself in readiness to perform the services. But it is also required that when an agent is thus discharged, he should use ordinary diligence to find similar employment, so as to make the damages as light as possible. Thus, by these two rules, the agent was required both to remain idle and to seek other employment, an inconsistency which clearly shows that the doctrine of constructive services has no support in principle, and, by reason of which, it was early repudiated in most jurisdictions.<sup>143</sup>

(f) **Same**—Where the principal repudiates the contract of employment prior to, or at the time for, performance.—If a principal wrongfully repudiates a contract of employment before, or at the time for, performance of services under the contract, by the weight of authority, the agent may at once sue the principal as for a breach of the contract, and recover what damages he has sustained;<sup>144</sup> and it is not

Rep. 821; *Chamberlin v. Morgan*, 68 Pa. 168; *Willoughby v. Thomas*, 24 Grat. (Va.) 522.

<sup>141</sup> *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 289.

<sup>142</sup> *James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 825.

<sup>143</sup> *James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 825.

<sup>144</sup> *Hochster v. De la Tour*, 2 El. & Bl. 678; *Danube & Black Sea R. Co. v. Xenos*, 13 C. B. (N. S.) 825; *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285.

In discussing the case of *Hochster v. De la Tour*, *supra*, in which

necessary, after such breach, for the agent to tender services or to keep in readiness to perform.<sup>145</sup> All that is necessary is that the agent was ready and willing to continue in the principal's services, at the time the contract of employment was repudiated.<sup>146</sup>

this doctrine was first laid down, Miller, J., in *Dugan v. Anderson*, supra, says: "The principle of this decision in cases to which it has been held applicable, is, that there is a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. It is said the promisee has an inchoate right to the performance of the bargain which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with in various ways for his benefit and advantage. Of all such advantages the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract in omnibus, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract and bring his action accordingly. The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach, by reason of the future non-performance, becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for the performance may yet be remote. It is obvious that such a course must lead to the convenience of both parties, and though decisions ought not to be founded on grounds of convenience alone, they yet tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, the promisee may in many cases avert, or at all events materially lessen the injurious effects which would otherwise flow from the non-fulfillment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished."

<sup>145</sup> *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285. And see cases cited ante, note 144.

<sup>146</sup> *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285. And see cases cited ante, note 144.

**§ 366. Right to compensation on revocation of agency by operation of law.**

As a general rule, when an agency is revoked by operation of law, as has been explained in another chapter,<sup>147</sup> the contract is discharged in so far as further performance is concerned, and the agent can recover, if at all, only for services rendered prior to the revocation. The circumstances may be such that there can be no recovery even for the services actually rendered, but generally it is otherwise. When a contract of agency is revoked by operation of law because of the illness, death, insanity, imprisonment, or other incapacity of the agent, the general rule is that he or his personal representative, as the case may be, may recover, on an implied or quasi contract, the value of the services actually rendered by him before the revocation, less the damages, if any, sustained by the principal by reason of the agent's nonperformance of the contract, even though the contract of employment be one for an entire performance.<sup>148</sup> This, however, is not always the case. There can be no recovery, even for services actually rendered, if the agent, when he made the contract, knew that it would be impossible for him to perform it.<sup>149</sup> Nor can there be such a recovery contrary to the express terms of the contract.<sup>150</sup>

When a contract of agency is discharged because of the illness or imprisonment of the agent, the fact that it is because of the fault of the agent will not prevent his recovering for the services actually rendered, for the law regards the illness

<sup>147</sup> See ante, §§ 181-192.

<sup>148</sup> *Hunter v. Waldron*, 7 Ala. 753; *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560; *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93; *Ricks v. Yates*, 5 Ind. 117; *Persons v. McKibben*, 5 Ind. 261, 61 Am. Dec. 85; *Coe v. Smith*, 4 Ind. 79, 58 Am. Dec. 618; *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77; *Hughes v. Wamsutta Mills*, 11 Allen (Mass.) 201; *Fuller v. Brown*, 11 Metc. (Mass.) 440; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Fenton v. Clark*, 11 Vt. 557; *Seaver v. Morse*, 20 Vt. 620; *George v. Elliott*, 2 Hen. & M. (Va.) 5; *Green v. Gilbert*, 21 Wis. 395.

<sup>149</sup> *Jennings v. Lyons*, 39 Wis. 553, 20 Am. Rep. 57.

<sup>150</sup> *Cutter v. Powell*, 6 Term R. 320.

or imprisonment, and not the agent's fault, as the proximate cause of the discharge.<sup>151</sup> So if the contract of agency is revoked by operation of law, by reason of the death or insanity of the principal, the agent would be entitled to compensation for services rendered up to the time of the principal's death or insanity, but not afterwards.<sup>152</sup>

— **Bankruptcy.** To the rule that revocation of an agency by operation of law discharges the contract of agency in so far as the future is concerned, there is an exception in the case of a principal's bankruptcy. The bankruptcy of the principal will revoke the authority of his agent, but it does not discharge the contract, so as to prevent the agent from recovering damages.<sup>153</sup>

**§ 367. Right to compensation on renunciation of agency by the agent.**

(a) **Where the renunciation is by right.**—When an agent has a right to terminate the agency at any time, as where it is to last for an indefinite period, or where he has that right under the terms of the contract of employment, or where he terminates it for a sufficient cause, as has been explained in a former chapter,<sup>154</sup> and in accordance with such right he renounces the agency at any time, he would be entitled to recover compensation for the services rendered by him up to the time of such renunciation.<sup>155</sup> And if he had expressly reserved the right to terminate the agency at any time, he could recover the value of his services rendered, although he terminated it without a sufficient cause.<sup>156</sup> So,

<sup>151</sup> *Hughes v. Wamsutta Mills*, 11 Allen (Mass.) 201.

<sup>152</sup> *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578; *Farrow v. Wilson*, L. R. 4 C. P. 744.

<sup>153</sup> *Vanuxem v. Bostwick*, 19 Wkly. Notes Cas. (Pa.) 74, 7 Atl. 598; *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534.

<sup>154</sup> See ante, §§ 177, 178.

<sup>155</sup> *Cody v. Raynaud*, 1 Colo. 272; *Lincoln v. Schwartz*, 70 Ill. 134; *Baird v. Ratcliff*, 10 Tex. 81; *Bishop v. Ranney*, 59 Vt. 316; *Patterson v. Gage*, 23 Vt. 558, 56 Am. Dec. 96; *Patrick v. Putnam*, 27 Vt. 759; *Rossiter v. Cooper*, 23 Vt. 522.

<sup>156</sup> *Evans v. Bennett*, 7 Wis. 404; *Provost v. Harwood*, 29 Vt. 219.

where an agent is justified in renouncing his agency by reason of prevalence of a contagious disease in the vicinity in which the agency required him to work,<sup>157</sup> or by reason of some unforeseen sickness or incapacity,<sup>158</sup> or by reason of the fault or misconduct of the principal,<sup>159</sup> although the contract of agency had been for a definite time, he would be entitled to recover the value of services rendered. But he is not entitled to compensation for services rendered after he has tendered his resignation and it has been accepted by the principal, though he is personally liable on contracts made for his principal.<sup>160</sup>

If the contract of employment expressly provides certain conditions, which the agent must comply with before he may renounce the agency, such conditions must be fulfilled, or the agent will be liable to his principal for the resulting damages. Thus, if the contract expressly provides that the agent should give certain notice before he renounces the agency, and, unless he does so, he shall forfeit all or a certain part of his compensation, such provision is held to be valid and binding, and the agent must give such notice, or he will be entitled to a part only or no compensation for services rendered, unless, in the particular case, this provision of forfeiture is unreasonable and oppressive.<sup>161</sup> But, although there may be a

<sup>157</sup> *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77.

<sup>158</sup> *Hunter v. Waldron*, 7 Ala. 753; *Greene v. Linton*, 7 Port. (Ala.) 133, 31 Am. Dec. 707; *Smith v. Hill*, 13 Ark. 173; *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560; *Leopold v. Salkey*, 89 Ill. 420, 31 Am. Rep. 93; *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77; *Harrington v. Fall River Iron Works*, 119 Mass. 82; *Callahan v. Shotwell*, 60 Mo. 398; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Fahy v. North*, 19 Barb. (N. Y.) 341; *Hubbard v. Belden*, 27 Vt. 645.

<sup>159</sup> *Cody v. Raynaud*, 1 Colo. 272; *Warner v. Smith*, 8 Conn. 14; *Bishop v. Ranney*, 59 Vt. 316. And see *Patterson v. Gage*, 23 Vt. 558, 56 Am. Dec. 96.

<sup>160</sup> *Greer v. Featherston*, 95 Tex. 654.

<sup>161</sup> *Walsh v. Walley*, L. R. 9 Q. B. 367; *Harmon v. Salmon Falls Mfg. Co.*, 35 Me. 447, 58 Am. Dec. 718; *Hunt v. Otis Co.*, 4 Metc. (Mass.) 464; *Richardson v. Woehler*, 26 Mich. 90; *Bradley v. Salmon Falls Mfg. Co.*, 30 N. H. 487; *Pottsville Iron & Steel Co. v. Good*, 116 Pa. 385, 2 Am. St. Rep. 614; *Schimpf v. Tennessee Mfg.*



provision requiring notice of renunciation, if there is no provision for forfeiture, the agent's failure to give such notice would not cause him to forfeit his compensation already earned.<sup>162</sup> Nor would he forfeit his compensation, even under such a provision, if his abandonment has been caused by no fault of his own.<sup>163</sup> Such provisions may be put in an express contract with the agent, but it is not necessary that they should be. They may be contained in regulations provided by the principal for his employes, and if the agent enters into or continues in an employment with assent to, or notice of, such regulations, he will be bound by the provisions contained therein.<sup>164</sup> It would be otherwise, however, if he had no notice of such regulations.<sup>165</sup> And the mere fact that the agent has in his possession a paper containing printed regulations of the principal's business is not conclusive evidence that the contents were known to him.<sup>166</sup> Nor does the fact that the agent continued to work without objection after he had been informed of such a regulation, show, as a matter of law, that he assented to the rules as a part of his contract.<sup>167</sup>

**(b) Where the renunciation is wrongful—Divisible contracts.**—If an agent wrongfully renounces or abandons his agency, in breach of the express terms of the contract of employment, without sufficient cause, as has been explained in a preceding chapter,<sup>168</sup> whether or not he is entitled to compensation for services rendered prior to the renunciation

Co., 86 Tenn. 219; *Preston v. American Linen Co.*, 119 Mass. 400; *Collins v. New England Iron Co.*, 115 Mass. 23.

<sup>162</sup> *Hunt v. Otis Co.*, 4 Metc. (Mass.) 464.

<sup>163</sup> *Hughes v. Wamsutta Mills*, 11 Allen (Mass.) 201; *Fuller v. Brown*, 11 Metc. (Mass.) 440.

<sup>164</sup> *Collins v. New England Iron Co.*, 115 Mass. 23; *Harmon v. Salmon Falls Mfg. Co.*, 35 Me. 447, 58 Am. Dec. 718; *Walsh v. Walley*, L. R. 9 Q. B. 367; *Bradley v. Salmon Falls Mfg. Co.*, 30 N. H. 487; *Pottsville Iron & Steel Co. v. Good*, 116 Pa. 385, 2 Am. St. Rep. 614.

<sup>165</sup> *Stevens v. Reeves*, 9 Pick. (Mass.) 198.

<sup>166</sup> *Bradley v. Salmon Falls Mfg. Co.*, 30 N. H. 487.

<sup>167</sup> *Collins v. New England Iron Co.*, 115 Mass. 23.

<sup>168</sup> See ante, § 176.

is a much vexed question, the solution of which depends, to a great extent, upon the nature of the contract of employment. It seems, however, that if the contract is a divisible one, and the agent wrongfully renounces his authority before he has fully performed the services, he may recover for services rendered, subject to the right of the principal to a counterclaim for any damages he may have sustained by reason of the agent's failure to perform the residue.<sup>169</sup> Thus, a contract providing for an agent's compensation by an annual salary, with no other condition than that the principals should not be required to advance the same, but that the agent should raise money for its payment by sales of the property or borrowing money thereon, did not contemplate performance of his entire work by the agent before receiving compensation, nor call for a forfeiture of his right to partial compensation on a termination of the agency by his abandonment of it.<sup>170</sup>

Whether a contract of employment is entire or divisible depends upon the intention of the parties, which is to be ascertained, without regard to technicalities, from the language employed by them, construed as a whole. If it appears that the parties intended an entire and indivisible contract, the courts will give it such a construction, even though the compensation may be payable in instalments.<sup>171</sup> But if it appears that the matter of the contract may be divided into several distinct parts or items, and the agent is to receive his pay according as he performs each part or item, or in certain specific instalments, the contract would generally be considered divisible or severable.<sup>172</sup>

<sup>169</sup> *Taylor v. Laird*, 1 Hurl. & N. 266; *Cotton v. Rand*, 93 Tex. 7. See *Huffc. Ag.* (1st Ed.) 76; *Anson, Cont.* (7th Ed.) 300 et seq.

<sup>170</sup> *Cotton v. Rand*, 93 Tex. 7.

<sup>171</sup> *Cutter v. Powell*, 6 Term R. 320; *Diefenback v. Stark*, 56 Wis. 462, 43 Am. Rep. 719; *Davis v. Maxwell*, 12 Metc. (Mass.) 286; *Carthage v. Gray*, 10 Ind. App. 428; *Charlestown School Tp. v. Hay*, 74 Ind. 127; *Reab v. Moor*, 19 Johns. (N. Y.) 337. See *Hammon, Cont.* 907, et seq.

<sup>172</sup> See *Woods v. Russell*, 5 Barn. & Ald. 942; *Shipman v. Stralitsville Cent. Min. Co.*, 158 U. S. 356; *Thayer v. Wadsworth*, 19 Pick. (Mass.) 349; *Capron v. Stout*, 11 Nev. 304; *Cunningham v. Mor-*

(c) **Same—Where the contract is entire—Prevailing rule.—**

When the contract of agency is entire, as where it is to perform a specific piece of work, or to receive payment in a given sum for performing certain services, or where it otherwise appears that the continuance in the services for the time fixed, or the performance of certain services, is a condition precedent to the right to the compensation agreed upon, and the agent renounces the agency before full performance, without a sufficient cause therefor, the authorities are in conflict as to whether or not the agent can recover any compensation for his services rendered up to the time of such renunciation. By the weight of authority, in England and in this country, it is held that where an agent has an indivisible or entire contract of employment with his principal, and he voluntarily, and without just cause, abandons it before he has fully completed the services, he can recover no compensation from his principal, either upon the original contract or upon a quantum meruit, for services rendered.<sup>178</sup> Thus, where one had been employed to work

rell, 10 Johns. (N. Y.) 203, 6 Am. Dec. 332; Wooten v. Walters, 110 N. C. 251. Hammon, Cont. 907.

<sup>178</sup> *England*: Waddington v. Oliver, 2 Bos. & P. (N. R.) 61; Ellis v. Hamlen, 3 Taunt. 52; Cutter v. Powell, 6 Term R. 320, 2 Smith Lead. Cas. (9th Ed.) 1212.

*United States*: Hulse v. Bonsack Mach. Co., 65 Fed. 864.

*Alabama*: Whitley v. Murray, 34 Ala. 155; Givhan v. Dalley's Adm'x, 4 Ala. 336.

*California*: Hogan v. Titlow, 14 Cal. 255; Hutchinson v. Wetmore, 2 Cal. 310, 56 Am. Dec. 337.

*Colorado*: Cody v. Raynaud, 1 Colo. 272.

*Connecticut*: Rockwell v. Newton, 44 Conn. 333.

*Georgia*: Henderson v. Stiles, 14 Ga. 135.

*Illinois*: Angle v. Hanna, 22 Ill. 429, 74 Am. Dec. 161; Thrift v. Payne, 71 Ill. 408; Holmes v. Stummel, 24 Ill. 370; Eldridge v. Rowe, 7 Ill. 91, 43 Am. Dec. 41.

*Kentucky*: Morford v. Ambrose, 3 J. J. Marsh. 688; Jewell v. Thompson, 2 Litt. 52.

*Louisiana*: Word v. Winder, 16 La. Ann. 111.

*Maine*: Miller v. Goddard, 34 Me. 102, 56 Am. Dec. 638.

*Massachusetts*: Stark v. Parker, 2 Pick. 267, 13 Am. Dec. 425; Davis v. Maxwell, 12 Metc. 236; Thayer v. Wadsworth, 19 Pick. 349; Olmstead v. Beale, 19 Pick. 528.

for one year for one hundred and twenty dollars, and he voluntarily left the service before the expiration of the year,

*Minnesota:* Nelichka v. Esterly, 29 Minn. 146.

*Mississippi:* Wooten v. Read, 2 Smedes & M. 585; Timberlake v. Thayer, 71 Miss. 279. Although this case follows the prevailing rule, the court seemed to favor the more liberal rule of Britton v. Turner, 6 N. H. 481. As said by Cooper, J., "If we were authorized to make the law, instead of announcing it as it is already made, we would unhesitatingly hold that one contracting to render personal services to another for a specified time, could, upon breach of the contract, by himself, recover from that other for the value of the services rendered by him and received by that other, subject to a diminution of his demand to the extent of the damage flowing from his breach of contract."

*Missouri:* Schnerr v. Lemp, 19 Mo. 40; Henson v. Hampton, 32 Mo. 408. But compare Downey v. Burke, 23 Mo. 228.

*New Jersey:* Brown v. Fitch, 33 N. J. Law, 418.

*New York:* Lantry v. Parks, 8 Cow. 63; Jennings v. Camp, 13 Johns. 94, 7 Am. Dec. 367; Reab v. Moor, 19 Johns. 337; McMillan v. Vanderlip, 12 Johns. 165, 7 Am. Dec. 299.

*North Carolina:* Dover v. Plemmons, 32 N. C. (10 Ired.) 23.

*Ohio:* Larkin v. Buck, 11 Ohio St. 561.

*Oregon:* Steeples v. Newton, 7 Or. 110, 33 Am. Rep. 705.

*Pennsylvania:* Martin v. Schoenberger, 8 Watts & S. 367; Alexander v. Hoffman, 5 Watts & S. 382.

*South Carolina:* Byrd v. Boyd, 4 McCord, 246, 17 Am. Dec. 740.

*Tennessee:* Abernathy v. Black, 2 Cold. 314; Holloway v. Lacy, 4 Humph. 468.

*Vermont:* Ripley v. Chipman, 13 Vt. 268; Forsyth v. Hastings, 27 Vt. 646; Mack v. Bragg, 30 Vt. 571; Clark v. School Dist., 29 Vt. 217; Kelly v. Bradford, 33 Vt. 35.

*Wisconsin:* Diefenback v. Stark, 56 Wis. 462, 43 Am. Rep. 719.

In Stark v. Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425 (a leading case in this country on this rule), Lincoln, J., in discussing this rule in part says: "It cannot but seem strange to those who are in any degree familiar with the fundamental principles of law that doubts should ever have been entertained upon a question of this nature. Courts of justice are eminently characterized by their obligation and office to enforce the performance of contracts, and to withhold aid and countenance from those who seek through their instrumentality impunity or excuse for the violation of them. And it is no less repugnant to the well established rules of civil jurisprudence, than to the dictates of moral sense, that a party who deliberately and understandingly enters into an engagement and voluntarily breaks it, should be permitted to make that very

without any fault on the part of the principal, he could not recover for his services rendered.<sup>174</sup> In such cases, how-

engagement the foundation of a claim to compensation for services under it. The true ground of legal demand in all cases of contracts between parties, is that the party claiming has done all that which on his part was to be performed by the terms of the contract to entitle him to enforce the obligation of the other party. It is not sufficient that he has given to the party contracted with a right of action against him. \* \* \* Upon examining the numerous authorities, which have been collected with great industry by the counsel for the plaintiff, it will be found that a distinction has been uniformly recognized in the construction of contracts between those in which the obligation of the parties is reciprocal and independent, and those where the duty of the one may be considered as a condition precedent to that of the other. In the latter cases, it is held that the performance of the precedent obligations can alone entitle the party bound to it to his action. \* \* \* Numerous instances are indeed to be found in the books, of actions being maintained where the specific contract has not been executed by the party suing for compensation, but in every case it will be seen that the precise terms of the contract have been first held, either to have been expressly or impliedly waived, or the non-execution excused upon some known and settled principle of law. Such was the case in *Burn v. Miller*, 4 Taunt. 745; *Thorpe v. White*, 13 Johns. (N. Y.) 53; and in most of the cases cited by the plaintiff's counsel, in which the decision was had upon considering the obligation of the party to execute the contract, and not upon the construction of the contract itself. Nothing can be more unreasonable than that a man who deliberately and wantonly violates an engagement, should be permitted to seek in a court of justice an indemnity from the consequences of his voluntary act; and we are satisfied that the law will not allow it.

"That such a contract as is supposed in the exceptions before us, expresses a condition to be performed by the plaintiff, precedent to his right of action against the defendant, we cannot doubt. The plaintiff was to labor one year for an agreed price. The money was to be paid in compensation for the services and not as a consideration for an engagement to serve. Otherwise, as no precise time was fixed for payment, it might as well be recovered before the commencement of the labor or during its progress, as at any subsequent period. While the contract was executory and in the course of execution, and the plaintiff was in the employ of the defendant, it would never have been thought an action could be

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<sup>174</sup> *Stark v. Parker*, 2 Pick. (Mass.) 267, 13 Am. Dec. 425.

ever, it requires but slight evidence of assent or agreement to apportion the contract, and allow the agent to recover. Some proof of a promise on the part of the principal to

maintained for the precise sum of compensation agreed upon for the year.

"The agreement of the defendant was as entire on his part to pay, as that of the plaintiff to serve. The latter was to serve one year, the former to pay one hundred and twenty dollars. \* \* \* The performance of a year's service was in this case a condition precedent to the obligation of payment. The plaintiff must perform the condition before he is entitled to recover anything under the contract, and he has no right to renounce his agreement and recover upon a quantum meruit. The cases of *McMillan v. Vanderlip*, 12 Johns. 165, 7 Am. Dec. 299; *Jennings v. Camp*, 13 Johns. (N. Y.) 94, 7 Am. Dec. 367; *Reab v. Moor*, 19 Johns. (N. Y.) 337, are analogous in their circumstances to the case at bar, and are directly and strongly in point. The decisions in the English cases express the same doctrine: *Waddington v. Oliver*, 2 Bos. & P. (N. R.) 61; *Ellis v. Hamlen*, 3 Taunt. 52; and the principle is fully supported by all the elementary writers. \* \* \*

"The law, indeed, is most reasonable in itself. It denies only to a party an advantage from his own wrong. It requires him to act justly, by a faithful performance of his own engagements, before he exacts the fulfillment of dependent obligations on the part of others. It will not admit of the monstrous absurdity, that a man may voluntarily and without cause, violate his agreement, and make the very breach of that agreement the foundation of an action which he could not maintain under it. An apprehension that this rule may be abused to the purposes of oppression, by holding out an inducement to the employer, by unkind treatment near the close of a term of service, to drive the laborer from his engagement, to the sacrifice of his wages, is wholly groundless. It is only in cases where the desertion is voluntary, and without cause on the part of the laborer, or fault or consent on the part of the employer, that the principle applies. Wherever there is a reasonable excuse, the law allows a recovery. To say that this is not a sufficient protection, that an excuse may in fact exist in countless secret and indescribable circumstances, which from their very nature, are not susceptible of proof, or which, if proved, the law does not recognize as adequate, is to require no less than that the law should presume what can never be legally established, or should admit that as competent, which by positive rules is held to be wholly immaterial. We think well established principles are not thus to be shaken, and that in this commonwealth, more especially where the important business of husbandry leads to multi-

settle with the agent will sustain a verdict for him in such a case.<sup>175</sup>

This rule does not apply where an infant renounces a contract of employment before or after attaining his majority, not having expressly or impliedly ratified the same. In such a case he does only what he has a right to do, and he may recover the value of the services rendered prior to the renunciation,<sup>176</sup> and this without any deduction for the damages caused by his breach of the contract,<sup>177</sup> though a deduction may be made for clothing, schooling, and other necessities furnished during the time of such employment.<sup>178</sup> It is otherwise, of course, if an infant expressly or impliedly ratifies a contract of employment after attaining his majority, and subsequently renounces it.<sup>179</sup>

(d) **Same—Rule in other states.**—In some states, however, it has been thought that the above rule is too severe, and a more liberal and equitable rule has been applied, where the agent voluntarily renounces his agency, without just cause, notwithstanding the fact that the contract of agency was an indivisible or entire one. In those states, the rule followed is the one laid down in an early New Hampshire case, that where an agent voluntarily and wrongfully abandons his indivisible contract of employment before he has

plied engagements of precisely this description, it should least of all be questioned, that the laborer is worthy of his hire, only upon the performance of his contract and as the reward of fidelity."

<sup>175</sup> *Hogan v. Titlow*, 14 Cal. 255.

<sup>176</sup> *Ray v. Haines*, 52 Ill. 485; *Dallas v. Hollingsworth*, 3 Ind. 537; *Wheatly v. Miscal*, 5 Ind. 142; *Judkins v. Walker*, 17 Me. 38, 35 Am. Dec. 239; *Derocher v. Continental Mills*, 58 Me. 217; *Vehue v. Pinkham*, 60 Me. 142; *Moses v. Stevens*, 2 Pick. (Mass.) 332; *Gaffney v. Hayden*, 110 Mass. 137; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Lowe v. Sinklear*, 27 Mo. 308; *Lufkin v. Mayall*, 25 N. H. 82; *Madbury v. Watrous*, 7 Hill (N. Y.) 110; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375; *Price v. Furman*, 27 Vt. 268; *Thomas v. Dike*, 11 Vt. 273.

<sup>177</sup> *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375; *Derocher v. Continental Mills*, 58 Me. 217. But see *Lowe v. Sinklear*, 27 Mo. 308; *Thomas v. Dike*, 11 Vt. 273; *Moses v. Stevens*, 2 Pick. (Mass.) 332.

<sup>178</sup> *Meredith v. Crawford*, 34 Ind. 399.

<sup>179</sup> *Forsyth v. Hastings*, 27 Vt. 646.

fully performed his services under it, and the principal actually derives a benefit from the services rendered over and above the damages occasioned by the breach of the contract, the agent would be entitled to recover on a quantum meruit, but not on the original contract, the reasonable value of his services, less the damage sustained by the principal.<sup>180</sup> In such a case, he cannot recover upon the

<sup>180</sup> *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713. The decisions following this rule are:

*Indiana*: *Ricks v. Yates*, 5 Ind. 115; *Coe v. Smith*, 4 Ind. 82, 58 Am. Dec. 618; *Adams v. Cosby*, 48 Ind. 153; *Everroad v. Schwartzkopf*, 123 Ind. 35; *Gastlin v. Weeks*, 2 Ind. App. 222, overruling *De Camp v. Stevens*, 4 Blackf. 24.

*Iowa*: *Pixler v. Nichols*, 8 Iowa, 106, 74 Am. Dec. 298; *Wolf v. Gerr*, 43 Iowa, 339; *Byerlee v. Mendel*, 39 Iowa, 382; *McAfferty v. Hale*, 24 Iowa, 356; *McClay v. Hedge*, 18 Iowa, 66. But see *Powers v. Wilson*, 47 Iowa, 666.

*Kansas*: *Duncan v. Baker*, 21 Kan. 99, 31 Am. Rep. 102.

*Michigan*: *Allen v. McKibbin*, 5 Mich. 449.

*Nebraska*: *Purcell v. McComber*, 11 Neb. 209, 35 Am. Rep. 476, 38 Am. Rep. 366; *McMillan v. Malloy*, 10 Neb. 228, 35 Am. Rep. 471.

*Texas*: *Carroll v. Welch*, 26 Tex. 147; *Wilson v. Adams*, 15 Tex. 323.

In *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713, the court in part says: "It has been held, upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to fulfill the contract, by performing the whole labor contracted for, is not entitled to recover anything for the labor actually performed, however much he may have done towards the performance, and this has been considered the settled rule of law upon this subject. \* \* \* That such rule in its operation may be very unequal, not to say unjust, is apparent. A party who contracts to perform certain specified labor, and who breaks his contract in the first instance, without any attempt to perform it, can only be made liable to pay the damage which the other party has sustained by reason of such nonperformance, which in many instances may be trifling—whereas a party who, in good faith, has entered upon the performance of his contract, and nearly completed it, and then abandoned the further performance—although the other party has had the full benefit of all that has been done, and has perhaps sustained no actual damage—is in fact subjected to a loss of all which has been performed, in the nature of damages for the non-fulfillment of the remainder, upon the technical rule, that the contract must be fully performed, in order to a recovery of any part of the



contract, because the services, which were to entitle him to the sum agreed upon, have never been performed.<sup>181</sup> But if

compensation. By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more, by the breach of the contract, than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action. The case before us presents an illustration. Had the plaintiff in this case never entered upon the performance of his contract, the damage could not probably have been greater than some small expense and trouble incurred in procuring another to do the labor which he had contracted to perform. But having entered upon the performance, and labored nine and a half months, the value of which labor to the defendant, as found by the jury, is ninety-five dollars, if the defendant can succeed in this defense, he in fact receives nearly five-sixths of the value of a whole year's labor, by reason of the breach of contract by the plaintiff, a sum not only utterly disproportionate to any probable, not to say possible damage, which could have resulted from the neglect of the plaintiff to continue the remaining two and a half months, but altogether beyond any damage which could have been recovered by the defendant, had the plaintiff done nothing towards the fulfillment of his contract.

\* \* \* It is said, that where a party contracts to perform certain work, and to furnish materials, as, for instance, to build a house, and the work is done, but with some variations from the mode prescribed by the contract, yet if the other has the benefit of the labor and materials, he should be bound to pay so much as they are reasonably worth. 2 Stark. Ev. 97, 98; Hayward v. Leonard, 7 Pick. 181 [19 Am. Dec. 268]; Smith v. First Congregational Meeting-house, 8 Pick. 178; Jewell v. Schroepfel, 4 Cow. 564; Hayden v. Madison, 7 Greenl. 78; Bull. N. P. 139; 4 Bos. & P. 355; 10 Johns. 36; 13 Johns. 97; 7 East, 479. \* \* \* It is, in truth, virtually conceded in such cases that the work has not been done, for if it had been, the party performing it would be entitled to recover upon the contract itself, which, it is held, he cannot do. Those cases are not to be distinguished, in principle, from the present, unless it be in the circumstance that where the party has contracted to furnish materials, and do certain labor, as to build a house in a specified manner, if it is not done according to the contract, the party for whom it is built may refuse to receive it—elect to take no benefit from what has been performed; and therefore if he does receive, he shall be bound to pay the value—whereas, in a contract for labor merely, from day to day, the party is continually receiving

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<sup>181</sup> Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 714.

the principal receives the services, and thereby derives a benefit over and above the damage which has resulted from the breach by the agent, such benefit furnishes a new con-

the benefit of the contract under an expectation that it will be fulfilled, and cannot, upon the breach of it, have an election to refuse to receive what has been done, and thus discharge himself from payment. But we think this difference in the nature of the contracts does not justify the application of a different rule in relation to them. The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge, also, that the other may eventually fail of completing the entire term. If, under such circumstances, he actually receives a benefit from the labor performed, over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he perhaps enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it, such as it is, that he should pay for the value of the house.

\* \* \* It is said, that in those cases where the plaintiff has been permitted to recover, there was an acceptance of what had been done. The answer is, that where the contract is to labor from day to day, for a certain period, the party for whom the labor is done, in truth stipulates to receive it from day to day, as it is performed, and although the other may not eventually do all he has contracted to do, there has been necessarily an acceptance of what has been done in pursuance of the contract, and the party must have understood, when he made the contract, that there was to be such acceptance. If, then, the party stipulates in the outset to receive part performance from time to time, with a knowledge that the whole may not be completed, we see no reason why he should not equally be holden to pay for the amount of value received, as where he afterwards takes the benefit of what has been done, with a knowledge that the whole which was contracted for has not been performed. In neither case has the contract been performed. In neither can an action be sustained on the original contract. In both the party has assented to receive what is done. The only difference is, that in the one case the assent is prior, with a knowledge that all may not be performed; in the other it is subsequent, with a knowledge that the whole has not been accomplished. We have no hesitation in holding that the same rule should be applied to both classes of cases, especially as the opera-

sideration, and the law thereupon raises a promise to pay the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement,

tion of the rule will be to make the party who has failed to fulfill his contract liable to such amount of damages as the other party has sustained, instead of subjecting him to an entire loss for a partial failure, and thus making the amount received in many cases wholly disproportionate to the injury. 1 Saund. 320, C; 2 Starkie Ev. 643. It is as 'hard upon the plaintiff to preclude him from recovering at all, because he has failed as to his part of his entire undertaking,' where his contract is to labor for a certain period, as it can be in any other description of contract, provided the defendant has received a benefit and value from the labor actually performed. We hold, then, that where a party undertakes to pay upon a special contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it, and where the parties have made an express contract, the law will not imply and raise a contract different from that which the parties have entered into, except upon some farther transaction between the parties. In case of a failure to perform such special contract by the default of the party contracting to do the service, if the money is not due by the terms of the special agreement, he is not entitled to recover for his labor, or for the materials furnished, unless the other party receives what has been done or furnished, and upon the whole case derives a benefit from it. Taft v. Montague, 14 Mass. 282 [7 Am. Dec. 215]; 2 Starkie Ev. 644. \* \* \*

In fact, we think the technical reasoning that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it—that the contract being entire, there can be no apportionment—and that there being an express contract no other can be implied, even upon the subsequent performance of service—is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe, that the general understanding of the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary. Where a beneficial service has been performed and received, therefore, under contracts of this kind, the mutual agreements cannot be considered as going to the whole of the consideration, so as to make them mutual conditions, the one precedent to the other, without a specific proviso to that effect. Boone v. Eyre, 1 H. Bl. 273, note; Campbell v. Jones, 6

and the agent is entitled to recover on his new case, for the services rendered and accepted by the principal.<sup>182</sup> But if, on the agent's failure to perform the whole service, the nature of the contract be such that the principal can reject what has been done, and refuses to receive any benefit from the part performance, he is entitled to do so, and in such a case the agent can recover no compensation, however much he may have done towards the performance, unless the principal has before assented to and accepted what has been done.<sup>183</sup> "He has, in such case, received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay, because his express promise was only to pay on receiving the whole, and having

Term R. 570; *Ritchie v. Atkinson*, 10 East, 295; *Burn v. Miller*, 4 Taunt. 745. It is easy, if parties so choose, to provide by an express agreement that nothing shall be earned, if the laborer leaves his employer without having performed the whole service contemplated, and then there can be no pretense for a recovery if he voluntarily deserts the service before the expiration of the time.

\* \* \* If a person makes a contract fairly, he is entitled to have it fully performed, and if this is not done, he is entitled to damages. He may maintain a suit to recover the amount of damages sustained by the nonperformance. The benefit and advantage which the party takes by the labor, therefore, is the amount of value which he receives, if any, after deducting the amount of damage; and if he elects to put this in defense he is entitled so to do, and the implied promise which the law will raise, in such case, is to pay such amount of the stipulated price for the whole labor, as remains after deducting what it would cost to procure a completion of the residue of the service, and also any damage which has been sustained by reason of the non-fulfillment of the contract.

\* \* \* This rule, by binding the employer to pay the value of the service he actually receives, and the laborer to answer in damages where he does not complete the entire contract, will leave no temptation to the former to drive the laborer from his service near the close of his term, by ill-treatment, in order to escape from payment; nor to the latter to desert his service before the stipulated time, without a sufficient reason; and it will, in most instances, settle the whole controversy in one action, and prevent a multiplicity of suits and cross actions."

<sup>182</sup> *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713.

<sup>183</sup> *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 720.

actually received nothing, the law cannot, and ought not, to raise an implied promise to pay."<sup>184</sup>

The amount, however, which the agent can recover is only the reasonable worth of the benefit the principal has received upon the whole transaction, and in estimating the value of his services, the contract price cannot be exceeded.<sup>185</sup> If the damage sustained by the principal is equal to or greater than the value of the services performed, the agent can recover nothing.<sup>186</sup> Nor can the principal, in a suit by the agent in such a case, claim judgment for damages beyond the amount of the benefit which he has received;<sup>187</sup> unless it is a suit in equity, or the case is in a state where the Code provides for a counterclaim, in which case the principal may file such counterclaim and recover damages, if the amount of his damages exceeds the agent's claim for services.<sup>188</sup> Where the damage sustained by the principal is much greater than the value of the agent's services, the principal, if he so elects, may waive his right to a reduction, by paying the agent the reasonable value of his services, and bring a separate action to recover his damages for the nonperformance.<sup>189</sup>

**(e) What abandonment is sufficient to forfeit compensation.**

—Whether or not an agent has renounced or abandoned his agency so as to forfeit his compensation is a question of fact to be determined by the jury from all the facts and circumstances in the case.<sup>190</sup> To work such a forfeiture, the

<sup>184</sup> *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713.

<sup>185</sup> *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713; *Carroll v. Welch*, 26 Tex. 149; *Allen v. McKibbin*, 5 Mich. 449.

<sup>186</sup> *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713; *Pixler v. Nichols*, 8 Iowa, 106, 74 Am. Dec. 298.

<sup>187</sup> *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 722.

<sup>188</sup> *Standley v. Northwestern Mut. L. Ins. Co.*, 95 Ind. 254; *Pomeroy*, Rem. (3d Ed.) § 736.

<sup>189</sup> *Crowninshield v. Robinson*, 1 Mason, 93, Fed. Cas. No. 3,451; *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713.

<sup>190</sup> *Ford v. Danks*, 16 La. Ann. 119; *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77; *Hughes v. Wamsutta Mills*, 11 Allen (Mass.) 201; *Partington v. Wamsutta Mills*, 110 Mass. 467; *Naylor v. Fall River Iron Works Co.*, 118 Mass. 317; *Heber v. United States Flax Mfg. Co.*, 13 R. I. 303.

agent's abandonment must be his direct, voluntary act, or the natural and necessary consequence of some voluntary act on his part, or the result of some act committed by him with a design to terminate the contract or employment, or render its further prosecution impossible. Such a forfeiture is not incurred where the abandonment is immediately caused by acts or occurrences not foreseen or anticipated, over which the agent had no control, and the natural and necessary consequence of which was not to cause the termination of the employment.<sup>191</sup> So a mere temporary absence usually does not have this effect. It may be a proper cause for a discharge, but in the absence of an express contract, it is generally not such an abandonment as to work a forfeiture of compensation.<sup>192</sup> But if the agent left his work willfully, without sufficient cause to justify or excuse his conduct, under such circumstances and in such manner that the principal, considering the nature of the work and its relation to the other operations of the principal's business, might fairly and reasonably regard his leaving and continued absence as an abandonment of his work, rendering it necessary to procure another person to supply the place, it is a breach of the contract and a forfeiture, although there may have been an intention on the part of the agent to be absent only temporarily.<sup>193</sup> Whether the agent's absence is merely temporary or whether it constitutes an abandonment is to be determined by the agent's acts and not by his undisclosed intentions.<sup>194</sup>

**(f) Waiver of forfeiture of compensation by the principal.—** Although an agent has wrongfully renounced or abandoned his agency, if the principal, with a full knowledge of the facts, receives him back without objection, and the agent continues to render services until the end of the term, the

<sup>191</sup> *Hughes v. Wamsutta Mills*, 11 Allen (Mass.) 201. See cases cited ante, note 173.

<sup>192</sup> *Heber v. United States Flax Mfg. Co.*, 13 R. I. 303.

<sup>193</sup> *Naylor v. Fall River Iron Works Co.*, 118 Mass. 317. And see cases cited in note 173, supra.

<sup>194</sup> *Partington v. Wamsutta Mills*, 110 Mass. 467; *Naylor v. Fall River Iron Works Co.*, 118 Mass. 317. And see cases cited in note 173, supra.

principal thereby waives his right to declare compensation under the contract forfeited, and the agent may recover for the services actually rendered.<sup>195</sup> And the same is true if the principal, after the agent has abandoned his contract, offers to pay him the value of his services, based upon the compensation agreed upon.<sup>196</sup> And, of course, the principal may expressly waive this forfeiture upon such terms as may be agreed upon between him and his agent.

### § 368. Principal's right of recoupment.

Whenever an agent sues his principal for compensation, either upon an express contract or upon a quantum meruit, the principal may recoup, against the agent's claim, any damages he has sustained by reason of the agent's negligence, misconduct, or failure to perform services, in the transaction or contract out of which the agent's suit arises;<sup>197</sup> and this right is good, not only against the agent himself, but also against the latter's assignee,<sup>198</sup> or against any one into whose hands the agent's claim comes to be sued upon. But he may recoup only such actual damages as arise out of the contract or transaction upon which the agent bases

<sup>195</sup> *Ridgway v. Hungerford Market Co.*, 3 Adol. & E. 171; *Thrift v. Payne*, 71 Ill. 408; *McGrath v. Bell*, 1 Jones & S. (N. Y.) 195; *Bast v. Byrne*, 51 Wis. 531, 37 Am. Rep. 841; *Prentiss v. Ledyard*, 28 Wis. 131.

<sup>196</sup> *Patnote v. Sanders*, 41 Vt. 66, 98 Am. Dec. 564; *Boyle v. Parker*, 46 Vt. 343; *Seaver v. Morse*, 20 Vt. 620; *Hogan v. Titlow*, 14 Cal. 255.

<sup>197</sup> *Mobile & Montgomery R. Co. v. Clanton*, 59 Ala. 392, 31 Am. Rep. 15; *Brunson v. Martin*, 17 Ark. 270; *Stoddard v. Treadwell*, 26 Cal. 294; *Bixby v. Parsons*, 49 Conn. 483, 44 Am. Rep. 246; *Satchwell v. Williams*, 40 Conn. 371; *Lee v. Clements*, 48 Ga. 128; *Brigham v. Hawley*, 17 Ill. 38; *Sanger v. Fincher*, 27 Ill. 347; *Campbell v. Somerville*, 114 Mass. 334; *Allen v. McKibbin*, 5 Mich. 449; *Dunlap v. Hand*, 26 Miss. 460; *Harper v. Ray*, 27 Miss. 622; *Blodgett v. Berlin Mills Co.*, 52 N. H. 215; *Marshall v. Hann*, 17 N. J. Law, 425; *Still v. Hall*, 20 Wend. (N. Y.) 51; *Allaire Works v. Gulon*, 10 Barb. (N. Y.) 55; *Runyan v. Nichols*, 11 Johns. (N. Y.) 547; *Carroll v. Welch*, 26 Tex. 149; *Swift v. Harriman*, 30 Vt. 607; *Phelps v. Paris*, 39 Vt. 511; *Barker v. Troy & Rutland R. Co.*, 27 Vt. 766; *De Witt v. Cullings*, 32 Wis. 298.

<sup>198</sup> *Bixby v. Parsons*, 49 Conn. 483, 44 Am. Rep. 246.

his claim for compensation.<sup>199</sup> He cannot recoup damages that have been caused by the agent in a different and independent transaction, or without the scope of his authority,<sup>200</sup> nor can he recoup damages that are merely speculative, or remote, except perhaps in cases of fraud.<sup>201</sup> And such damages may be recouped only in the way of reducing the agent's claim for compensation, and if they exceed such claim, the principal can have no recovery for the excess,<sup>202</sup> except where statutes expressly so provide.<sup>203</sup> Nor can the principal, after having once set the damages up by way of recoupment bring an independent action to recover the excess.<sup>204</sup>

The principal is not compelled to claim such damages by way of recoupment, but if he so chooses he may waive that right and permit the agent to recover for his services, and bring an independent action for the damages sustained;<sup>205</sup> and that would probably be the better procedure, where the damages are greatly in excess of the agent's claim for services. But if he once uses them to reduce the agent's claim, he cannot afterwards make them the subject of an action.

<sup>199</sup> *Harris v. Gamble*, 6 Ch. Div. 748; *Mayberry v. Leech*, 58 Ala. 339; *Desha's Ex'rs v. Robinson*, 17 Ark. 228; *Satchwell v. Williams*, 40 Conn. 371; *Sanger v. Fincher*, 27 Ill. 346; *Waterman v. Clark*, 76 Ill. 428; *Fessenden v. Forest Paper Co.*, 63 Me. 175; *Ward v. Wilson*, 3 Mich. 1; *Allen v. McKibbin*, 5 Mich. 449; *Allaire Works v. Guion*, 10 Barb. (N. Y.) 55.

<sup>200</sup> *Nashville & C. R. Co. v. Chumley*, 6 Helsk. (Tenn.) 325.

<sup>201</sup> *Finney v. Cadwallader*, 55 Ga. 75; *Pettee v. Tennessee Mfg. Co.*, 1 Sneed (Tenn.) 381.

<sup>202</sup> *Brunson v. Martin*, 17 Ark. 270; *Streeter v. Streeter*, 43 Ill. 156; *Holcraft v. Mellott*, 57 Ind. 539; *Ward v. Fellers*, 3 Mich. 281; *Fowler v. Payne*, 52 Miss. 210; *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713.

<sup>203</sup> In some states, the code expressly provides that an affirmative judgment may be rendered in favor of the defendant on a counterclaim, and the word "counterclaim" therein used, includes recoupment. See *Stover's N. Y. Ann. Code*, 514, and see statutes in other states.

<sup>204</sup> *Ward v. Fellers*, 3 Mich. 281.

<sup>205</sup> *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713; *Crowninshield v. Robinson*, 1 Mason, 93, Fed. Cas. No. 3,451; *Stoddard v. Treadwell*, 26 Cal. 294.



The above rules do not apply, however, where the agent is an infant, and the damages have been caused by his failure to perform the services required of him by the contract of employment, and in such case the principal can have no recoupment against his claim for compensation.<sup>206</sup>

**§ 369. When principal may offset moneys advanced.**

Where an agent is employed at a fixed salary, and in addition thereto, all his expenses not to exceed a certain sum, the principal has a right to know that the expenses charged are legitimate business expenses, and he is not bound to pay anything without knowing what it was for; and until the agent accounts for money advanced for expenses, the principal may offset the money so advanced against the agent's claim for a balance due on salary.<sup>207</sup>

**II. REIMBURSEMENT AND INDEMNITY.**

**§ 370. Reimbursement of agent.**

A principal is under an obligation to reimburse his agent for all advances, expenses, and disbursements made by him, in good faith, for the benefit of the principal and in the proper execution of the agency, whether there is an express promise by the principal to this effect or not.<sup>208</sup> Interest

<sup>206</sup> *Ray v. Haines*, 52 Ill. 485; *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286; *Gaffney v. Hayden*, 110 Mass. 137, 14 Am. Rep. 580; *Vent v. Osgood*, 19 Pick. (Mass.) 575; *Widrig v. Taggart*, 51 Mich. 103; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375; *Meeker v. Hurd*, 31 Vt. 642. But see *Lowe v. Sinklear*, 27 Mo. 308; *Thomas v. Dike*, 11 Vt. 273; *Moses v. Stevens*, 2 Pick. (Mass.) 332.

<sup>207</sup> *Moyes v. Rosenbaum*, 98 Ill. App. 7.

<sup>208</sup> *Sentance v. Hawley*, 13 C. B. (N. S.) 458; *Bristow v. Whitmore*, 9 H. L. Cas. 391; *Child v. Morley*, 8 Term R. 610; *Bibb v. Allen*, 149 U. S. 481; *Bartlett v. Smith*, 13 Fed. 263; *Parker v. Moore*, 115 Fed. 799; *Warren v. Hewitt*, 45 Ga. 501; *Beach v. Branch*, 57 Ga. 362; *Armstrong v. Pease*, 66 Ga. 70; *Searing v. Butler*, 69 Ill. 575; *Rochester v. Levering*, 104 Ind. 562; *Veltum v. Koehler*, 85 Minn. 125; *Blazo v. Gill*, 143 N. Y. 232; *Powell v. Newburgh*, 19 Johns. (N. Y.) 284; *Mohawk & Hudson R. Co. v. Costigan*, 2 Sandf. Ch. (N. Y.) 306; *Woerz v. Schumacher*, 37 App. Div. (N. Y.) 374; *Maitland v. Martin*, 86 Pa. 120; *Bush v. Froelich*, 14 S. D. 62; *Ruffner v. Hewitt*, 7 W. Va. 585; *Clark v. Randall*, 9 Wis. 135, 76 Am. Dec. 252.

also may be recovered upon such advances, and disbursements, whenever the express agreement of the parties, nature of the business, and usages of trade show such to have been the intention of the parties.<sup>209</sup> This is true not only of attorneys,<sup>210</sup> auctioneers,<sup>211</sup> factors and brokers,<sup>212</sup> but of all other agents.<sup>213</sup>

The right of an agent to reimbursement, however, only extends to such expenses and disbursements as are reasonably necessary in the due execution of the agency. He is not entitled to reimbursement for unreasonable or unnecessary disbursements or for disbursements or losses made or incurred by him in violation of the instructions of his principal, or in exceeding his authority, there being no ratification by the principal in such case, or for disbursements or losses otherwise rendered necessary or incurred by reason of his own default or negligence.<sup>214</sup> And an agent cannot recover from his principal for disbursements in a transaction which the agent knew or was bound to know was illegal, as in a gambling transaction,<sup>215</sup> a dealing

<sup>209</sup> *Calton v. Bragg*, 15 East, 223; *Bruce v. Hunter*, 3 Camp. 467; *Meech v. Smith*, 7 Wend. (N. Y.) 315; *Woerz v. Schumacher*, 37 App. Div. (N. Y.) 374; *Liotard v. Graves*, 3 Caines (N. Y.) 226; *Delaware Ins. Co. v. Delaunie*, 3 Bin (Pa.) 295.

<sup>210</sup> Post, § 715.

<sup>211</sup> Post, § 920.

<sup>212</sup> Post, §§ 784, 865.

<sup>213</sup> See the cases in note 208, *supra*.

<sup>214</sup> *Stokes v. Lewis*, 1 Term R. 20; *Howard v. Tucker*, 1 Barn. & Adol. 712; *Brown v. Clayton*, 12 Ga. 564; *Godman v. Meixsel*, 65 Ind. 32; *Chamberlain's Adm'r v. Chamberlain*, 19 Ky. L. R. 572, 41 S. W. 312; *J. I. Case Threshing Mach. Co. v. Gardner*, 24 Ky. L. R. 63, 67 S. W. 367; *Clamagaran v. Sacerdotte*, 8 Mart. (N. S., La.) 538; *Summers v. Clark*, 29 La. Ann. 93; *Woodlief v. Moncure*, 17 La. Ann. 241; *Keyes v. Westford*, 17 Pick. (Mass.) 273; *Sheffield v. Linn*, 62 Mich. 151; *Veltum v. Koehler*, 85 Minn. 125; *Burby v. Roome*, 7 Misc. (N. Y.) 167; *Schrack v. McKnight*, 84 Pa. 26; *Maitland v. Martin*, 86 Pa. 120.

<sup>215</sup> Where wagers are made illegal by statute, an agent who pays out money for his principal on a wager cannot recover therefor from the principal. *Tatam v. Reeve* [1893] 1 Q. B. Div. 44. It is otherwise where wagers are merely void and unenforceable, and not illegal. *Thacker v. Hardy*, 4 Q. B. Div. 685; *Read v. Anderson*, 13 Q. B. Div. 779.

in futures,<sup>216</sup> etc. It is otherwise, however, in case of a contract rendered illegal by the secret intention of the principal not to perform it according to its terms, of which intention the agent is ignorant.<sup>217</sup> Nor can the agent recover reimbursement for charges or expenses, which he has expressly agreed to pay himself, even though there is a custom or usage in the vicinity to the contrary.<sup>218</sup> Thus, in a contract of employment with a general agent, an insurance company obligated the agent to employ subagents in his territory, providing that commissions allowed upon the business done should be in full payment of his compensation for his services and those of his subagent. It also provided that the contract might be terminated at the option of either party, and that in case of its termination before five years, the company should be under no obligation to pay the agent anything beyond the commissions earned up to the time of the termination. On the termination by the company according to such contract, it could not be held liable to the agent for advances made by him to the subagents, and which had never been charged to the company in his monthly report.<sup>219</sup>

**§ 371. Agent's right to indemnity.**

A principal is also under an obligation to indemnify his agent against any losses or damages suffered by reason of any act performed by him in the due execution of the agency, unless the act was illegal and the agent knew or was chargeable with knowledge of its illegality; for an agent has a right to assume, in the absence of notice to the contrary, that his principal will not require him to do acts which will render him liable to third persons, and if the principal does require him to perform such acts, the principal, and not the innocent agent, should suffer the consequences; and in such cases, if there is not an express promise of indemnity, it will usually be implied.<sup>220</sup> The loss, however, must

<sup>216</sup> *Harvey v. Merrill*, 150 Mass. 1, 15 Am. St. Rep. 159; and many other cases cited ante, § 39 (n).

<sup>217</sup> *Parker v. Moore*, 115 Fed. 799.

<sup>218</sup> *Champion Mach. Co. v. Ervay* (Tex. App.) 16 S. W. 172.

<sup>219</sup> *Montgomery v. Aetna Life Ins. Co.*, 97 Fed. 913.

<sup>220</sup> *Betts v. Gibbins*, 2 Adol. & E. 57; *Adamson v. Jarvis*, 4 Bing.

be such as results from the acts of the agent while properly executing his authority. If it is caused by reason of his disobeying or exceeding his instructions, or acting negligently, or by reason of his misconduct, he is not entitled to indemnity therefor.<sup>221</sup> But the mere fact that the agent was negligent does not affect his right to indemnity, if such neglect does not result in an injury to the principal.<sup>222</sup> Thus, in accordance with this doctrine, a principal is bound to indemnify his agent when the latter has been held liable to a third person for a trespass upon or conversion of property innocently committed by the agent in the due course of his employment,<sup>223</sup> or for a trespass against the person.<sup>224</sup> So a principal is bound to indemnify his agent where the

66; *Duncan v. Hill*, L. R. 8 Exch. 242; *Read v. Anderson*, 13 Q. B. Div. 779; *Bibb v. Allen*, 149 U. S. 481; *Moore v. Appleton*, 26 Ala. 633, 34 Ala. 147, 73 Am. Dec. 448; *Stocking v. Sage*, 1 Conn. 522; *Beach v. Branch*, 57 Ga. 362; *Nelson v. Cook*, 17 Ill. 443; *Otter Creek Lumber Co. v. McElwee*, 37 Ill. App. 285; *Haskin v. Haskin*, 41 Ill. 197; *Flower v. Downs*, 6 La. Ann. 538; *Garland v. Scott*, 15 La. Ann. 143; *Drummond v. Humphreys*, 39 Me. 347; *Gower v. Emery*, 18 Me. 79; *Greene v. Goddard*, 9 Metc. (Mass.) 212; *Avery v. Halsey*, 14 Pick. (Mass.) 174; *Denney v. Wheelwright & Co.*, 60 Miss. 733; *Fowler v. New York Gold Exch. Bank*, 67 N. Y. 138; *Ramsay v. Gardner*, 11 Johns. (N. Y.) 439; *Castle v. Noyes*, 14 N. Y. 329; *Howe v. Buffalo, N. Y. & E. R. Co.*, 37 N. Y. 297; *Allaire v. Ouland*, 2 Johns. Cas. (N. Y.) 54; *Stone v. Hooker*, 9 Cow. (N. Y.) 154; *Ives v. Jones*, 25 N. C. (3 Ired.) 538, 40 Am. Dec. 421; *D'Arcy v. Lyle*, 5 Bin. (Pa.) 441; *Maitland v. Martin*, 86 Pa. 120; *Clark v. Jones*, 16 Lea (Tenn.) 351; *Saveland v. Green*, 36 Wis. 612.

<sup>221</sup> *Capp v. Topham*, 6 East, 392; *Bensley v. Moon*, 7 Ill. App. 415; *Haskin v. Haskin*, 41 Ill. 197; *Nelson v. Cook*, 17 Ill. 443, 450; *J. I. Case Threshing Mach. Co. v. Gardner*, 24 Ky. L. R. 63, 67 S. W. 367; *Baily v. Burgess*, 48 N. J. Eq. 411; *Fuller v. Ellis*, 39 Vt. 345, 94 Am. Dec. 327.

<sup>222</sup> *Haskin v. Haskin*, 41 Ill. 197.

<sup>223</sup> *Adamson v. Jarvis*, 4 Bing. 66; *Moore v. Appleton*, 26 Ala. 633, 34 Ala. 147, 73 Am. Dec. 448; *Nelson v. Cook*, 17 Ill. 443; *Drummond v. Humphreys*, 39 Me. 347; *Castle v. Noyes*, 14 N. Y. 329; *Ives v. Jones*, 25 N. C. (3 Ired.) 538, 40 Am. Dec. 421; and other cases in note 220, *supra*.

<sup>224</sup> *Fletcher v. Harcot, Hutton*, 55; *Howe v. Buffalo, N. Y. & E. R. Co.*, 37 N. Y. 297.

agent has been held liable on a contract entered into by the agent in his own name but for the benefit of the principal, who refused or failed to perform the same.<sup>225</sup> But the fact that the principal refuses to carry out the transaction does not entitle the agent to indemnity unless it is shown that the agent has fully and properly executed the agency on his part.<sup>226</sup>

If the agent knows that he has become liable to a third party, by reason of acts done in the proper course of his employment, he need not wait until he has been sued before he may pay such damages and be entitled to indemnity from his principal therefor, though the latter is bound to reimburse him only for the amount of damages that might have been recovered against him, notwithstanding he may have paid more.<sup>227</sup>

As has been stated above, the right to indemnity does not extend, although there is an express promise of indemnity, to acts which the agent knew to be illegal, or which, although he may not have had such knowledge in fact, were expressly prohibited and declared illegal by statute, or were otherwise manifestly contrary to law or public policy, for in such case he is chargeable with knowledge of the illegality;<sup>228</sup> though an express promise to indemnify, founded upon a sufficient consideration and given after an

<sup>225</sup> *Saveland v. Green*, 36 Wis. 612; *Clark v. Jones*, 16 Lea (Tenn.) 351.

<sup>226</sup> *Acme Harvester Co. v. Madden*, 4 Kan. App. 598.

<sup>227</sup> *Saveland v. Green*, 36 Wis. 612.

<sup>228</sup> *Holman v. Johnson*, 1 Cowp. 341; *Bibb v. Allen*, 149 U. S. 498; *Moore v. Appleton*, 26 Ala. 633; *Id.*, 34 Ala. 147, 73 Am. Dec. 448; *Nelson v. Cook*, 17 Ill. 443; *Harvey v. Merrill*, 150 Mass. 1, 15 Am. St. Rep. 159; *Forniquet v. Tegarden*, 24 Miss. 96; *Coventry v. Barton*, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; *Cumpston v. Lambert*, 18 Ohio, 81, 51 Am. Dec. 442; *Harvey v. Doty*, 54 S. C. 382; *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260. Thus, where there is a statute making a contract for the future delivery of grain void, unless it is the bona fide intention of the parties at the time the contract is made that the grain shall be actually delivered and received, an agent making such a contract with a third party cannot recover of his principal for his losses, unless he shows that it was the bona fide intention of his principal to receive the grain. *Harvey v. Doty*, 54 S. C. 382.

illegal act has been committed, is valid and may be enforced.<sup>229</sup> The fact that the act for which the agent has been held liable was illegal does not affect his right to be indemnified by the principal, whether upon an express or implied promise, unless he knew or was chargeable with knowledge of the illegality.<sup>230</sup>

### III. REMEDIES OF AGENT AS AGAINST PRINCIPAL.

#### § 372. Personal remedies of agent to recover compensation.

When compensation is due from a principal to his agent, the agent has the same right as any other creditor to resort to the ordinary remedies to recover the same. In the case of a simple contract, he may maintain an action of special assumpsit on an express promise. Or he may maintain an action of debt where the amount due is certain. Where there is no express contract for compensation, he may maintain general assumpsit to recover, on the quantum meruit, what the services are reasonably worth. And even in the case of a special agreement for compensation, he may maintain an action on the quantum meruit under some circumstances.<sup>231</sup> If the contract is under seal, he may maintain an action of covenant or debt according to the circumstances.<sup>232</sup> As a general rule a suit in equity for an accounting cannot be prosecuted by an agent against his principal in order to recover commissions for his services.<sup>233</sup> But where the accounts between the principal and his agent are so intri-

<sup>229</sup> *Hacket v. Tilly*, 11 Mod. 93; *Knight v. Nelson*, 117 Mass. 458; *Doty v. Wilson*, 14 Johns. (N. Y.) 378; *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Kneeland v. Rogers*, 2 Hall (N. Y.) 579.

<sup>230</sup> *Moore v. Appleton*, 26 Ala. 633; *Id.*, 34 Ala. 147, 73 Am. Dec. 448; *Bibb v. Allen*, 149 U. S. 481; *Nelson v. Cook*, 17 Ill. 449; *Jacobs v. Pollard*, 10 Cush. (Mass.) 238, 57 Am. Dec. 105; *Forniquet v. Tegarden*, 24 Miss. 96; *Armstrong v. Clarion Co.*, 66 Pa. 218; *Jameison v. Calhoun*, 2 Speer (S. C.) 19; *Davis v. Arledge*, 3 Hill (S. C.) 170, 30 Am. Dec. 360; *Kemper v. Kemper*, 3 Rand. (Va.) 8.

<sup>231</sup> See *Ship. Com. Law Pl.* (2d Ed.) 21, 221.

<sup>232</sup> *Ship. Com. Law Pl.* (2d Ed.) 226, 231.

<sup>233</sup> *Blyth v. Whiffin*, 27 Law T. (N. S.) 330; *Padwick v. Hurst*, 18 Beav. 575, 23 Law J. Ch. 657; *Johnston v. Berlin*, 35 Misc. (N. Y.) 146; *Skilton v. Payne*, 18 Misc. (N. Y.) 332; *Smith v. Bodine*, 74 N. Y. 30; *Arnold v. Angell*, 62 N. Y. 508.

cate or complicated that they cannot be satisfactorily disposed of in an action at law, the agent may sue in equity to have an account taken.<sup>284</sup>

**§ 373. Agent's lien for compensation, advances, and disbursements—In general.**

Besides the personal remedies, referred to in the preceding section, by which may be enforced the obligation due to him by the principal, the agent has also, in many cases, a special or passive remedy by which he may retain funds or property of the principal in his hands until his claim for compensation, advances, or disbursements is satisfied. This is called the agent's right to a lien, or in other words, is known as an agent's lien. It is beyond the scope of a work of this nature to give a general discussion of the subject of liens, and only such rules as apply to agents in general will be discussed in these sections. Liens existing in favor of special agents, as attorneys, factors, brokers, etc., will be considered in subsequent chapters.<sup>285</sup> An agent's lien may arise in one of three ways: either (1) it may be created by express agreement between the parties; or (2) it may be created by statutory provision; or (3) it may arise by the common law. The first of these, of course, depends upon the contract between the parties. The second will be governed by the particular statute, and has reference more especially to particular classes of agents, as will be seen in subsequent chapters.<sup>286</sup> It is the object of these sections, however, to treat especially of the agent's common-law lien.

As a general rule, then, by the common law, an agent who performs services for another, and as a result thereof comes into possession of property or funds for his principal, has a lien on such property or funds for his compensation, advances, and expenditures in the transaction, or, in other words, he has a right to retain such property or funds until his claim for compensation, advances, and expenditures, in respect to

<sup>284</sup> *Blyth v. Whiffin*, 27 Law T. (N. S.) 330; *Padwick v. Hurst*, 18 Beav. 575, 23 Law J. Ch. 657; *Harrington v. Churchward*, 29 Law J. Ch. 521; *Waters v. Shaftesbury*, 14 Law T. (N. S.) 184.

<sup>285</sup> See post, chapters 19-22.

<sup>286</sup> See post, chapters 19-22.

such property, is satisfied, provided his services, advances, and expenditures were proper, necessary, and incidental to his due execution of the agency.<sup>237</sup> This common-law lien of an agent is not an active or enforceable one; it is merely a right to retain the property in his hands, and does not give the agent any title to, or estate in, the subject-matter of the lien. It is also a right personal to the agent himself, and it cannot be assigned by him to another; nor is it subject to attachment or other legal process against the agent; and no question can arise upon it except between the principal and agent.<sup>238</sup> It cannot be set up as a defense by a third person in a suit against such person by the principal.<sup>239</sup> Thus, where one delivers goods to an agent for sale, he may maintain trover against an officer who seizes them upon a writ against such agent, and the officer cannot set up, in bar, any lien for expenses which the agent may have upon the goods.<sup>240</sup>

In general, an agent's lien attaches only for certain liquidated amounts, and not for those which sound in damages and can be ascertained only through the intervention of a jury, unless there is a special contract between the parties, stipu-

<sup>237</sup> *Hammonds v. Barclay*, 2 East, 235; *In re Pavy's Felted Fabric Co.*, 1 Ch. Div. 631; *Dowell v. Cardwell*, 4 Sawy. 217, Fed. Cas. No. 4,039; *White v. Sheffield & T. St. R. Co.*, 90 Ala. 254; *Byers v. Danley*, 27 Ark. 77; *Vinton v. Baldwin*, 95 Ind. 433; *Nevan v. Roup*, 8 Iowa, 207; *Grauman v. Reese*, 13 Ky. L. R. 683; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379; *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271; *Deering Harvester Co. v. Hamilton*, 80 Minn. 162; *Wilson v. Martin*, 40 N. H. 88; *Lovett v. Brown*, 40 N. H. 511; *Muller v. Pondir*, 55 N. Y. 325, 14 Am. Rep. 259; *Nagle v. McFeeters*, 97 N. Y. 196; *Underhill v. Jordan*, 72 App. Div. 71, 76 N. Y. Supp. 266; *Mathias v. Sellers*, 86 Pa. 486, 27 Am. Rep. 723; *McIntyre v. Carver*, 2 Watts & S. (Pa.) 392, 37 Am. Dec. 519; *Dewing v. Hutton*, 40 W. Va. 521.

<sup>238</sup> *Daubigny v. Duval*, 5 Term R. 606; *Meany v. Head*, 1 Mason, 319, Fed. Cas. No. 9,397; *Holly v. Huggerford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; *Jones v. Sinclair*, 2 N. H. 319, 9 Am. Dec. 75; *Lovett v. Brown*, 40 N. H. 511; *Dewing v. Hutton*, 40 W. Va. 521.

<sup>239</sup> *Jones v. Sinclair*, 2 N. H. 319, 9 Am. Dec. 75; *Holly v. Huggerford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303.

<sup>240</sup> *Jones v. Sinclair*, 2 N. H. 319, 9 Am. Dec. 75; *Holly v. Huggerford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303.



lating that the lien shall cover such amounts.<sup>241</sup> The amount must also be due to the agent in his own right as agent of the party against whom the lien is claimed, and not merely as a subordinate or as the agent of a third person.<sup>242</sup>

**§ 374. Classes of agent's liens.**

Agents' liens are of two kinds or classes, general and particular. A general lien is a right to retain the property of his principal that comes into his possession, for a general balance of account due to him by such principal, and covers compensation, advances, expenses, and disbursements in all transactions in his principal's behalf, whether in the particular transaction in which the property subject to such lien is obtained by him, or in another. This lien is not generally favored either at law or in equity, and will not be held to exist except upon an express or implied agreement between the parties to that effect, or in certain lines of business in which it is shown to exist by established custom or usage, or has been judicially approved and acknowledged.<sup>243</sup> General liens will be found to exist by implication from custom in some particular classes of agents, as factors, brokers, etc.<sup>244</sup>

An agent's particular lien is a right to retain funds or property of his principal, in his possession, until his claim for compensation, advances, and disbursements, in respect to that particular property, has been satisfied.<sup>245</sup> This class of liens is generally favored as resting on natural equity and in general convenience of trade and commerce; and when an agent's lien is spoken of, it will generally be in reference to his particular lien, unless a general lien is

<sup>241</sup> *Drinkwater v. Goodwin*, Cowp. 251; *Story, Ag.* § 364.

<sup>242</sup> *Houghton v. Matthews*, 3 Bos. & P. 485; *Ex parte Shank*, 1 Atk. 234; *Story, Ag.* § 365.

<sup>243</sup> *Bock v. Gorrissen*, 30 Law J. Ch. 39; *Rushforth v. Hadfield*, 7 East, 224; *Houghton v. Matthews*, 3 Bos. & P. 494; *Bleaden v. Hancock*, 4 Car. & P. 156; *McIntyre v. Carver*, 2 Watts & S. (Pa.) 392, 37 Am. Dec. 519.

<sup>244</sup> See post, Chapters 19-22.

<sup>245</sup> *Vinton v. Baldwin*, 95 Ind. 433. See ante, § 373, note 237. And see particular lien of factors, brokers, etc., in subsequent chapters.

shown to exist.<sup>246</sup> The chief distinction between these two classes of liens is that a general lien covers all claims for services, expenses, and disbursements as agent, whether in the particular transaction in which the agent obtains possession of the property or in other transactions, and that it attaches to property or goods only, whereas a particular lien covers only a claim for services, expenses, and disbursements in the particular transaction in which he gets the property, and that it attaches to funds of the principal in his hands as well as to goods.

### § 375. Essential elements of agent's lien.

It is an essential element of an agent's common-law lien, whether general or special, that the agent, as such, should lawfully have possession, actual or constructive, of the property upon which the lien is claimed.<sup>247</sup> It is not necessary that it should be in his actual possession, as constructive possession is sufficient, as where it is in the custody of his agent or servant,<sup>248</sup> or where in some cases he has the documents or muniments of title in his possession,<sup>249</sup> or where it is given into the possession of a third person for a temporary or particular purpose only.<sup>250</sup> It is also essential that the

<sup>246</sup> *Wright v. Snell*, 5 Barn. & Ald. 350; *Rushforth v. Hadfield*, 7 East, 224; *Scott v. Jester*, 13 Ark. 437; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Barry v. Boninger*, 46 Md. 59; *Jarvis v. Rogers*, 15 Mass. 396; *Stevens v. Robins*, 12 Mass. 182.

<sup>247</sup> *Taylor v. Robinson*, 2 Moore, 730; *Ex parte Foster*, 2 Story, 131, Fed. Cas. No. 4,960; *Donald v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431; *Sawyer v. Lorillard*, 48 Ala. 332; *Tucker v. Taylor*, 53 Ind. 93; *Nevan v. Roup*, 8 Iowa, 207; *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379; *Robinson v. Larrabee*, 63 Me. 116; *Collins v. Buck*, 63 Me. 459; *Rice v. Austin*, 17 Mass. 197; *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467; *Heard v. Brewer*, 4 Daly (N. Y.) 136; *Winter v. Colt*, 7 N. Y. 288; *Jenkins v. Eichelberger*, 4 Watts (Pa.) 121, 28 Am. Dec. 691; *McIntyre v. Carver*, 2 Watts & S. (Pa.) 392, 37 Am. Dec. 519; *Clemson v. Davidson*, 5 Bin. (Pa.) 392; *Elliott v. Bradley*, 23 Vt. 217.

<sup>248</sup> *McComble v. Davies*, 7 East, 5; *Bryans v. Nix*, 4 Mees. & W. 775; *Heard v. Brewer*, 4 Daly (N. Y.) 136; *Elliott v. Bradley*, 23 Vt. 217.

<sup>249</sup> *Rice v. Austin*, 17 Mass. 197. See post, §§ 785, 867 et seq.

<sup>250</sup> *Dewing v. Hutton*, 40 W. Va. 521. See post, § 378.

property, upon which the lien is claimed, should have come into his possession in the course of his employment as agent in respect to that property, and must remain in his possession in that capacity. If he gets possession or holds it in any other capacity than as agent, this lien does not arise or continue.<sup>251</sup> So the property must have been lawfully and in good faith obtained from one who had the right to give the possession. If he obtained it unlawfully or by means of fraud or misrepresentations, or if he obtained it from one who had no right to give the possession, he would have no lien thereon.<sup>252</sup>

**§ 376. Agent's lien will not arise contrary to agreement.**

An agent's lien will not arise, if the express terms or clear intent of the contract between the parties shows that it was their intention that it should not.<sup>253</sup> Thus, if the property comes into the agent's hands for a particular purpose, inconsistent with the idea of a lien, no lien will arise.<sup>254</sup> But the mere fact that there is a special contract between the parties is not inconsistent with the idea of a lien, and unless there is something in the terms of the contract expressly or impliedly showing a contrary intention, it will exist.<sup>255</sup>

**§ 377. Effect of the principal's insolvency, death, etc.**

An agent's lien is not affected by the fact that the principal becomes bankrupt or insolvent.<sup>256</sup> If an agent has

<sup>251</sup> *Scott v. Jester*, 13 Ark. 438; *Thacher v. Hannahs*, 4 Rob. (N. Y.) 407; *McIntyre v. Carver*, 2 Watts & S. (Pa.) 392, 37 Am. Dec. 519.

<sup>252</sup> *Madden v. Kempster*, 1 Camp. 12; *Burn v. Brown*, 2 Starkie, 272; *Randel v. Brown*, 2 How. (U. S.) 406.

<sup>253</sup> *Chase v. Westmore*, 5 Maule & S. 180; *Crawshay v. Homfray*, 4 Barn. & Ald. 50; *Randel v. Brown*, 2 How. (U. S.) 406; *Jarvis v. Rogers*, 15 Mass. 389.

<sup>254</sup> *Walker v. Birch*, 6 Term R. 258; *Weymouth v. Boyer*, 1 Ves. Jr. 416; *Burn v. Brown*, 2 Starkie, 272; *Jarvis v. Rogers*, 15 Mass. 389.

<sup>255</sup> *Brandao v. Barnett*, 12 Clark & F. 787; *In re European Bank*, 8 Ch. App. 41; *Farrington v. Meek*, 30 Mo. 578, 77 Am. Dec. 627.

<sup>256</sup> *Robson v. Kemp*, 4 Esp. 233; *Ogle v. Story*, 4 Barn. & Adol. 735; *General Share & Trust Co. v. Chapman*, 46 Law J. C. P. 79; *Muller v. Pondir*, 55 N. Y. 325, 14 Am. Rep. 259.

advanced moneys or incurred liabilities upon the faith of the solvency of the principal, and he becomes insolvent while the proceeds and fruit of such advances and liabilities are in the possession of the agent or within his reach, and before they have come into the actual possession of the principal, within every principle of equity the agent has a lien upon the same for his protection and indemnity.<sup>257</sup> Nor is such lien affected by the death of the principal;<sup>258</sup> nor by the fact that the claim secured by the lien becomes barred by the statute of limitations.<sup>259</sup>

**§ 378. How an agent's lien may be waived or lost.**

An agent may waive his right to a lien, by entering into any agreement, or doing any act which is inconsistent or incompatible with the existence or continuance of the lien, or which indicates an intention to abandon it,<sup>260</sup> as where he agrees to give credit, or to receive payment in a particular mode inconsistent with a continuance of the lien, as by taking a note or other security in payment of his claim,<sup>261</sup> unless such security be dishonored while the property is yet in the agent's possession;<sup>262</sup> or by agreeing to deliver the property before the time of payment.<sup>263</sup> And of course he may waive his right to such lien by an express agreement to that effect based upon a sufficient consideration, or even

<sup>257</sup> *Muller v. Pondir*, 55 N. Y. 325, 14 Am. Rep. 259.

<sup>258</sup> *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45; *Hammonds v. Barclay*, 2 East, 227.

<sup>259</sup> *Spears v. Hartley*, 3 Esp. 81; *Curwen v. Milburn*, 42 Ch. Div. 424.

<sup>260</sup> *The Albion*, 27 Law T. (N. S.) 723; *In re Taylor* [1891] 1 Ch. Div. 590; *Groom v. Cheesewright* [1895] 1 Ch. Div. 730; *The Rainbow*, 53 Law T. (N. S.) 91; *Jacobs v. Latour*, 5 Bing. 130.

<sup>261</sup> *Cowell v. Simpson*, 16 Ves. 280; *Angus v. McLachlan*, 23 Ch. Div. 330; *Raitt v. Mitchell*, 4 Camp. 146; *Bunney v. Poyntz*, 4 Barn. & Adol. 568; *Hewison v. Guthrie*, 2 Bing. N. C. 755; *Au Sable River Boom Co. v. Sanborn*, 36 Mich. 358; *Stoddard Woolen Manufactory v. Huntley*, 8 N. H. 441, 31 Am. Dec. 198; *Chandler v. Belden*, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193; *Hutchins v. Olcott*, 4 Vt. 549, 24 Am. Dec. 634.

<sup>262</sup> *Felse v. Wray*, 3 East, 93.

<sup>263</sup> *Chandler v. Belden*, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193.

without such consideration if it is waived before it has attached.<sup>264</sup> But the agent's lien is not waived by an agreement to receive a special price for his services;<sup>265</sup> nor by charging the claim for which there is a lien in a general merchandise account.<sup>266</sup> So the agent will waive his right to a lien, where he claims title to the property in himself, or where he bases his right to retain such property on grounds other than his lien,<sup>267</sup> or by an unqualified refusal to deliver the property, without placing his refusal on the ground of the lien.<sup>268</sup>

As has been seen heretofore, it is essential to the continuance of an agent's lien that the agent should have possession of the goods to which it attaches. If then, for any reason, the agent voluntarily parts with possession of such goods, he will thereby lose his lien, unless there are other facts or circumstances in the case showing a contrary intent.<sup>269</sup> It is otherwise, however, if the property is not voluntarily parted with by him, as where it is taken from him by fraud or misrepresentation;<sup>270</sup> or if the transfer was

<sup>264</sup> *Danforth v. Pratt*, 42 Me. 50.

<sup>265</sup> *Hutton v. Bragg*, 7 Taunt. 14; *The Hostler's Case*, Metc. Yelv. 67; *Stoddard Woolen Manufactory v. Huntley*, 8 N. H. 441, 31 Am. Dec. 198; *Mathias v. Sellers*, 86 Pa. 486, 27 Am. Rep. 723.

<sup>266</sup> *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291.

<sup>267</sup> *Boardman v. Sill*, 1 Camp. 410, note; *Cannee v. Spanton*, 8 Scott N. R. 714; *Weeks v. Goode*, 6 C. B. (N. S.) 367; *Leigh v. Mobile & O. R. Co.*, 58 Ala. 165; *Hanna v. Phelps*, 7 Ind. 21, 63 Am. Dec. 410; *Picquet v. McKay*, 2 Blackf. (Ind.) 465; *Dows v. Morewood*, 10 Barb. (N. Y.) 183; *Everett v. Saltus*, 15 Wend. (N. Y.) 474; *Holbrook v. Wight*, 14 Wend. (N. Y.) 169, 35 Am. Dec. 607.

<sup>268</sup> *Hanna v. Phelps*, 7 Ind. 21, 63 Am. Dec. 410; *Spence v. McMillan*, 10 Ala. 583; *Dows v. Morewood*, 10 Barb. (N. Y.) 183. But compare *Buckley v. Handy*, 2 Miles (Pa.) 449; *Everett v. Coffin*, 6 Wend. (N. Y.) 603; *White v. Gainer*, 9 Moore, 41.

<sup>269</sup> *Watson v. Lyon*, 7 DeGex, M. & G. 288; *Daubigny v. Duval*, 5 Term R. 604; *Sweet v. Pym*, 1 East, 4; *Tucker v. Taylor*, 53 Ind. 93; *Spaulding v. Adams*, 32 Me. 212; *Robinson v. Larrabee*, 63 Me. 116; *Collins v. Buck*, 63 Me. 459; *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467.

<sup>270</sup> *Wallace v. Woodgate*, 1 Car. & P. 575; *Ash v. Putnam*, 1 Hill (N. Y.) 302; *Bigelow v. Heaton*, 6 Hill (N. Y.) 43.

merely qualified or temporary, as for a particular purpose, there being no intention to part with the possession of the property permanently or to abandon or release the lien.<sup>271</sup> Thus, if an agent delivers the goods of his principal to a third person as security, with notice of his lien, and as his agent to keep the possession for him, the lien will not be lost.<sup>272</sup> And although the agent's lien may be lost by his voluntary parting with the possession of the property, yet if it again comes into his possession from the principal or with his consent, without any intervening rights of third persons, the lien will revive and reattach.<sup>273</sup>

### § 379. Enforcement of agent's lien.

An agent's common-law lien is merely a passive right—a right to retain—and, in the absence of statutory provisions, it usually cannot be actively enforced by any legal proceedings.<sup>274</sup> The agent may sue the principal for his claim, and if he obtains a judgment may levy on the property of his principal in his possession to satisfy such judgment, but otherwise he can only retain the property until his claim is satisfied, except in the case of some particular classes of agents, as factors, brokers, etc., where the agent has a right to sell the property to reimburse himself.<sup>275</sup> Another exception to this rule exists where the goods amount to a pledge, and the agent or pledgee, after having made a demand and given reasonable notice to the principal, may sell the prop-

<sup>271</sup> *McComble v. Davies*, 7 East, 7; *Mann v. Shiffner*, 2 East, 529; *Reeves v. Capper*, 5 Bing. N. C. 136; *Northwestern Bank v. Poynter* [1895] App. Cas. 56; *Robinson v. Larrabee*, 63 Me. 116; *Jarvis v. Rogers*, 15 Mass. 389; *Urquhart v. McIver*, 4 Johns. (N. Y.) 103; *Hays v. Riddle*, 1 Sandf. (N. Y.) 248; *Clemson v. Davidson*, 5 Bin. (Pa.) 392; *Dewing v. Hutton*, 40 W. Va. 521.

<sup>272</sup> *Urquhart v. McIver*, 4 Johns. (N. Y.) 103.

<sup>273</sup> *Nevan v. Roup*, 8 Iowa, 207; *Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268.

<sup>274</sup> *Crumbacker v. Tucker*, 9 Ark. 365; *Hunt v. Haskell*, 24 Me. 339, 41 Am. Dec. 387; *Briggs v. Boston & L. R. Co.*, 6 Allen (Mass.) 246; *Balley v. Shaw*, 24 N. H. 297, 55 Am. Dec. 241; *Fox v. McGregor*, 11 Barb. (N. Y.) 41.

<sup>275</sup> See post, chapters 19-22.

erty at public sale, in order to satisfy his claim for compensation, reimbursement and indemnity.<sup>276</sup>

**§ 380. Agent may pursue either remedy.**

As a general rule, where an agent performs services, or makes advances to his principal, in the course of his agency, he does so upon the faith of receiving his compensation and reimbursement from the principal himself or from his property, or from both; and he may resort to his lien as well as to his personal remedy against the principal to recover his compensation, reimbursement, and indemnity.<sup>277</sup> If he elects to pursue his remedy on his lien first, it is no waiver of his personal remedy against the principal, and if the property subject to such lien is insufficient to satisfy his claim, he may afterwards resort to his personal remedy to recover the balance due him, unless there is an express agreement between the parties by which he is to look to the lien only for his reimbursement.<sup>278</sup>

**§ 381. Agent's rights as to goods bought on his own credit for his principal—Where principal becomes insolvent.**

Where an agent purchases goods for his principal, but in his own name, upon his own credit, or with funds furnished by himself, in accordance with an agreement between them, he may retain the title to such goods in himself until he is reimbursed for his advances, or until he shows an intention that it shall pass to his principal.<sup>279</sup> This may be done by taking a bill of sale in his own name, and when the

<sup>276</sup> *Parker v. Brancker*, 22 Pick. (Mass.) 40; *Potter v. Thompson*, 10 R. I. 1.

<sup>277</sup> *Graham v. Ackroyd*, 10 Hare, 192; *Peisch v. Dickson*, 1 Mason, 10, Fed. Cas. No. 10,911; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482; *Upham v. Lefavour*, 11 Metc. (Mass.) 174.

<sup>278</sup> *Peisch v. Dickson*, 1 Mason, 9, Fed. Cas. No. 10,911; *Burrill v. Phillips*, 1 Gall. 360, Fed. Cas. No. 2,200; *Parker v. Brancker*, 22 Pick. (Mass.) 40; *Stoddard Woolen Manufactory v. Huntley*, 8 N. H. 441, 31 Am. Dec. 198; *Gihon v. Stanton*, 9 N. Y. 476.

<sup>279</sup> *Jenkyns v. Brown*, 14 Q. B. 496; *Ex parte Banner*, 2 Ch. Div. 278; *Farmers' & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568; *Moors v. Kidder*, 106 N. Y. 32.

property is shipped, taking from the carrier a bill of lading in such terms as to show that he retained the power of control and disposition of it.<sup>280</sup> This rule results necessarily from the nature of the transaction. It is not, at once, an irrevocable appropriation of the property of the principal. It rests, for all of its efficiency and prospective performance, upon the intention to withhold and the withholding the right to the property, so that that right may be used to procure the money with which to pay. It contemplates no title in the principal until he has reimbursed to his agent the price paid by him, or to the person with whom he has dealt the money obtained from him with which to pay that price. From the start, the idea formed and nursed is that the property should be the means of getting the money with which to pay for it, and that the title shall not pass to him who is to be the ultimate owner, until he has paid the money thus obtained.<sup>281</sup>

If, in such cases, the principal becomes insolvent after the goods have been shipped, the agent is so far considered in the light of a vendor that he may stop the goods in transitu in order to protect himself for the reimbursement of his advances.<sup>282</sup> And this right is not affected by taking a bond, bill, or note of the purchaser,<sup>283</sup> or by receiving his commissions.<sup>284</sup> This right of stoppage in transitu has been well settled in the commercial world. It is analogous to the common-law right of lien, being an equitable lien which enables the vendor, after he has parted with his possession, to resume it at any time before the vendee has acquired it, and to retain the goods until the price has been paid or tendered.<sup>285</sup>

But if the agent delivers the goods to a carrier, at the

<sup>280</sup> *Farmers' & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568; *Moors v. Kidder*, 106 N. Y. 32.

<sup>281</sup> *Farmers' & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 578.

<sup>282</sup> *Feise v. Wray*, 3 East, 93; *Tucker v. Humphrey*, 4 Bing. 516; *Hawkes v. Dunn*, 1 Crompt. & J. 519; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Seymour v. Newton*, 105 Mass. 272.

<sup>283</sup> *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489.

<sup>284</sup> *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489.

<sup>285</sup> *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489.



direction of his principal, to be shipped to a third person, taking and retaining a shipping receipt in the name of the principal, he loses this right, though the principal refused to pay the agent's draft on him for advances to the principal on the goods.<sup>286</sup> Nor would the agent have this right, if he is merely a surety for the price of the goods;<sup>287</sup> or if at the time of the consignment, the agent is indebted to the principal in a greater amount than the value of the goods, and the consignment was made to cover such amount.<sup>288</sup>

#### IV. OBLIGATIONS OF PRINCIPAL TO SUBAGENT.

##### § 382. In general.

As has been seen in a former chapter, when a subagent is appointed by an agent with express or implied authority of the principal, or where custom or usage permits such appointment, the relation of principal and agent exists between the principal and the subagent, and the subagent generally has the same rights and is subject to the same liabilities, in reference to his principal, as if he had been appointed by the principal himself. But if the appointment is made by the agent upon his own responsibility, without any authority from the principal or without the sanction of custom or usage, there is, in general, no privity of contract between the principal and the subagent, and he is the agent of the original agent alone.<sup>289</sup>

When, then, the appointment is such that the subagent becomes the agent of the principal, a privity of contract existing between them, the subagent has the same rights and remedies against the principal for his compensation, reimbursement, and indemnity, as if he had been directly appointed by the principal,<sup>290</sup> unless he has agreed to rely upon the

<sup>286</sup> *Gwyn v. Richmond & D. R. Co.*, 85 N. C. 429, 39 Am. Rep. 708. And see *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489.

<sup>287</sup> *Siffken v. Wray*, 6 East, 371.

<sup>288</sup> *Vertue v. Jewell*, 4 Camp. 31.

<sup>289</sup> See ante, § 342 et seq.

<sup>290</sup> *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *McConnell v. McCormick*, 12 Cal. 142; *Holmes v. Griffith*, 1 Colo. App. 423; *Cotton States L. Ins. Co. v. Mallard*, 57 Ga. 64; *Aetna Ins. Co. v. Church*,

property is shipped, taking from the carrier a bill of lading in such terms as to show that he retained the power of control and disposition of it.<sup>280</sup> This rule results necessarily from the nature of the transaction. It is not, at once, an irrevocable appropriation of the property of the principal. It rests, for all of its efficiency and prospective performance, upon the intention to withhold and the withholding the right to the property, so that that right may be used to procure the money with which to pay. It contemplates no title in the principal until he has reimbursed to his agent the price paid by him, or to the person with whom he has dealt the money obtained from him with which to pay that price. From the start, the idea formed and nursed is that the property should be the means of getting the money with which to pay for it, and that the title shall not pass to him who is to be the ultimate owner, until he has paid the money thus obtained.<sup>281</sup>

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<sup>280</sup> *Farmers' & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568; *Moors v. Kidder*, 106 N. Y. 32.

<sup>281</sup> *Farmers' & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 578.

<sup>282</sup> *Feise v. Wray*, 3 East, 93; *Tucker v. Humphrey*, 4 Bing. 516; *Hawkes v. Dunn*, 1 Crompt. & J. 519; *Newhall v. Vargas*, 13 Me. 29 Am. Dec. 489; *Seymour v. Newton*, 105 Mass. 272.

<sup>283</sup> *Newhall v. Vargas*, 13 Me. 29, 29 Am. Dec. 489.

<sup>284</sup> *Newhall v. Vargas*, 13 Me. 29, 29 Am. Dec. 489.

<sup>285</sup> *Newhall v. Vargas*, 13 Me. 29, 29 Am. Dec. 489.

direction of the principal to a third person, taking and retaining a security interest in the name of the principal, he does not thereby become an agent if he refused to pay the agent's debt or any of them to the principal on the goods.<sup>286</sup> But if he does not refuse this right, if he is merely a security for the principal's debt,<sup>287</sup> or if at the time of the consignment the agent is bound to the principal in a greater amount than the value of the goods, and the consignment was made to cover the debt,<sup>288</sup>

#### IV. OBLIGATION OF AGENT TO PRINCIPAL.

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<sup>286</sup> *Gwyn v. Richmond & D. R. Co.*, 85 N. C. 429, 39 Am. Rep. 708. And see *Newhall v. Varpa*, 12 N. H. 29, 29 Am. Dec. 489.

<sup>287</sup> *Siffken v. Wray*, 42 N. H. 11.

<sup>288</sup> *Montgomery v. Wray*, 42 N. H. 11.

(N. Y.) 475; *McConnell v. McKeith*, 1 Colo. App. 423; *Cotton*, 14; *Aetna Ins. Co. v. Church*.

responsibility of the agent alone.<sup>291</sup> And he has this right against the principal for his services, although he knows that the agent has charged the demand to the principal.<sup>292</sup> But if the appointment is such that the subagent is the agent of the first agent only, and there is no privity of contract between the subagent and the principal, his sole remedy for compensation, reimbursement, etc., would be against his immediate employer, the first agent;<sup>293</sup> unless the principal, with a full knowledge of all the facts, has ratified the acts done by him within the course of the alleged agency.<sup>294</sup> But the mere fact that the principal knows that the person so employed is acting in the business committed by him to his agent, and accepts the services rendered by such subagent as beneficial, does not prove a promise on the principal's part to pay for such services, or show a ratification of the employment of the subagent to be paid by the principal,<sup>295</sup> unless there is some privity between them.

But a principal cannot be made liable to subagents appointed by his agent where such principal, in the contract with his general agent, has expressly stipulated that such general agent is to be responsible to the principal for the acts and conduct of his subagents, and that in no case and under no circumstances shall the principal be liable for

21 Ohio St. 492. See ante, § 347. One who is the general agent of the owner of real property respecting the control and sale of the same may employ another as broker to sell the property, and such person, upon effecting a sale, may recover of the former owner his commissions. *Gold v. Serrell*, 55 N. Y. St. Rep. 696.

<sup>291</sup> *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475.

<sup>292</sup> *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475.

<sup>293</sup> *Schmalling v. Tomlinson*, 6 Taunt. 147; *Johnson v. Pacific Mail S. S. Co.*, 5 Cal. 407; *Fudge v. Seckner Contracting Co.*, 80 Ill. App. 35; *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385; *Hanback v. Corrigan*, 7 Kan. App. 479; *Hand v. Conger*, 71 Wis. 292; *Cleaves v. Stockwell*, 33 Me. 341; *Hill v. Morris*, 15 Mo. App. 322; *Fearn v. Mayers*, 53 Miss. 458; *Dale v. Hepburn*, 11 Misc. (N. Y.) 286. In such cases, the subagent should sue the principal for work and labor done. *Johnson v. Pacific Mail S. S. Co.*, 5 Cal. 407.

<sup>294</sup> *Beyers v. Hodge*, 1 Misc. (N. Y.) 76; *Homan v. Brooklyn L. Ins. Co.*, 7 Mo. App. 22; *Dewing v. Hutton*, 48 W. Va. 576. Compare *Hanback v. Corrigan*, 7 Kan. App. 479.

<sup>295</sup> *Homan v. Brooklyn L. Ins. Co.*, 7 Mo. App. 22.

commissions or compensation of such subagents.<sup>296</sup> Thus, where, by a contract between an insurance company and its general agent, the latter was authorized to appoint or employ all subagents reasonably necessary for the proper transaction of the business contemplated by the contract, and for the fulfillment of his agreements thereunder, and further provided that the general agent should be directly accountable to the company for all moneys, premiums, etc., belonging to the company and liable in respect to all acts, doings, and agreements of the subagents, and to pay all salaries, commissions, and compensation earned by them, and said company should, under no circumstances nor in any manner, be liable for the same or any part thereof, a contract by the general agent in his own name appointing a subagent for a definite term, who was required to give a bond, and to account to him alone, did not create a contract of agency between the subagent and the company which could be enforced against the latter after the general agent had been removed in accordance with the terms of his own contract.<sup>297</sup>

**§ 383. Subagent's right of lien.**

And the same rules apply in reference to the subagent's lien. If the appointment is such that the subagent is considered to be the agent of the principal, he will be entitled to the same right of lien against the funds or property of the principal as any other agent.<sup>298</sup> And the same is true where the principal ratifies the subagent's acts, although his appointment was without authority, express or implied.<sup>299</sup> If, however, the subagent is appointed without the express or implied authority of the principal, and there is no privity of contract between them, he would have no lien for compensation, disbursements, etc., upon the property of the principal in the agent's possession.<sup>300</sup>

<sup>296</sup> *Union Casualty & Surety Co. v. Gray*, 114 Fed. 422; *Montgomery v. Aetna L. Ins. Co.*, 97 Fed. 913.

<sup>297</sup> *Union Casualty & Surety Co. v. Gray*, 114 Fed. 422.

<sup>298</sup> *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Cahill v. Dawson*, 3 C. B. (N. S.) 106; *Mildred v. Maspons*, 8 App. Cas. 874, 53 Law J. Q. B. 33. See ante, § 342 et seq.

<sup>299</sup> *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291.

<sup>300</sup> *Solly v. Rathbone*, 2 Maule & S. 298; *Mann v. Shiffner*, 2 East,

Where the subagent knows or has reason to believe that the agent is acting for another person at the time he appoints him, he has no general lien upon the principal's property for a general balance of account due to him by the first agent; but he may have a lien against the principal to the extent of the lien which the first agent has at the time against the principal, provided his own or the agent's acts are not tortious.<sup>301</sup> But where he acts without such knowledge or reason for belief, he will have, in many cases, a lien on the property for his general balance.<sup>302</sup> Thus, where an agent, with the authority of his principal, employs an insurance broker to effect a policy, the broker having no notice that he is dealing with an agent, the broker has a lien on the policy for the general balance due to him from the agent, and may apply the proceeds of the policy in payment of such balance.<sup>303</sup>

523; *Lanyon v. Blanchard*, 2 Camp. 597; *Snook v. Davidson*, 2 Camp. 218.

<sup>301</sup> *Maanss v. Henderson*, 1 East, 335; *Mann v. Shiffner*, 2 East, 523; *Solly v. Rathbone*, 2 Maule & S. 298; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Foster v. Hoyt*, 2 Johns. Cas. (N. Y.) 327; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Miller v. Farmers' & Mechanics' Bank*, 30 Md. 392; Story, Ag. § 389.

<sup>302</sup> *Mann v. Forrester*, 4 Camp. 60; *Westwood v. Bell*, 4 Camp. 349; *Maanss v. Henderson*, 1 East, 335; *Taylor v. Kymer*, 3 Barn. & Adol. 320; Story, Ag. § 390.

<sup>303</sup> *Mann v. Forrester*, 4 Camp. 60; *Westwood v. Bell*, 4 Camp. 349.

## CHAPTER XIV.

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#### I. OBEDIENCE.

### § 384. Duty of agent to obey instructions.

One of the primary duties of an agent is obedience to the instructions of his principal. It is his duty to carry out the will of his principal, and not to substitute his own will instead, even though he may think it best. That he will do so is an implied term of his contract, and his failure to do so, unless excused, is a breach of contract. It follows that if an agent deviates from the instructions of his principal, he will be liable to the principal in damages for any loss that may ensue, even though he may act in good faith and prudently, and for what he supposes to be the best interests of the principal.<sup>1</sup> "It is the first duty of an agent, whose authority is

<sup>1</sup> *Pape v. Westacott* [1894] 1 Q. B. 272; *Lilley v. Doubleday*, 7 Q. B. Div. 510; *Short v. Skipwith*, 1 Brock. 103, Fed. Cas. No. 12,809; *Adams v. Robinson*, 65 Ala. 586; *Austill v. Crawford*, 7 Ala. 335; *Thompson v. Stewart*, 3 Conn. 172, 8 Am. Dec. 168; *Oxford Lake Line v. First Nat. Bank*, 40 Fla. 349; *Hardeman v. Ford*, 12 Ga. 205; *McDermid v. Cotton*, 2 Ill. App. 297; *Hasselman v. Carroll*, 102 Ind. 153; *United States Mortg. Co. v. Henderson*, 111 Ind. 24; *Bank of Owensboro v. Western Bank*, 13 Bush (Ky.) 526, 26 Am. Rep. 211; *Szymanski v. Plassan*, 20 La. Ann. 90, 96 Am. Dec. 382; *Merritt v. Wright*, 19 La. Ann. 91; *Ward v. Warfield*, 3 La. Ann. 468; *Lowe v. Bell*, 6 La. Ann. 28; *Sawyer v. Mayhew*, 51 Me. 398; *Whitney v. Merchants' Union Exp. Co.*, 104 Mass. 152, 6 Am. Rep. 207; *Coker v. Ropes*, 125 Mass. 577; *Rice v. Longfellow Bros. Co.*,

limited, to adhere faithfully to his instructions in all cases to which they can be properly applied. If he exceeds, or violates, or neglects them, he is responsible for all losses which are the natural consequence of his acts."<sup>2</sup> And the agent cannot set up as a defense, in an action against him for the damages caused by his disobedience of orders, the fact that the agency was gratuitous.<sup>3</sup>

All that is required of the agent, however, is a substantial compliance with his instructions, and a mere circumstantial variance that does not result in an injury to the principal will not render the agent liable.<sup>4</sup> But the presumption is always against the agent, when there is a violation of his instructions, and the burden of proof is upon him to show that his violation resulted in no substantial injury to the principal.<sup>5</sup> Before this presumption can be taken advantage of, however, it must be shown that the agent has, in some manner, violated or varied from his instructions. For the law also presumes, in the absence of evidence to the contrary, that an agent has faithfully obeyed the instructions given to him by his principal; and if the contrary is alleged, the burden of proof is on the one so alleging to prove it.<sup>6</sup>

The damages which the principal may recover in such cases are the actual damages sustained by reason of the

82 Minn. 154; *Marshall v. Ferguson*, 94 Mo. App. 175; *Rechtscherd v. Accommodation Bank*, 47 Mo. 181; *Butts v. Phelps*, 79 Mo. 302; *Switzer v. Connett*, 11 Mo. 88; *Frothingham v. Everton*, 12 N. H. 239; *Lavery v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184; *Scott v. Rogers*, 31 N. Y. 676; *Wilts v. Morrell*, 66 Barb. (N. Y.) 511; *Hays v. Stone*, 7 Hill (N. Y.) 128; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Brown v. Arrott*, 6 Watts & S. (Pa.) 402; *Wilson v. Wilson*, 26 Pa. 393; *Walker v. Walker*, 5 Heisk. (Tenn.) 425; *Fuller v. Ellis*, 39 Vt. 345, 94 Am. Dec. 327; *Howatt v. Davis*, 5 Munf. (Va.) 34, 7 Am. Dec. 681.

<sup>2</sup> *Whitney v. Merchants' Union Exp. Co.*, 104 Mass. 152, 6 Am. Rep. 207.

<sup>3</sup> *Passano v. Acosta*, 4 La. 26, 23 Am. Dec. 470; *Marshall v. Ferguson*, 94 Mo. App. 175. And see post, § 433.

<sup>4</sup> *Parkhill v. Imlay*, 15 Wend. (N. Y.) 431; *Parker v. Kett*, 1 Salk. 95.

<sup>5</sup> *Adams v. Robinson*, 65 Ala. 586; *Willson v. Willson*, 26 Pa. 393.

<sup>6</sup> *Bangs v. Hornick*, 30 Fed. 97; *Kirkpatrick v. Adams*, 20 Fed. 287; *Bartlett v. Smith*, 13 Fed. 263.

agent's disobedience. The damages recovered are to be compensatory only, unless it is shown that the agent willfully disobeyed his instructions, with an evil intention, in which case the jury may give vindictive damages.<sup>7</sup>

### § 385. Ratification by principal.

Of course, if an agent departs from the instructions of his principal, the principal may ratify his act, either expressly or impliedly, and thus release him from liability. "If an agent, acting in good faith, disobeys the instructions of his principal, and promptly informs the principal of what he has done, it is the duty of the principal, at the earliest opportunity, to repudiate the act if he disapprove. Silence in such a case is a ratification."<sup>8</sup> Thus, where an agent, contrary to instructions, takes, in payment of goods sold, notes of insolvent makers, and the principal receives and retains such notes for a long time with a full knowledge of the facts, the agent is not liable to the principal for any loss sustained thereby.<sup>9</sup> An agent will not be relieved from liability, however, where he communicates to the principal all the facts known to him at the time, and the principal ratifies his acts, if it afterward turns out that the facts as communicated were not the real facts of the case.<sup>10</sup>

<sup>7</sup> *Nelson v. Morgan*, 2 Mart. (La.) 256, 5 Am. Dec. 729; *Cassaboglou v. Gibb*, 11 Q. B. Div. 797; *Ainsworth v. Partillo*, 13 Ala. 460. And see cases cited in note 1.

<sup>8</sup> *Aetna Ins. Co. v. Sabine*, 6 McLean, 393, Fed. Cas. No. 97; *Richmond Mfg. Co. v. Starks*, 4 Mason, 296, Fed. Cas. No. 11,802; *Courcier v. Ritter*, 4 Wash. C. C. 549, Fed. Cas. No. 3,282; *Bray v. Gunn*, 53 Ga. 144; *United States Mortg. Co. v. Henderson*, 111 Ind. 24; *Bank of Owensboro v. Western Bank*, 13 Bush (Ky.) 526, 26 Am. Rep. 211; *Oliver v. Johnson*, 24 La. Ann. 460; *Ward v. Warfield*, 3 La. Ann. 468; *Flower v. Downs*, 6 La. Ann. 538; *Plano Mfg. Co. v. Buxton*, 36 Minn. 203; *Lewin v. Dille*, 17 Mo. 64; *Clarke v. Meigs*, 10 Bosw. (N. Y.) 337; *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 300; *Hanks v. Drake*, 49 Barb. (N. Y.) 202; *Pickett v. Pearsons*, 17 Vt. 470. And see ante, § 141.

<sup>9</sup> *Plano Mfg. Co. v. Buxton*, 36 Minn. 203.

<sup>10</sup> *Bank of Owensboro v. Western Bank*, 13 Bush (Ky.) 526, 26 Am. Rep. 211. And see *Walker v. Walker*, 5 Heisk. (Tenn.) 425; *Bank of St. Marys v. Calder*, 3 Strobb. (S. C.) 403.

And although the principal should repudiate or disapprove of the agent's act, in violation of instructions, at the earliest opportunity, it is not meant that he should do so at the earliest possible opportunity; as where an agent does an act contrary to instructions, on a certain day, and his principal receives notice in the afternoon of that day, he will not be deemed, as a matter of law, to have ratified it and exempted the agent from liability to him, if he does not look up the agent and express his dissent before the next day.<sup>11</sup>

**§ 386. Applications of this principle.**

In accordance with this principle, it has been held that an agent to collect a draft, who has been instructed by his principal to return the draft at once if not paid, is liable to the principal for the loss sustained by reason of holding the draft after its presentation and nonpayment in order to allow the drawee to write to the drawer for an explanation;<sup>12</sup> that an agent of a landlord, who has received from his principal a license for the tenant to assign his lease, with directions not to deliver the same until payment of arrears of rent, is liable for the loss if he delivers the license on receipt of a check for the arrears of rent, which is not honored;<sup>13</sup> that an agent who is directed by his principal to send a claim to a certain person for collection, and who sends it to another person, is liable for the ensuing loss;<sup>14</sup> that an agent who disregards his instructions to ship goods by a certain route, and the goods are lost, is liable for the value of the goods;<sup>15</sup> that an agent who had been instructed to sell to solvent or responsible parties only, or to receive in payment only "first class collectible paper" or "undoubted paper," is liable for a loss resulting from his disregarding

<sup>11</sup> *Clarke v. Meigs*, 10 Bosw. (N. Y.) 338.

<sup>12</sup> *Whitney v. Merchants' Union Exp. Co.*, 104 Mass. 152, 6 Am. Rep. 207.

<sup>13</sup> *Pape v. Westacott* [1894] 1 Q. B. 272.

<sup>14</sup> *Butts v. Phelps*, 79 Mo. 302.

<sup>15</sup> *Johnson v. New York Cent. Transp. Co.*, 33 N. Y. 610, 88 Am. Dec. 416; *Ackley v. Kellogg*, 8 Cow. (N. Y.) 223.

his instructions in this respect;<sup>16</sup> that an agent ordered not to deliver goods to the buyer, there being doubts as to the latter's solvency, and the agent delivers them notwithstanding such order, and without receiving security, will be responsible to the principal for the loss sustained by reason of the buyer's insolvency;<sup>17</sup> that an agent who is instructed to sell for cash,<sup>18</sup> or at a certain price,<sup>19</sup> is liable for any loss occasioned by his violating those instructions. So if an agent is instructed to remit proceeds to his principal in a particular manner, or by a particular way, it is his duty to do so, and for any loss resulting from his failure to remit in that manner or by that way, he will be liable.<sup>20</sup> Thus, where an agent is instructed to remit by draft and he remits by money in a letter through the mail, and the letter is lost, he is responsible for the loss.<sup>21</sup> And where an agent is instructed to insure his principal's property, and he fails to do so, without a good reason, or otherwise disregards his instructions, he will become liable as an insurer himself, in the event of loss.<sup>22</sup> So an insurance agent who disobeys the

<sup>16</sup> *Clark v. Roberts*, 26 Mich. 506; *Robinson Machine Works v. Vorse*, 52 Iowa, 207; *Osborne v. Rider*, 62 Wis. 235. Compare *Plano Mfg. Co. v. Buxton*, 36 Minn. 203.

<sup>17</sup> *Howatt v. Davis*, 5 Munf. (Va.) 34, 7 Am. Dec. 681.

<sup>18</sup> *Barksdale v. Brown*, 1 Nott & McC. (S. C.) 517, 9 Am. Dec. 720; *Clark v. Roberts*, 26 Mich. 506; *Harlan v. Ely*, 68 Cal. 522; *Hall v. Storrs*, 7 Wis. 217. Where an agent's contract provided that he should not deliver machines until paid for, and a contract under which machines were sold provided that the purchase money would be refunded if the machines did not prove satisfactory after a certain time, the trial contemplated is to be after the machines are paid for, and if the agent delivers them without first receiving payment, he is liable for their price. *Unland v. McCormick Harvesting Mach. Co.*, 54 Neb. 364.

<sup>19</sup> *Wolfe v. Luyster*, 1 Hall (N. Y.) 146; *Steele v. Ellmaker*, 11 Serg. & R. (Pa.) 86; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345.

<sup>20</sup> *Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58; *Kerr v. Cotton*, 23 Tex. 411; *Foster v. Preston*, 8 Cow. (N. Y.) 198; *Wilson v. Wilson*, 26 Pa. 393; *Walker v. Walker*, 5 Heisk. (Tenn.) 425.

<sup>21</sup> *Foster v. Preston*, 8 Cow. (N. Y.) 198.

<sup>22</sup> *Park v. Hamond*, 4 Camp. 344, 6 Taunt. 495; *Smith v. Lascelles*, 2 Term. R. 188; *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Sawyer v. May-*

company's instruction to cancel a certain policy will be liable to the company for any amount paid on such policy in the event of loss.<sup>23</sup>

**§ 387. Liability of agent to principal for conversion.**

The most usual liability of an agent to his principal is in an action of assumpsit or a special action on the case; but there are cases in which the agent is guilty of conversion and the proper remedy against the agent is an action of trover. An agent may be guilty of conversion, so as to be liable to his principal in an action of trover, whenever he has wrongfully converted the property of his principal to his own use. This conversion may be actual or constructive; and it may be made out by showing a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of his principal's property contrary to, or without, his instructions.<sup>24</sup> Ordinarily, where the property of a principal is held by his agent as such, a demand and refusal must be shown to put the agent in the wrong, but demand and refusal, which constitute evidence of conversion, need not be shown where conversion may be otherwise proved.<sup>25</sup> But there must be some act on the part of the agent, showing an intention to exercise a right of ownership or dominion

*hew*, 51 Me. 398; *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645.

<sup>23</sup> *Phoenix Ins. Co. v. Frissell*, 142 Mass. 513; *Franklin Ins. Co. v. Sears*, 21 Fed. 290.

<sup>24</sup> *Syeds v. Hay*, 4 Term R. 260; *Atkinson v. Jones*, 72 Ala. 248; *Ainsworth v. Partillo*, 13 Ala. 460; *Loveless v. Fowler*, 79 Ga. 134, 11 Am. St. Rep. 407; *Lindley v. Downing*, 2 Ind. 418; *Rosenzweig v. Frazer*, 82 Ind. 342; *Haas v. Damon*, 9 Iowa, 589; *Badger v. Hatch*, 71 Me. 562; *McNear v. Atwood*, 17 Me. 434; *McMorris v. Simpson*, 21 Wend. (N. Y.) 610; *Spencer v. Blackman*, 9 Wend. (N. Y.) 167; *Scott v. Rogers*, 31 N. Y. 676; *Hynes v. Patterson*, 95 N. Y. 1; *Madison v. Gross*, 54 App. Div. (N. Y.) 129; *Salem Traction Co. v. Anson*, 41 Or. 562; *Etter v. Bailey*, 8 Pa. 442; *Irwin v. Harris*, 199 Pa. 405; *Galbreath v. Epperson* (Tenn.) 1 S. W. 157; *McCrillis v. Allen*, 57 Vt. 505; *Cotton v. Sharpstein*, 14 Wis. 226, 80 Am. Dec. 774; *Wells v. Collins*, 74 Wis. 341.

<sup>25</sup> *Nading v. Howe*, 23 Ind. App. 694; *Terrell v. Butterfield*, 92 Ind. 1. And see cases cited in preceding note.

over the property; a mere omission of duty is not enough, although the property may be lost in consequence of his neglect. Nor will a mere lack of good faith be sufficient to show conversion, if the agent otherwise acted within the scope of his authority. There must be a departure from his authority before trover can be maintained against him.<sup>26</sup> But it is not necessary that there should be an actual wrongful intent on the part of the agent. It is enough that the principal has been deprived of his property by some unauthorized act of the agent assuming dominion or control over it.<sup>27</sup> Thus an agent is liable for conversion, where a note, which his principal had placed in his hands for collection, with instructions not to let it go out of his hands without receiving the proceeds, is delivered to another, who got the money and appropriated it to his own use;<sup>28</sup> or where a note is sent to him to sell, with notice that the sender has drawn upon him for the amount of the note, which he refuses to pay, and who, on being notified that he must pay the draft or return the note, declines to pay the draft and sells the note;<sup>29</sup> or where he loans in his own name, and for his own benefit, a sum of money which had been placed in his hands to be loaned or invested for his principal;<sup>30</sup> or where, entrusted with wheat to hold and sell when directed by his principal, and to account for the proceeds, he refuses to sell or to account when directed, but unlawfully retains possession against the wishes of his principal;<sup>31</sup> or where he col-

<sup>26</sup> *McMorris v. Simpson*, 21 Wend. (N. Y.) 614.

<sup>27</sup> *Boyce v. Brockway*, 31 N. Y. 490; *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184; *Marshall v. Ferguson*, 94 Mo. App. 175.

<sup>28</sup> *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184; *Bostwick v. Dry Goods Bank*, 67 Barb. (N. Y.) 449.

<sup>29</sup> *Security Bank v. Fogg*, 148 Mass. 273; *First Nat. Bank v. Crocker*, 111 Mass. 163.

<sup>30</sup> *Farrand v. Hurlburt*, 7 Minn. 477.

<sup>31</sup> *Coleman v. Pearce*, 26 Minn. 123. Where he refuses to deliver to the principal wheat purchased for the latter, the principal may recover a sum equal to the profit he might have made by a subsequent sale thereof; and it is not necessary for the principal, in order to maintain such action, to show a tender of the purchase price of the wheat so bought, where he had agreed to furnish money for that purpose when called upon, but the agent had

lects, without authority, the price of goods sold;<sup>32</sup> or where he pledges property entrusted to him as collateral security for his own debt;<sup>33</sup> or where he refuses to deliver, to the representatives of his principal, property remaining unsold at the termination of the agency, by the death of the principal.<sup>34</sup>

But the fact that the agent sells the property at a lower price than the one authorized, or on credit when authorized to sell for cash, does not make him guilty of conversion. In such cases the agent does not exercise any right of ownership over the property; he does nothing with it but what he was authorized to do. He disobeyed his instructions as to price or terms of sale only, and is liable for misconduct, but not for a conversion of the property. This distinction may, in a practical sense, seem technical, but it is founded upon the distinction between exercising a right of ownership over the property itself, and an unauthorized interference with the terms of sale, and is well supported by authorities. The proper remedy in such cases is an action for damages, not trover.<sup>35</sup> So where an agent was authorized to deliver goods on receiving sufficient security, and delivered the goods on inadequate security, it was held that trover would not lie for the reason that the question of the sufficiency of the security was a matter of judgment.<sup>36</sup> Nor is an agent liable for conversion where he authorizedly sells on credit, guarantying payment, and the goods so sold are not paid for. The principal's remedy in such case is upon the agent's contract of guaranty.<sup>37</sup> Nor is he liable for conversion for a failure to account for the proceeds of goods

not called upon him for money. *Nading v. Howe*, 23 Ind. App. 690.

<sup>32</sup> *Schanz v. Martin*, 37 Misc. (N. Y.) 492.

<sup>33</sup> *State v. Berning*, 74 Mo. 87; *Newcomb-Buchanan Co. v. Basket*, 14 Bush (Ky.) 658; *Birdsall v. Davenport*, 43 Hun (N. Y.) 552; *Nichols v. Gage*, 10 Or. 82.

<sup>34</sup> *Brown v. Cushman*, 173 Mass. 368.

<sup>35</sup> *Dufresne v. Hutchinson*, 3 Taunt. 117; *Sarjeant v. Blunt*, 16 Johns. (N. Y.) 74; *Loveless v. Fowler*, 79 Ga. 134, 11 Am. St. Rep. 407; *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184.

<sup>36</sup> *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 300.

<sup>37</sup> *Standard Fertilizer Co. v. Van Valkenburgh*, 21 Misc. (N. Y.) 559.



sold, the principal's remedy, in such cases, being an action upon the contract.<sup>38</sup> Thus, an action for the conversion of money received by an agent cannot be maintained against him unless he is bound to turn over the identical money.<sup>39</sup>

— **Title to property converted.** The mere fact that a principal recovers a money judgment against his agent, for the value of the goods wrongfully withheld by the latter, does not alone operate to invest the agent with the title to the property so withheld; but payment of the judgment is necessary.<sup>40</sup>

**§ 388. Agent need not obey instructions to perform illegal or immoral acts.**

It is no part of an agent's duty to obey instructions which require him to perform illegal or immoral acts, and therefore he cannot be held liable to his principal for any loss sustained by the latter by reason of his failure or refusal to obey such instructions.<sup>41</sup>

**§ 389. Agent is not liable for departure from instructions in cases of emergency.**

Although as a general rule an agent is bound to obey the instructions of his principal, yet, where from the necessities of the case, without any fault on the part of the agent, some sudden and unexpected emergency or necessity arises, or some unforeseen event happens that will not admit of delay for communication with the principal, if the agent, exercising due prudence and discretion, in good faith departs from his instructions and pursues the course which seems

<sup>38</sup> *Wright v. Duffe*, 23 Misc. (N. Y.) 338; *Walter v. Bennett*, 16 N. Y. 250; *Conaughty v. Nichols*, 42 N. Y. 83; *Greentree v. Rosenstock*, 61 N. Y. 583; *Herrmann Furniture & P. Cabinet Works v. Hyman*, 28 Misc. (N. Y.) 567.

<sup>39</sup> *Rothchild v. Schwarz*, 28 Misc. (N. Y.) 521; *Farrelly v. Hubbard*, 84 Hun. (N. Y.) 391; *Casanges v. Karam*, 26 Misc. (N. Y.) 797; *Salem Traction Co. v. Anson*, 41 Or. 562.

<sup>40</sup> *Gilman v. Gilby Tp.*, 8 N. D. 627; and cases cited.

<sup>41</sup> *Davis v. Barger*, 57 Ind. 54; *Goodhue v. McClarty*, 3 La. Ann. 58; *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Elmore v. Brooks*, 6 Heisk. (Tenn.) 45.

best for the principal's interests, he will be justified, and will not be liable to the principal for a loss, though some other course would probably have been more beneficial to the principal.<sup>42</sup> But it does not follow as a corollary that, under extraordinary circumstances, an agent will be justified in assuming any or all extraordinary powers, and not be responsible for his acts; hence the powers assumed by the agent, under such circumstances, must not be beyond the necessities of the case, and must be closely connected with the powers actually conferred.<sup>43</sup>

**§ 390. Liability of agent where instructions are ambiguous.**

We have seen in a former chapter that if an agent's instructions are ambiguous and capable of more than one construction, the agent may in good faith, exercising reasonable prudence and discretion, follow the construction that he thinks best.<sup>44</sup> Therefore, if he does so act, he cannot be held liable to the principal for any loss that may follow, because he did not act according to the construction the principal intended he should;<sup>45</sup> and the fact that the principal had reason to believe that the agent understood the instructions as he intended them is immaterial.<sup>46</sup> But the fact that the principal's instructions will reasonably admit

<sup>42</sup> *Forrestler v. Bordman*, 1 Story, 43, Fed. Cas. No. 4,945; *Williams v. Shackelford*, 16 Ala. 318; *Judson v. Sturges*, 5 Day (Conn.) 556; *Goodwillie v. McCarthy*, 45 Ill. 186; *Greenleaf v. Moody*, 13 Allen (Mass.) 363; *Bartlett v. Sparkman*, 95 Mo. 136, 6 Am. St. Rep. 35; *Drummond v. Wood*, 2 Caines (N. Y.) 310; *Lotard v. Graves*, 3 Caines (N. Y.) 226a; *Harter v. Blanchard*, 64 Barb. (N. Y.) 617; *Jervis v. Hoyt*, 2 Hun (N. Y.) 637; *Dusar v. Perit*, 4 Bin. (Pa.) 361; *Foster v. Smith*, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604; *Bernard v. Maury*, 20 Grat. (Va.) 434.

<sup>43</sup> *Foster v. Smith*, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604.

<sup>44</sup> See ante, § 212.

<sup>45</sup> *Ireland v. Livingston*, L. R. 5 H. L. 395; *Le Roy v. Beard*, 8 How. (U. S.) 451; *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; *Oxford Lake Line v. First Nat. Bank*, 40 Fla. 349; *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa, 67; *Shelton v. Merchants' Dispatch Transp. Co.*, 59 N. Y. 258; *Bessent v. Harris*, 63 N. C. 542; *Pickett v. Pearsons*, 17 Vt. 470.

<sup>46</sup> *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa, 67.

of two different interpretations does not authorize the agent to disregard the instructions entirely and substitute his own judgment therefor; if he acts at all in such cases, he must follow one of the interpretations reasonably derivable from the uncertain terms of the instructions.<sup>47</sup>

§ 391. Duty of agent to act according to custom or usage.

As has been seen in a previous chapter, where an agent is employed to transact business in respect to which there exists certain established customs or usages, in the absence of anything to the contrary such customs or usages will enter into and form an element of the agent's authority.<sup>48</sup> In such cases, then, it is an agent's duty to act according to such customs or usages, unless he has received positive instructions to the contrary, or unless there are other circumstances in the case showing that such customs or usages were not to form part of his authority; and in the absence of such instructions or circumstances, if he acts according to such customs or usages he will not be liable to his principal for any loss that may result.<sup>49</sup> Thus, where an agent to whom goods are consigned for sale generally sells them on credit to a merchant in good standing, taking a note payable to himself, and the purchaser becomes insolvent, the agent is not liable for the loss.<sup>50</sup> But as between the principal and his agent, such custom or usage cannot contravene the positive instructions of the principal; and if the agent follows the custom or usage, contrary to his principal's instructions, he will be liable to the latter for any loss sustained thereby.<sup>51</sup> Thus, where an agent, instructed to sell for cash, permits a

<sup>47</sup> *Oxford Lake Line v. First Nat. Bank*, 40 Fla. 349.

<sup>48</sup> See ante, § 209 (c).

<sup>49</sup> *Solomon v. Barker*, 2 Fost. & F. 726; *Hurrell v. Bullard*, 3 Fost. & F. 445; *Greely v. Bartlett*, 1 Greenl. (Me.) 172, 10 Am. Dec. 54.

<sup>50</sup> *Greely v. Bartlett*, 1 Greenl. (Me.) 172, 10 Am. Dec. 54.

<sup>51</sup> *Robinson Mach. Works v. Vorse*, 52 Iowa, 207; *Parsons v. Martin*, 11 Gray (Mass.) 112; *Day v. Holmes*, 103 Mass. 306 (compare *Clark v. Van Northwick*, 1 Pick. [Mass.] 343; *Ledyard v. Hibbard*, 48 Mich. 421; *Hutchings v. Ladd*, 16 Mich. 493); *Barksdale v. Brown*, 1 Nott & McC. (S. C.) 517, 9 Am. Dec. 720; *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467; *Catlin v. Smith*, 24 Vt. 85; *Osborne v. Rider*, 62 Wis. 235; *Hall v. Storrs*, 7 Wis. 253.

purchaser to take away goods without paying for them, and the purchaser absconds, the agent is liable to his principal for the loss, and cannot defend himself on the ground of a usage among factors allowing purchasers a week to make payment.<sup>52</sup>

## II. PRUDENCE, DILIGENCE, AND SKILL.

### § 392. Duty of agent to exercise prudence, skill, and diligence.

Whenever an agent undertakes to act for another in a particular transaction, he impliedly contracts with his principal that he possesses a reasonable amount of the skill required to carry on such transaction, and that he will exercise a reasonable degree of prudence and care therein. If he holds himself out as having certain skill, he is bound to exercise that skill, with reasonable prudence and diligence; or if he does not so hold himself out, he is bound to exercise the skill which he does possess. It is an agent's duty, therefore, to act prudently in the execution of the agency, and to exercise therein a reasonable degree of skill, care, and diligence, and a failure to do this, in any respect, by reason of which the principal sustains a loss, constitutes such negligence on the part of the agent as to render him responsible to his principal therefor;<sup>53</sup> and in case the agent dies, with-

<sup>52</sup> *Barksdale v. Brown*, 1 Nott & McC. (S. C.) 517, 9 Am. Dec. 720; *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467.

<sup>53</sup> *Bowerman v. Rogers*, 125 U. S. 585; *Steiner v. Clisby*, 103 Ala. 181; *Morrison v. Orr*, 3 Stew. & P. (Ala.) 49, 23 Am. Dec. 319; *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74; *Redfield v. Davis*, 6 Conn. 439; *Landon v. Humphrey*, 9 Conn. 209, 23 Am. Dec. 333; *Brown v. Clayton*, 12 Ga. 564; *Wright v. Central R. & Banking Co.*, 16 Ga. 38; *Deshler v. Beers*, 32 Ill. 368; *Darlington v. Fredenhagen*, 18 Ill. App. 273; *Phillips v. Moir*, 69 Ill. 155; *Stevens v. Walker*, 55 Ill. 151; *Hall v. Junction R. Co.*, 15 Ind. 362; *Babcock v. Orbison*, 25 Ind. 75; *Kempker v. Roblyer*, 29 Iowa, 274; *Bartle v. Phelps*, 39 Iowa, 498; *Sioux City & P. R. Co. v. Walker*, 49 Iowa, 273; *Respass v. Morton*, *Hardin* (Ky.) 234; *Myles v. Myles*, 6 Bush (Ky.) 237; *Clark v. Norwood*, 19 La. Ann. 116; *Hill v. White*, 11 La. Ann. 170; *Stimpson v. Sprague*, 6 Greenl. (Me.) 470; *Wilson v. Russ*, 20 Me. 421; *Folsom v. Mussey*, 8 Greenl. (Me.) 400, 23 Am. Dec. 522; *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316; *Varnum v. Martin*, 15 Pick. (Mass.) 440; *Page v. Wells*, 37 Mich. 415; *Lake*

out the principal having been indemnified for the results of his negligence, his estate will be held responsible therefor.<sup>54</sup>

To make an agent liable for negligence on the ground of omission, it must be an omission of some act which, according to law, he may rightfully do.<sup>55</sup> He cannot be held responsible as for negligence, by omitting to perform acts which are illegal.<sup>56</sup>

### § 393. Degree of skill, care, and diligence required.

The degree of skill, care, and diligence which an agent is required to exercise in any particular case will depend upon the nature and purposes of the agency and the circumstances of the particular case. What would be proper skill, care, and diligence in one case might be gross negligence in another. The rule in this respect is that an agent

*City Flouring-Mill Co. v. McVean*, 32 Minn. 301; *Rice v. Longfellow Bros. Co.*, 32 Minn. 154; *Richardson v. Futrell*, 42 Miss. 525; *Heinemann v. Heard*, 50 N. Y. 27; *Whitney v. Martine*, 88 N. Y. 535; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Van Alen v. Vanderpool*, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192; *Holmes v. Peck*, 1 R. I. 242; *Dickson v. Screven*, 23 S. C. 212; *Williams v. O'Daniels*, 35 Tex. 542; *Crooker v. Hutchinson*, 1 Vt. 73; *Wilson v. Greensboro*, 54 Vt. 583; *Crawford v. Cockran*, 2 Wash. T. 117.

This rule applies to physicians and surgeons. *Lanphier v. Philippos*, 8 Car. & P. 475; *Seare v. Prentice*, 8 East, 348; *Rich v. Pierpont*, 3 Fost. & F. 35; *Grannis v. Branden*, 5 Day (Conn.) 260, 5 Am. Dec. 143; *Landon v. Humphrey*, 9 Conn. 209, 23 Am. Dec. 333; *Ritchey v. West*, 23 Ill. 385; *McNevin v. Lowe*, 40 Ill. 209; *Long v. Morrison*, 14 Ind. 595; *Kelsey v. Hay*, 84 Ind. 189; *Patten v. Wiggin*, 51 Me. 594, 81 Am. Dec. 593; *Howard v. Grover*, 28 Me. 97, 48 Am. Dec. 478; *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Bellinger v. Craigie*, 31 Barb. (N. Y.) 534; *Craig v. Chambers*, 17 Ohio St. 253; *Gallaher v. Thompson*, *Wright* (Ohio) 466; *McCandless v. McWha*, 22 Pa. 261; *Wood v. Clapp*, 4 Sneed (Tenn.) 65; *Graham v. Gautier*, 21 Tex. 111; *Wilmot v. Howard*, 39 Vt. 447, 94 Am. Dec. 338; *Reynolds v. Graves*, 3 Wis. 416. And to attorneys at law, see post, § 655 et seq.

<sup>54</sup> *Robinson Mach. Works v. Vorse*, 52 Iowa, 207; *Stimpson v. Sprague*, 6 Greenl. (Me.) 470.

<sup>55</sup> *Brown v. Clayton*, 12 Ga. 564.

<sup>56</sup> See post, § 400.

is bound to exercise such a degree of skill, care, and diligence in the execution of the agency, and such only, as is ordinarily exercised by prudent men under like circumstances.<sup>57</sup> As has been held, an agent, without specific instructions, is bound to observe all the precautions ordinarily pursued in relation to the particular business in which he is employed, and according to the usage of the place and the circumstances of the times within which the business is transacted.<sup>58</sup> "There is no such thing in existence as an absolute standard of ordinary care and prudence, to which the conduct of individuals in each particular instance can be brought, and by which it can be compared and tested. Care and diligence should always vary according to the exigencies which required vigilance and attention, conforming in amount and degree to the particular circumstances under which they are to be exerted. But it must be equal to the occasion on which it is to be used, and is always to be judged of according to the subject-matter, and the circumstances of the case."<sup>59</sup> What might be extraordinary care at one place and under one set of circumstances, might amount only to ordinary diligence at other places and under a different state of facts. For example, a country physician and surgeon is not bound to the exercise of that

<sup>57</sup> *Steiner v. Chisley*, 103 Ala. 181; *Brown v. Clayton*, 12 Ga. 564; *Wright v. Central R. & Banking Co.*, 16 Ga. 38; *Deshler v. Beers*, 32 Ill. 368; *Hill v. White*, 11 La. Ann. 170; *Galther v. Myrick*, 9 Md. 118, 66 Am. Dec. 316; *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363; *Lake City Flouring-Mill Co. v. McVean*, 32 Minn. 301; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Heinemann v. Heard*, 50 N. Y. 27; *Whitney v. Martine*, 88 N. Y. 535. And see cases cited in note 53, *supra*. "It is the duty of a faithful agent to do for his principal, what the principal himself would probably have done, if he was a discreet and prudent man." *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 559. And see *Blight v. Ashley*, 1 Pet. C. C. 15, Fed. Cas. No. 1,541. But even where the principal is habitually negligent in attending to his own interests, it forms no excuse for similar negligence on the part of his agent. *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555.

<sup>58</sup> *Wright v. Central R. & Banking Co.*, 16 Ga. 38.

<sup>59</sup> *Holly v. Boston Gaslight Co.*, 8 Gray (Mass.) 123, 69 Am. Dec. 233.

high degree of art and skill possessed by eminent surgeons living in large cities and making a specialty of the practice of surgery, but only to that reasonable degree of learning, art, and skill ordinarily possessed by others learned in his profession, in his vicinity, having regard to the advanced state of the science.<sup>60</sup> And the same is true in other professions or lines of business. A person in a certain business in a country district would probably not be expected to reach the same degree of skill or proficiency, as one in the same business in a large city, where the opportunities for experience and learning are much greater.

**§ 394. Agent is not bound to exercise extraordinary skill and diligence.**

It follows as a corollary to the above rule that an agent is not bound to possess or exercise an extraordinary degree of skill, care and diligence, unless he expressly agrees to do so. He does not undertake, in the absence of such an agreement, to insure the success of the transaction, or that he will exercise more than the ordinary skill and diligence exercised by others under like circumstances, and he is not liable for losses that could not be prevented by ordinary skill and diligence.<sup>61</sup> Especially is this so if the principal knows of facts which show that more than ordinary diligence is required in the case, and he withholds those facts from the agent.<sup>62</sup> Of course, an agent may, by a special contract for that purpose, bind himself, not merely to the exercise of skill, care, and diligence, but to be responsible

<sup>60</sup> *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363.

<sup>61</sup> *Hancke v. Hooper*, 7 Car. & P. 81; *Darlington v. Fredenhagen*, 18 Ill. App. 273; *Howard v. Grover*, 28 Me. 97, 48 Am. Dec. 478; *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363; *Flick v. Runnels*, 48 Mich. 302; *Page v. Wells*, 37 Mich. 415; *Lake City Flouring-Mill Co. v. McVean*, 32 Minn. 301; *Furber v. Barnes*, 32 Minn. 105; *Rice v. Longfellow Bros. Co.*, 82 Minn. 154; *Van Skike v. Potter*, 53 Neb. 28; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Weakley v. Pearce*, 5 Heisk. (Tenn.) 401; *James v. Borgeois*, 4 Baxt. (Tenn.) 345; *Hale v. Wall*, 22 Grat. (Va.) 424.

<sup>62</sup> *Hill v. White*, 11 La. Ann. 170.

for results; and in such a case he cannot excuse himself on the ground of want of sufficient skill.<sup>63</sup>

Nor can an agent be held responsible for not providing against extraordinary dangers or perils. Though he may properly be held responsible for a neglect to provide against the risks or perils to which property entrusted to his care may, in the ordinary course of business, be exposed, he cannot be held liable for not anticipating a danger altogether out of the ordinary course of business or of natural events.<sup>64</sup>

**§ 395. Liability of agent in undertakings requiring special skill.**

Where an agent engages in an undertaking that requires the exercise of special or professional skill, he impliedly contracts with his principal that he possesses and will exercise a reasonable degree of the skill required to carry on such undertaking; and if he engages therein without possessing a reasonable amount of the skill required, and this fact is unknown to the principal, he will be liable to the latter for any loss that may result from his failure to possess and exercise such skill.<sup>65</sup> As has been said: "A person who offers his services to the community generally, or to any individual, for employment in any professional capacity as a person of skill, contracts with his employer that he possesses

<sup>63</sup> *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388.

<sup>64</sup> *Johnson v. Martin*, 11 La. Ann. 27, 66 Am. Dec. 193; *Clark v. Norwood*, 19 La. Ann. 116; *Weakley v. Pearce*, 5 Heisk. (Tenn.) 401.

<sup>65</sup> *Wilson v. Brett*, 11 Mees. & W. 113; *McDonald v. Simpson*, 4 Ark. 523; *Grannis v. Branden*, 5 Day (Conn.) 260, 5 Am. Dec. 143; *McNevin v. Lowe*, 40 Ill. 209; *Kelsey v. Hay*, 84 Ind. 189; *Becknell v. Hosler*, 10 Ind. App. 5; *Stimpson v. Sprague*, 6 Greenl. (Me.) 470; *Varnum v. Martin*, 15 Pick. (Mass.) 440; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Stanton v. Bell*, 9 N. C. (2 Hawks) 145, 11 Am. Dec. 744; *Holmes v. Peck*, 1 R. I. 242; *Kirtland v. Montgomery*, 1 Swan (Tenn.) 452; *Crooker v. Hutchinson*, 1 Vt. 73. And see cases cited ante, § 392, note 53. If an agent agrees to verify a matter of record, he is bound to make a personal examination of the record; and if he fails to do so he will be responsible for the resulting loss. *Avery Planter Co. v. Murphy*, 6 Kan. App. 29.



that reasonable degree of learning, skill, and experience which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community, and by those conversant with that employment, as necessary and sufficient to qualify him to engage in such business."<sup>66</sup>

The agent would not be liable for a loss resulting from his lack of such skill, however, if the principal knew of his want of skill when he employed him.<sup>67</sup> If the principal employs an agent in a case which requires special or professional skill, and the principal knows at the time that the agent does not possess the skill usually required in such cases, the agent is not bound to use the same degree of skill as would usually be exercised by another possessing the skill requisite to such line of business or profession, nor would he be liable for a loss resulting from his lack of such skill.<sup>68</sup> An agent so employed would only be held to the exercise of ordinary care and attention, to the best of the skill he possesses.<sup>69</sup> So if an agent does not profess to have special or professional skill, the fact that he is employed in a case requiring such skill does not hold him in responsibility for special or professional skill.<sup>70</sup> These rules apply especially to physicians, surgeons, attorneys at law, and members of other professions.

### § 396. Determination of agent's skill and diligence.

Whether or not an agent has exercised a reasonable degree of skill, prudence, and diligence in any particular case, is usually a question of fact to be determined by the jury from all the circumstances in the case, though there may be cases in which the facts are undisputed and so plainly show negligence that the court will determine it as a question of law.<sup>71</sup>

<sup>66</sup> Leighton v. Sargent, 27 N. H. 460, 59 Am. Dec. 388.

<sup>67</sup> Felt v. School Dist., 24 Vt. 297.

<sup>68</sup> Morrison v. Orr, 3 Stew. & P. (Ala.) 49, 23 Am. Dec. 319.

<sup>69</sup> Morrison v. Orr, 3 Stew. & P. (Ala.) 49, 23 Am. Dec. 319.

<sup>70</sup> McNevins v. Lowe, 40 Ill. 209; Ritchey v. West, 23 Ill. 385.

<sup>71</sup> Heinemann v. Heard, 50 N. Y. 27; Buckingham v. Payne, 36 Barb. (N. Y.) 81; Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548;

**§ 397. Agent is presumed to have performed his duty.**

In the absence of evidence of negligence, the law does not presume that an agent did not use a reasonable degree of skill, prudence, and diligence, but on the other hand it presumes that he has faithfully performed his duty, and if negligence on his part is sought to be shown, the burden of proof is upon the one alleging it.<sup>72</sup> Thus, in the absence of proof as to whether a deceased agent has or has not paid, to his principal, a sum of money collected by the agent, the presumption is that he has, rather than that he has not, paid it.<sup>73</sup> And where it is sought to show that the agent was negligent on a particular occasion, evidence that he was negligent on other occasions is not admissible, and has no legitimate bearing on the question.<sup>74</sup>

**§ 398. Agent's negligence presumed to result in loss.**

But where an agent is shown to have been negligent in the performance of his duties, the presumption is that his principal has suffered some loss thereby, and the burden of proof is on the agent to show that his negligence has not resulted in any injury to his principal.<sup>75</sup> Thus, where an agent has failed to give notice of demand of payment, and of protest of a note entrusted to him for collection, the burden is on him to show that his principal has incurred no

*National Bank v. City Bank*, 103 U. S. 668; *Grant v. Ludlow*, 8 Ohio St. 1; *Eddy v. Livingston*, 35 Mo. 487, 88 Am. Dec. 122; *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316; *Brown v. Clayton*, 12 Ga. 564; *Hall v. Junction R. Co.*, 15 Ind. 362; *Savage v. Birckhead*, 20 Pick. (Mass.) 167; *Williams v. O'Daniels*, 35 Tex. 542; *Kirtland v. Montgomery*, 1 Swan (Tenn.) 452.

<sup>72</sup> *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316; *Bellinger v. Craigue*, 31 Barb. (N. Y.) 534; *Starr v. Peck*, 1 Hill (N. Y.) 270; *Lampley v. Scott*, 24 Miss. 528.

<sup>73</sup> *Breed v. Breed*, 55 App. Div. (N. Y.) 121.

<sup>74</sup> *Konold v. Rio Grande Western R. Co.*, 21 Utah, 379, 81 Am. St. Rep. 693; *Chicago & A. R. Co. v. Hodge*, 55 Ill. App. 166.

<sup>75</sup> *Miranda v. City Bank*, 6 La. 740, 26 Am. Dec. 493; *Bartle v. Phelps*, 39 Iowa, 498; *Crawford v. Louisiana State Bank*, 1 Mart. (N. S., La.) 213. It is not necessary to enable the principal to recover in such cases, that he should prove he has sustained any damage. *Harvey v. Turner*, 4 Rawle (Pa.) 223.

damage from his neglect.<sup>76</sup> So where an agent has lost money entrusted to his care, the burden is on him to show that the loss was not occasioned by any want of care on his part.<sup>77</sup> And it is not competent for the agent to protect himself, from his negligence, by showing the custom of another principal to provide similar agents with certain appliances or means for carrying out the agency.<sup>78</sup>

**§ 399. Agent is not liable for errors of judgment.**

If the case in which the agent is acting requires him to exercise his discretion, and he does so in good faith, he is not responsible for losses that are caused by mere errors of judgment.<sup>79</sup> "Whoever bargains to render services for another undertakes for good faith and integrity, but he does not agree that he will commit no errors. For negligence, bad faith, or dishonesty he would be liable to his employer; but if he is guilty of neither of these, the master or employer must submit to such incidental losses as may occur in the course of the employment, because these are incident to all avocations, and no one, by any implication of law, ever undertakes to protect another against them."<sup>80</sup> This rule is often applied to attorneys-at-law, as will be seen in a subsequent chapter.<sup>81</sup>

**§ 400. Agent is not liable for negligence in performance of illegal acts.**

It has been seen in former chapters that a contract of agency for the performance of illegal acts is void,<sup>82</sup> and that an agent could recover no compensation for the performance

<sup>76</sup> *Miranda v. City Bank*, 6 La. 740, 26 Am. Dec. 493.

<sup>77</sup> *Darling v. Younker*, 37 Ohio St. 487, 41 Am. Rep. 532.

<sup>78</sup> *Wright v. Central R. & Banking Co.*, 16 Ga. 38.

<sup>79</sup> *McLaughlin v. Simpson*, 3 Stew. & P. (Ala.) 85; *Steele v. Taylor*, 4 Dana (Ky.) 445; *Chapman v. Clements*, 22 Ky. L. R. 17, 56 S. W. 646; *Page v. Wells*, 37 Mich. 415; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Milbank v. Dennistoun*, 21 N. Y. 386; *Long v. Poole*, 68 N. C. 479.

<sup>80</sup> *Page v. Wells*, 37 Mich. 415.

<sup>81</sup> See post, § 656.

<sup>82</sup> See ante, §§ 38, 39.

of such acts.<sup>83</sup> From this it necessarily follows that a principal can have no right of action against his agent for matters growing out of such contract; and therefore if an agent is negligent in performance of acts which are illegal or against public policy, he is not liable to his principal for any loss resulting therefrom, for the reason that in order to sustain an action therefor the principal would have to plead the contract, which is void.<sup>84</sup> Thus, where an agent is negligent in making bets, he is not liable for any loss, because the principal could not have enforced the bets if made.<sup>85</sup>

**§ 401. Damages for which agent is liable.**

An agent is liable to his principal only for the actual damage or loss the latter has sustained as a proximate result of the agent's lack of skill or negligence. The principal is only to be made whole, or, in other words, put in the same position he would have been in had the agent fully performed his duty. It is not necessary that the damages should be caused directly or immediately by the agent's negligence, but it will not be sufficient if they are remote or merely speculative. They must at least be such as are the natural result or just consequence of the agent's negligence.<sup>86</sup> And this includes, where the principal is compelled to defend litigation caused by the negligence of the agent against whom the principal has a remedy over, not only the amount of the judgment against the principal, but also all reasonable counsel fees and expenses incurred in such defense, if the agent has been given an opportunity to come in and defend the action.<sup>87</sup> And if it is clear that the agent has been

<sup>83</sup> See ante, § 359.

<sup>84</sup> *Baynard v. Harrity*, 1 *Houst. (Del.)* 200; *Webster v. De Tastet*, 7 *Term R.* 157.

<sup>85</sup> *Cohen v. Kittell*, L. R. 22 Q. B. Div. 680.

<sup>86</sup> *In re United Service Co., Johnston's Claim*, 6 Ch. App. 212; *Bell v. Cunningham*, 3 *Pet. (U. S.)* 69; *Ainsworth v. Partillo*, 13 *Ala.* 460; *Mobile Bank v. Huggins*, 3 *Ala.* 206; *Andrews v. Pardee*, 5 *Day (Conn.)* 29; *Gilson v. Collins*, 66 *Ill.* 136; *Ryder v. Thayer*, 3 *La. Ann.* 149; *Ashley v. Root*, 4 *Allen (Mass.)* 504; *First Nat. Bank v. Fourth Nat. Bank*, 77 *N. Y.* 320. And see cases cited ante, § 392, note 53.

<sup>87</sup> *Westfield v. Mayo*, 122 *Mass.* 100, 23 *Am. Rep.* 292; *Respass v.*

guilty of negligence, in the absence of evidence of actual damages, it will be presumed that the principal has sustained nominal damages.<sup>88</sup> Thus, where an agent is employed to insure buildings for his principal during a certain time, and he neglects to do so for a certain year, in which no loss occurs, he is liable for the breach of his duty, but as no actual injury is sustained by such breach, no more than nominal damages can be recovered.<sup>89</sup>

But an agent is responsible only for such injuries or damages as are the proximate result of his own negligence. If the principal himself has been guilty of contributory negligence and thereby caused the loss, or if he has been negligent in not endeavoring to prevent the loss, the agent cannot be held liable therefor.<sup>90</sup> It is the duty of one who seeks to recover for another's wrong to use due diligence in preventing loss from such wrong. Thus, where a patient has received injury through a surgeon's negligence, but the patient is also guilty of negligence contributing to the injury, the surgeon is not liable therefor.<sup>91</sup> So an agent charged with the disbursement of funds is not liable for a loss occurring through his negligence, provided the exercise of reasonable care on the part of his principal would have prevented the loss.<sup>92</sup> So, if an agent neglects to effect insurance upon his principal's property, as it is his duty to do, and he gives notice of his neglect to his principal in ample time to procure the insurance himself, but the principal neglects to do so, he cannot recover for a loss he may sustain by reason of such neglect.<sup>93</sup> In such cases, the principal

Morton, Hardin (Ky.) 234; *Chesapeake & Ohio Canal Co. v. County Com'rs*, 57 Md. 201, 40 Am. Rep. 430; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475, 7 Am. Rep. 469; *Wilson v. Greensboro*, 54 Vt. 533.

<sup>88</sup> *Marzetti v. Williams*, 1 Barn. & Adol. 415; *Van Wart v. Woolley*, *Moody & M.* 520.

<sup>89</sup> *Brant v. Gallup*, 111 Ill. 487.

<sup>90</sup> *Sioux City & P. R. Co. v. Walker*, 49 Iowa, 273; *Brant v. Gallup*, 111 Ill. 487.

<sup>91</sup> *Lower v. Franks*, 115 Ind. 334; *Young v. Mason*, 8 Ind. App. 264.

<sup>92</sup> *Sioux City & P. R. Co. v. Walker*, 49 Iowa, 273.

<sup>93</sup> *Brant v. Gallup*, 111 Ill. 487.

could recover only nominal damages for the breach of duty.<sup>94</sup>

§ 402. Special applications of these rules.

(a) **Negligence of agent to loan.**—Where an agent is employed to loan or invest money it is his duty to use a reasonable degree of skill, care and prudence therein, as by loaning to solvent parties; procuring an abstract of title; having the title examined; loaning only on good security, or such as a person of common prudence and skill in business would have esteemed good; and by doing any other acts which a person of ordinary care and prudence would do to make the loan or investment a safe and secure one. If he fails to perform his duty in this respect, by reason of which a loss results to his principal, he will be guilty of such negligence as will make him liable to his principal for the loss.<sup>95</sup> Thus, an agent employed to loan money on a first-mortgage security was guilty of negligence and liable therefor in loaning it on a mortgage on real estate, without

<sup>94</sup> *Brant v. Gallup*, 111 Ill. 487.

<sup>95</sup> *Samonset v. Mesnager*, 108 Cal. 354; *Haines v. Christie*, 28 Colo. 502; *Watson v. Roth*, 191 Ill. 382; *Bronnenburg v. Rinker*, 2 Ind. App. 391; *Welsh v. Brown*, 8 Ind. App. 421; *Bank of Owensboro v. Western Bank*, 13 Bush (Ky.) 526, 26 Am. Rep. 211; *Bannon v. Warfield*, 42 Md. 22; *Hardwick v. Ickler*, 71 Minn. 25; *Whitney v. Martine*, 88 N. Y. 535; *Van Cott v. Hull*, 11 App. Div. (N. Y.) 89; *Heinemann v. Heard*, 50 N. Y. 27; *McFarland v. McClees* (Pa.) 5 Atl. 50; *Murrah v. Brichta* (Tex.) 9 S. W. 185. And see *Wheadon v. Mead*, 72 Minn. 372.

The fact that an agent, in making a loan for his principal, relied on information furnished him by an agent in another state, and his own experience and general knowledge in placing loans in the surrounding country, does not show that the agent was guilty of a want of ordinary care in placing the loan or was negligent. *Momsen v. Atkins*, 105 Wis. 557. And where an agent lends the money of his principal upon security which proves to be insufficient, the judgment of such agent as to the value of the security at the time it was taken is not conclusive, but evidence may be introduced as reflecting on the question of want of good faith and reasonable care in making the loan and taking the security, to show that the value of the security was very much less than the estimate placed thereon by the agent. *Bannon v. Warfield*, 42 Md. 22.

procuring an abstract of the title or having the title examined, and without inquiring as to the condition of the property as to encumbrances.<sup>96</sup> So he is negligent if he invests his principal's money upon the mere personal security of the person to whom it is lent.<sup>97</sup> So if the agent was directed to take a deed of trust as security for the loan, and in violation of such instructions, he includes, in the deed of trust, a note owed by the third party to himself without his principal's knowledge or consent, the latter may look to the agent alone for the money loaned;<sup>98</sup> and the fact that the agent acted gratuitously is no defense.<sup>99</sup> But, in such a case, the burden is on the principal to show that the agent included the note in the deed without his knowledge and consent.<sup>100</sup>

An agent, however, does not ordinarily insure or guarantee the loan or investment, and if he has acted in good faith, with ordinary prudence and care, he cannot be held liable for any loss that may ensue.<sup>101</sup> Nor will the agent be responsible to his principal in the absence of fraud or bad faith, for his negligence in investing the principal's money, if the latter authorizes or ratifies all he does in the matter.<sup>102</sup> And it has been held that the agent will not be liable, although he has been negligent, in the absence of proof that loss has resulted or will probably result therefrom.<sup>103</sup>

As has been seen in a preceding section, the agent is presumed to have faithfully and fully performed his duty, and if the principal tries to show that the agent was guilty of negligence in making the loan, the burden of proof is upon him to establish that fact.<sup>104</sup>

<sup>96</sup> *Hardwick v. Ickler*, 71 Minn. 25; *Whitney v. Martine*, 88 N. Y. 535; *Van Cott v. Hull*, 11 App. Div. (N. Y.) 89.

<sup>97</sup> *Samonset v. Mesnager*, 108 Cal. 354.

<sup>98</sup> *Marshall v. Ferguson*, 94 Mo. App. 175.

<sup>99</sup> *Marshall v. Ferguson*, 94 Mo. App. 175.

<sup>100</sup> *Marshall v. Ferguson*, 94 Mo. App. 182.

<sup>101</sup> *Kennedy v. McCain*, 146 Pa. 63; *Stewart v. Parnell*, 147 Pa. 523; *Texas Loan Agency v. Swayne* (Tex. Civ. App.) 27 S. W. 183.

<sup>102</sup> *Wagner v. Phillips*, 12 S. D. 335.

<sup>103</sup> *Porter v. Woodruff*, 36 N. J. Eq. 174.

<sup>104</sup> *Rand v. Johns* (Tex. App.) 15 S. W. 200.

(b) **Negligence of agent to insure.**—An agent is not bound to insure his principal's property, in his possession, unless he has specially undertaken to do so, or has received special instructions to that effect, or there is a custom in the particular case for him to insure, or it is the habit or course of dealing between the parties for him to do so.<sup>105</sup> But if it becomes his duty to insure in any of the cases above mentioned, he is bound to use a reasonable degree of prudence and care, in procuring the proper amount of insurance, in good companies, against proper risks, and in securing such other provisions in the policies as may reasonably be required for the proper protection of the property. If he fails to perform this duty, he is, himself, to be considered as the insurer, and liable as such for any loss the principal sustains by reason of his negligence, in which case he is entitled to credit for the premium which should have been paid.<sup>106</sup> Thus, an agent is liable to his principal for an ensuing loss if he fails to perform his duty by not insuring

<sup>105</sup> *Kingston v. Wilson*, 4 Wash. C. C. 310, Fed. Cas. No. 7,823; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Schaefer v. Kirk*, 49 Ill. 251; *Berthoud v. Gordon*, 6 La. (O. S.) 579; *De Forrest v. Fulton Fire Ins. Co.*, 1 Hall (N. Y.) 84; *Lee v. Adsit*, 37 N. Y. 78; *Brisban v. Boyd*, 4 Paige (N. Y.) 17; *Shircliff v. Whitfield*, 2 Brev. (S. C.) 71, 3 Am. Dec. 701.

<sup>106</sup> *Mallough v. Barber*, 4 Camp. 150; *Park v. Hammond*, 6 Taunt. 495; *Smith v. Lascelles*, 2 Term R. 187; *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; *Kingston v. Wilson*, 4 Wash. C. C. 310, Fed. Cas. No. 7,823; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Berthoud v. Gordon*, 6 La. (O. S.) 579; *Strong v. High*, 2 Rob. (La.) 103, 38 Am. Dec. 195; *Storer v. Eaton*, 50 Me. 219, 79 Am. Dec. 611; *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 167; *Shircliff v. Whitfield*, 2 Brev. (S. C.) 71, 3 Am. Dec. 701. But an agent is not liable for the loss of property left with him, where he was only to insure it for a reasonable time, and it was destroyed by fire after it had been with him for a long time, and the policies had expired. *Milburn Wagon Co. v. Evans*, 30 Minn. 89. And it is held that an agent who has been instructed to insure cannot take the risk upon himself as an insurer; he cannot, if he does, recover from his principal premiums for insurance, but in case of loss he would be bound to indemnify his principal, not as insurer, but on the ground of having failed to comply with his instructions. *Keane v. Branden*, 12 La. Ann. 20.



against a certain peril;<sup>107</sup> or by not using reasonable diligence and care to insure for the amount instructed,<sup>108</sup> or to insure for the full insurable value of the property, where the amount of insurance is not fixed by his instructions.<sup>109</sup>

If the agent has been in the habit of insuring his principal's property and he decides to discontinue such habit, or if he has undertaken to insure but is unable to do so, it is his duty to notify the principal of these facts, in order that the latter may effect the desired insurance; and for a failure to give such notice he will himself be liable for the ensuing loss.<sup>110</sup>

All that is required of the agent, however, is reasonable diligence and prudence, and if he uses such, in good faith, he cannot be held responsible for a failure to effect the insurance.<sup>111</sup> Nor will he be liable for having failed to effect insurance if it would have been of no use.<sup>112</sup>

If the agency to insure is a gratuitous one, the agent will be liable if he attempts to effect insurance and does it so negligently that a loss ensues, but he would not be liable if he made no attempt whatever to carry out his undertaking.<sup>113</sup>

(c) **Negligence of agent to sell.**—As has been seen in a previous chapter, an agent, employed to sell property, is authorized to sell for cash only, unless he is specially authorized to sell on credit, or unless there is a usage to that effect governing the particular case.<sup>114</sup> It is such an agent's duty, therefore, in the absence of such authority or usage,

<sup>107</sup> *Strong v. High*, 2 Rob. (La.) 103, 38 Am. Dec. 195.

<sup>108</sup> *Miner v. Tagert*, 3 Bin. (Pa.) 204.

<sup>109</sup> *Beardsley v. Davis*, 52 Barb. (N. Y.) 159.

<sup>110</sup> *Callander v. Oehlrichs*, 5 Bing. N. C. 58; *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; *Ralston v. Barclay*, 6 Mart. (La.) 649, 12 Am. Dec. 483; *Area v. Milliken*, 35 La. Ann. 1150. If he does give such notice he will be relieved from his responsibility to his principal for any loss. *Williams v. Rost*, 13 La. Ann. 327.

<sup>111</sup> *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; *Sanchez v. Davenport*, 6 Mass. 258.

<sup>112</sup> *Alsop v. Colt*, 12 Mass. 40.

<sup>113</sup> *Thorne v. Deas*, 4 Johns. (N. Y.) 84. See post, § 433.

<sup>114</sup> See ante, §§ 232, 247 (b).

not to sell his principal's goods on credit, and to use a reasonable degree of prudence and diligence in all matters pertaining to the sale, so as to effect a sale as favorable to the principal's interests as could be reasonably expected under the circumstances. For any neglect of this duty, resulting in a loss to the principal, the agent will be responsible.<sup>115</sup> Thus, an agent has been held negligent and liable therefor to his principal, for not making proper inquiries as to the financial condition and taking notes of a purchaser, who was insolvent, where he was authorized to sell on credit;<sup>116</sup> or for not using reasonable diligence and care to secure or enforce payment of such notes;<sup>117</sup> or for selling the property below its fair value;<sup>118</sup> or for not selling when directed to do so;<sup>119</sup> or for not making deposits and exhibits of the conditions of the sales and proceeds, as required by agreement;<sup>120</sup> or for not using reasonable diligence to protect the property while in his possession, by reason of which a loss results.<sup>121</sup> But if the agent has acted in good faith and used a reasonable degree of prudence and care to effect the

<sup>115</sup> *Scanlan v. Hodges*, 52 Fed. 354; *Evans v. Lawton*, 34 Fed. 233; *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122; *Harlan v. Ely*, 68 Cal. 522; *Babcock v. Orbison*, 25 Ind. 75; *Robinson Mach. Works v. Vorse*, 52 Iowa, 207; *Hemenway v. Hemenway*, 5 Pick. (Mass.) 389; *Fick v. Runnels*, 48 Mich. 302; *Birdsell Mfg. Co. v. Brown*, 96 Mich. 213; *Nichols v. Wadsworth*, 40 Minn. 547; *Plano Mfg. Co. v. Buxton*, 36 Minn. 203; *Tate v. Marco*, 27 S. C. 493; *Thompson v. Babcock*, *Brayt.* (Vt.) 24; *Piedmont Guano Co. v. Morris*, 86 Va. 941. It is the duty of an agent, authorized to sell at a price not less than a specified sum, to sell for the highest price obtainable, though the power was executed upon a valuable consideration paid by the agent. *Miller v. Louisville & N. R. Co.*, 83 Ala. 274, 3 Am. St. Rep. 722.

<sup>116</sup> *Doty v. Case & Willard Thresher Co.*, 50 Hun (N. Y.) 595; *Clark v. Roberts*, 26 Mich. 506; *Frick v. Larned*, 50 Kan. 776; *Paul v. Grimm*, 165 Pa. 139, 44 Am. St. Rep. 648. And see *Wilson v. McCormick Harvesting Mach. Co.*, 96 Ill. App. 545.

<sup>117</sup> *Kinney v. Crane*, 17 La. (O. S.) 417.

<sup>118</sup> *Chase v. Blaisdell*, 4 Minn. 90; *Bigelow v. Walker*, 24 Vt. 149, 58 Am. Dec. 156.

<sup>119</sup> *Pulsifer v. Shepard*, 36 Ill. 513.

<sup>120</sup> *Chase v. Blaisdell*, 4 Minn. 90.

<sup>121</sup> *Chenowith v. Dickinson*, 8 B. Mon. (Ky.) 156.

sale for the best interests of his principal, he cannot be held liable for any loss that may result from an error of judgment, or from some other cause not negligence on his part.<sup>122</sup>

The measure of damages, where the agent has been negligent in selling, would depend, not upon the value of the property at the time it was received by the agent, but upon its value in his hands at the time of the neglect complained of, and how the interest of the principal was affected by the agent's neglect.<sup>123</sup> Thus, where an agent authorized to sell and convey property, but without fraud, exceeds his authority, and accepts bonds instead of money in payment, he is liable only for the market price of such property.<sup>124</sup>

(d) **Negligence of agent to collect.**—An agent employed to collect a claim, in the absence of an express contract making him liable to collect in any event, is bound only to exercise a reasonable degree of skill, care, and diligence in taking all available steps that may be necessary to press the claim and make the collection. If he fails to perform this duty, in any respect, by reason of which a loss results to his principal, the agent will be responsible therefor.<sup>125</sup> Thus, it is the duty of an agent who receives negotiable paper for collection to do all acts necessary to secure and preserve the liability thereon of all the parties prior to his principal; and if he fails in this duty, and thereby causes loss to his principal, he becomes liable for such loss,<sup>126</sup> as where he

<sup>122</sup> *Betts v. Planter's & Merchant's Bank*, 3 Stew. (Ala.) 18; *Washburn v. Blake*, 47 Me. 316; *Greely v. Bartlett*, 1 Me. 172.

<sup>123</sup> *Chase v. Blaisdell*, 4 Minn. 90.

<sup>124</sup> *Paul v. Grimm*, 183 Pa. 330.

<sup>125</sup> *Kingston v. Kincaid*, 1 Wash. C. C. 454, Fed. Cas. No. 7,822; *Lawrence v. McCalmont*, 2 How. (U. S.) 426; *Hall v. Junction R. Co.*, 15 Ind. 362; *Stancill v. Gilmore*, 6 La. Ann. 763; *Mechanics' Bank v. Merchants' Bank*, 6 Metc. (Mass.) 26; *Flick v. Runnels*, 48 Mich. 302; *Reed v. Northrup*, 50 Mich. 442; *Walker v. State Bank*, 9 N. Y. 582; *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; *Wiley v. Logan*, 95 N. C. 358; *Diamond Mill Co. v. Groesbeck Nat. Bank*, 9 Tex. Civ. App. 31, 29 S. W. 169; *Crooker v. Hutchinson*, 1 Vt. 73.

<sup>126</sup> *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618; *Buckingham v. Payne*, 36 Barb. (N. Y.) 81. But he cannot be held liable for the amount of the note except upon a distinct

unnecessarily delays in presenting such paper for acceptance or payment;<sup>127</sup> or where he does not use reasonable diligence in protesting and giving notice of dishonor, where the negotiable paper is not accepted or paid. And although it is prudent and probably customary, in such cases, for the agent to give notice of such dishonor to all the parties to the paper, yet it is thought to be the better rule that the agent is only bound to give notice to his next indorser, his principal.<sup>128</sup> In some cases, however, it is held that an agent who takes a note or bill for collection is bound to give notice of its dishonor to all the indorsers, and is liable for all loss occasioned by his neglect to do so.<sup>129</sup> These cases base their decisions on the ground that it is the established usage in such cases for the agent, especially a bank, to give notice to all the indorsers.

"But this is not the utmost limit of the agent's duty and liability. He may so act as to charge all the parties to the paper, and yet become liable for a loss occasioned by his negligence. The rule which will measure the diligence which is exacted of a holder of such paper, in order to charge the prior parties, will not always measure the diligence which is required of a collecting agent in the discharge of his duty to his principal."<sup>130</sup> "Suppose an

finding that the loss of the sum due upon the paper was owing to, or consequent upon his negligence. *Buckingham v. Payne*, supra; *Sandefur v. Mattingley*, 16 Ark. 237.

<sup>127</sup> *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618; *Chapman v. McCrea*, 63 Ind. 360.

<sup>128</sup> *Mead v. Engs*, 5 Cow. (N. Y.) 303; *Howard v. Ives*, 1 Hill (N. Y.) 263; *Farmers' Bank v. Vail*, 21 N. Y. 485; *Tunno v. Lague*, 2 Johns. Cas. (N. Y.) 1, 1 Am. Dec. 141; *Bank of Mobile v. Hugins*, 3 Ala. 206; *United States Bank v. Goddard*, 5 Mason, 366, Fed. Cas. No. 917; *Seaton v. Scovill*, 18 Kan. 433; *Phipps v. Millbury Bank*, 8 Metc. (Mass.) 79.

<sup>129</sup> *Thompson v. Bank of S. C.*, 3 Hill (S. C.) 77, 30 Am. Dec. 354; *McKinster v. Bank of Utica*, 9 Wend. (N. Y.) 46; *Smedes v. Bank of Utica*, 20 Johns. (N. Y.) 372.

<sup>130</sup> *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618; *Hamilton v. Cunningham*, 2 Brock. 350, Fed. Cas. No. 5,978; 1 Daniel, Neg. Inst., § 330.

agent receives for collection from the payee a sight draft. No circumstance can make it his duty, in order to charge the drawer, to present it for payment until the next day. He has entered into no contract with the drawer, is not employed or paid by him to render him any service, and owes him no duty to protect him from loss. What is required to be done to charge the drawer is simply a compliance with the condition attached to the draft, as if written therein; and that condition is in all cases complied with by presentation, demand and notice, on the next day after receipt of the draft. But suppose the agent, on the day he receives the draft, obtains reliable information that the drawee must fail the next day, and that the draft will not be paid unless immediately presented; what then is the duty he owes his principal, whose interests for a compensation he has agreed with proper diligence and skill to serve in and about the collection of the draft? Clearly, all would say, to present the draft at once; and if he fails to do this, and loss ensues, he incurs responsibility to his principal; and yet the drawer would be charged if it was not presented until the next day. Where an agent receives a bill for collection, payable some days or months after date, in order to charge the drawer he need not present it for acceptance until it falls due; and if he then presents it and demands payment, and protests it, and gives the notice, the drawer is held; and yet in such a case he owes his principal the duty to present the bill for acceptance at once, and if he fails in such duty, and loss ensues to his principal, he becomes liable for such loss."<sup>131</sup> So an agent is liable for satisfying by mistake a mortgage, which he was authorized to collect, for a less sum than is actually due thereon.<sup>132</sup>

The liability of an agent to his principal for the acts of a subagent in making collections will be considered hereafter, in this chapter.<sup>133</sup>

<sup>131</sup> *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618.

<sup>132</sup> *Kempker v. Roblyer*, 29 Iowa, 274.

<sup>133</sup> See post, § 441 et seq.

(e) **Same—Duty to receive payment in money.**—In the absence of express authority otherwise, it is ordinarily the duty of an agent, to collect, to receive payment in lawful money only, and not in checks, drafts, notes, etc.<sup>134</sup> It is undoubtedly true that men who have bank accounts are accustomed to give checks for their debts, and in many cases their standing is such that these checks are taken by their neighbors as readily as cash. But, although this may be a common practice among men who are dealing on their own account, such checks do not constitute a payment, in the absence of an express agreement to that effect, unless they are in fact paid upon presentment at the bank within a reasonable time. An agent, however, receives anything but money at his peril, unless he is otherwise authorized. Thus, an agent employed to collect a draft for an absent party cannot give it up to the drawee, and sacrifice the claim which the owner may have on prior parties, upon the mere receipt of a check which may turn out to be worthless; and by so doing the agent makes the check his own as between himself and principal and will be liable to the latter for the amount thereof.<sup>135</sup> And so where an agent accepted confederate treasury notes, without showing any necessity therefor, or without making any effort to dispose of them to the best advantage, he was liable for the loss.<sup>136</sup> So an agent employed to collect notes, who takes merchandise in payment therefor, which he sells at a loss, is bound to account to the principal for the full amount due on the notes, in the absence of authority from the principal to accept such payment or a ratification by him of such unauthorized act.<sup>137</sup> And especially does the above rule apply where the agent receives property as money in violation of his instructions.<sup>138</sup>

(f) **Same—Negligence in remitting.**—In the absence of express instructions to remit in a particular manner or by a

<sup>134</sup> See ante, § 275.

<sup>135</sup> *Whitney v. Esson*, 99 Mass. 308, 96 Am. Dec. 762. Compare *Russell v. Hankey*, 6 Term R. 12.

<sup>136</sup> *Webster v. Whitworth*, 49 Ala. 201.

<sup>137</sup> *Rush v. Rush*, 170 Ill. 624.

<sup>138</sup> *Holmes v. Langston*, 110 Ga. 861.

particular way,<sup>139</sup> an agent who has collected a claim for his principal is bound only to use a reasonable degree of skill and diligence in remitting the proceeds; and if he does so he will not be responsible for any ensuing loss.<sup>140</sup> Thus, an agent may transmit money to his principal through the mail, and he will not be liable for its loss unless his instructions are to the contrary, or unless the circumstances of that particular transaction would warrant a belief that such a course would be unsafe.<sup>141</sup>

(g) **Same—Measure of damages.**—The measure of damages which a principal is entitled to recover of a collecting agent, who has been negligent, is the actual loss which he has suffered.<sup>142</sup> This loss is *prima facie* the amount of the claim which has been in his hands for collection if there is a reasonable probability that the entire debt would have been collected, but for the agent's negligence;<sup>143</sup> but this amount may be reduced by the agent, the burden of proof being on him, by positive evidence proving that the real damages were less, or that they were merely nominal.<sup>144</sup> Thus, if the debt

<sup>139</sup> See *supra*, note 125.

<sup>140</sup> *Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58. Where an agent is unable to remit money to his principal on the day it is collected, and he locks it in an iron safe in the principal's office, he is not liable for a loss of the money by burglary, in the absence of a special agreement to act as insurer of the moneys collected. *Louisville & N. R. Co. v. Buffington*, 131 Ala. 620.

<sup>141</sup> *Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58; *Morgan v. Richardson*, 13 Allen (Mass.) 410.

<sup>142</sup> *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618; *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; *Omaha Nat. Bank v. Kiper*, 60 Neb. 33. And see cases cited in following notes. Where an agent falls through negligence to collect cotton due to his principal, he is liable for the value of the cotton with interest thereon. *Dickson v. Screven*, 23 S. C. 212.

<sup>143</sup> *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618; *Bank of Washington v. Triplett*, 1 Pet. (U. S.) 25; *Omaha Nat. Bank v. Kiper*, 60 Neb. 33; *Dern v. Kellogg*, 54 Neb. 560.

<sup>144</sup> *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618; *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; *Coghlan v. Dinsmore*, 9 Bosw. (N. Y.) 453; *Van Wart v. Woolley*, *Moody & M.* 520; *Miranda v. City Bank*, 6 La. 740, 26 Am. Dec. 493.

to be collected was upon a bill or note, the loss is *prima facie* the face value of the bill or note;<sup>145</sup> but the agent may mitigate the damages by showing either the solvency of the maker, the insolvency of the indorser, or that the paper was partially or wholly secured;<sup>146</sup> or that if he had used the greatest diligence, the bill would not have been accepted or paid;<sup>147</sup> or that the principal has an effectual remedy against prior parties to the bill or note;<sup>148</sup> or any other matter showing that the whole amount of the bill or note has not been lost through his negligence. The real loss in any case is a question of fact to be determined by the jury.<sup>149</sup>

**§ 403. Negligence of architects.**

An architect, employed to make plans and superintend certain work, is not a contractor to do the work, but is merely an agent of the owner to assist in doing it; and the responsibility resting on him is essentially the same as that which rests upon an attorney to his client, or which rests upon anyone to another where such person pretends to possess some skill and ability in some special employment, and offers his services to the public on account of his fitness to act in the line of business for which he may be employed. The undertaking of an architect implies that he possesses skill and ability sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply in the given case his skill and ability, his judgment and taste, reasonably and without neglect, and for any failure in this respect he will be held

<sup>145</sup> *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618; *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; *Borup v. Nininger*, 5 Minn. 523.

<sup>146</sup> *Borup v. Nininger*, 5 Minn. 523; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618; *Coghlan v. Dinsmore*, 9 Bosw. (N. Y.) 453.

<sup>147</sup> *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618.

<sup>148</sup> *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618.

<sup>149</sup> *Borup v. Nininger*, 5 Minn. 523.



responsible to his principal.<sup>150</sup> Thus, an architect, employed to furnish plans for a building and superintend the construction, is liable for damage caused by the cracking of the walls through his lack of skill and care.<sup>151</sup> But he does not undertake or impliedly warrant that the results shall be satisfactory at all events, nor does he promise that miscalculations may not occur; and if he has exercised his best skill and judgment, the principal cannot set up, as a defense to the architect's action for services, in the absence of allegations of fraud or mistake, or contract of warranty or guaranty, the fact that the services were not beneficial to him for the reason that they were performed in a manner contrary to and in excess of his express directions.<sup>152</sup> Thus, where an architect exercises the skill and care of those ordinarily engaged in the business, and uses his best judgment, he is not liable for faults in the construction caused by defects in the plans.<sup>153</sup>

### III. GOOD FAITH AND LOYALTY.

#### § 404. Duty of agent to act in good faith and with loyalty to his principal.

It is well settled that an agent occupies a fiduciary relation towards his principal, and that he is bound, in the execution of the agency, to act in the most perfect good faith and with loyalty to the interests of his principal; and so sedulously is this principle guarded that all departures from it are esteemed frauds upon the confidence bestowed.<sup>154</sup> An agent will not be allowed to assume any position which is inconsistent with this duty, or to acquire any rights by violation of it. This duty necessarily arises out of the na-

<sup>150</sup> *Coombs v. Beede*, 89 Me. 187, 56 Am. St. Rep. 406; *Shipman v. State*, 43 Wis. 381; *Lasher v. Colton*, 80 Ill. App. 75.

<sup>151</sup> *Schreiner v. Miller*, 67 Iowa, 91, 56 Am. Rep. 339.

<sup>152</sup> *Coombs v. Beede*, 89 Me. 187, 56 Am. St. Rep. 406.

<sup>153</sup> *Chapel v. Clark*, 117 Mich. 638.

<sup>154</sup> *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600; *Michoud v. Girod*, 4 How. (U. S.) 503; *Merryman v. David*, 31 Ill. 404; *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74; and other cases cited in the notes following.

ture of the relation. The principal trusts to the agent, whom he has employed, to faithfully use all reasonable efforts to advance his interests. Many details of the transaction are conducted by the agent without the principal having any knowledge thereof; and in the course of the transaction the agent acquires knowledge of facts that are unknown to the principal. Thus the agent has many opportunities of acquiring an interest or benefit to himself out of the transaction, to the detriment of the principal, and against which the latter may be unable to protect himself. For this reason the law jealously guards all the agent's dealings or actions in reference to the subject-matter of the agency, and requires that they shall be strictly in good faith and loyal to the interests of his principal.

But it has been held that this principle applies only to agents who are relied upon for counsel and direction and whose employment is rather a trust than a service, and not to those who are merely employed as instruments in the performance of some appointed service.<sup>155</sup>

#### § 405. Personal interest of agent in transaction.

As stated above, an agent will not be allowed to assume any position which is inconsistent with his duty to be loyal to his principal, or to place himself in an attitude of antagonism to the interests of his principal. He not only will not be allowed to acquire any personal interest or advantage by an actual violation of his duty, but he also will not be allowed to take a position, without his principal's knowledge and consent, which will have a tendency to cause him to violate such duty, and to act in his own interest rather than that of his principal.<sup>156</sup> If he does so, the principal may

<sup>155</sup> *Deep River Gold Min. Co. v. Fox*, 39 N. C. (4 Ired. Eq.) 61.

<sup>156</sup> *Michoud v. Girod*, 4 How. (U. S.) 503; *Sessions v. Payne*, 113 Ga. 955; *Kerfoot v. Hyman*, 52 Ill. 512; *Tewksbury v. Spruance*, 75 Ill. 187; *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541; *Bouton v. Cameron*, 99 Ill. App. 600; *Bunker v. Miles*, 30 Me. 431, 50 Am. Dec. 632; *Conkey v. Bond*, 36 N. Y. 427; *Taussig v. Hart*, 58 N. Y. 425; and see further cases cited in following sections. This principle does not apply, however, where a school board authorizes its president to enter into a contract of insurance through an insurance agent who

compel him to account, or set the transaction aside, according to circumstances, and no local custom or usage can be shown to avoid this rule.<sup>157</sup>

**§ 406. Agent must not make profit out of his agency for himself.**

Good faith and loyalty to a principal's interest requires of an agent that he shall not take advantage of his position, and the confidence reposed in him, to deal with the principal's property, during the course of his agency, so as to make a profit out of it for himself, beyond his lawful compensation. All profits accruing from the subject-matter of the agency properly belong to the principal, and it is a fraud upon the latter for the agent to deal with or use the property so as to take these profits, or a part thereof, to himself. Nor does it matter whether the profit is made while he is regularly pursuing the course of his agency, or whether it is made while acting entirely beyond the scope of the agency, assuming to act for his principal. If he uses the subject-matter of his agency, or information acquired therein, to make a profit, it properly belongs to his principal, and the agent should not appropriate it to himself. It is an agent's duty, therefore, not to use or deal with the subject-matter of his agency, in any manner, so as to make a profit for himself without the principal's knowledge and consent, but to always give to his principal the benefit of any advantage, or of any information, he may obtain in the course of the agency; and if he does not do so the principal may compel him to account for the profits thus obtained.<sup>158</sup>

is also a member of the board, as the agent's interest as a school director is not such as to make his duties inconsistent. *German Ins. Co. v. Independent School Dist.*, 80 Fed. 366.

<sup>157</sup> *Robinson v. Mollett*, L. R. 7 H. L. 802; *Butcher v. Krauth*, 14 Bush (Ky.) 713; *Robertson v. Western M. & F. Ins. Co.*, 19 La. 227, 36 Am. Dec. 673.

<sup>158</sup> *England*: *Keech v. Sandford*, 2 Eq. Cas. Abr. 741; *York Buildings Co. v. MacKenzie*, 3 Paton, 378; *Imperial Mercantile Credit Ass'n v. Coleman*, L. R. 6 H. L. 189.

*United States*: *Northern Pacific R. Co. v. Kindred*, 14 Fed. 77; *Ringo v. Binns*, 10 Pet. 269.

*Alabama*: *Whelan v. McCreary*, 64 Ala. 319.

"It matters not how fair the conduct of the agent may have been in the particular case, nor that the principal would have been no better off if the agent had strictly executed his power, nor that the principal was not in fact injured by the interven-

*Arkansas:* Rhea v. Puryear, 26 Ark. 344; Leake v. Sutherland, 25 Ark. 219.

*California:* Herrlich v. McDonald, 80 Cal. 473; Wiard v. Brown, 59 Cal. 194.

*Connecticut:* Thompson v. Stewart, 3 Conn. 171, 8 Am. Dec. 168.

*Illinois:* Merryman v. David, 31 Ill. 404; Salsbury v. Ware, 183 Ill. 505; Tilden v. Blackwell, 94 Ill. App. 605; Watson v. Union Iron & Steel Co., 15 Ill. App. 509; Prince v. Dupuy, 163 Ill. 417.

*Indiana:* Lafferty v. Jelley, 22 Ind. 471; Ackenburgh v. McCool, 36 Ind. 473.

*Iowa:* Stoner v. Weiser, 24 Iowa, 434; Rorebeck v. Van Eaton, 90 Iowa, 82.

*Louisiana:* Denson v. Stewart, 15 La. Ann. 456.

*Mississippi:* Murphey v. Sloan, 24 Miss. 658; Gillenwaters v. Miller, 49 Miss. 150.

*Missouri:* Bent v. Priest, 86 Mo. 475; Jamison v. Glascock, 29 Mo. 191; Jacques v. Edgell, 40 Mo. 77.

*Nebraska:* Buck v. Reed, 27 Neb. 67.

*New Jersey:* Porter v. Woodruff, 36 N. J. Eq. 174; Dodd v. Wakeman, 26 N. J. Eq. 484.

*New York:* Dutton v. Willner, 52 N. Y. 312; Price v. Keyes, 62 N. Y. 378; Willink v. Vanderveer, 1 Barb. 599.

*Ohio:* Aetna Ins. Co. v. Church, 21 Ohio St. 492.

*Pennsylvania:* Norris' Appeal, 71 Pa. 106; Simons v. Vulcan Oil & Min. Co., 61 Pa. 202, 100 Am. Dec. 628.

*Tennessee:* Molnett v. Days, 1 Baxt. 431.

*Texas:* Bell v. Maximos, 85 Tex. 140; Borden v. Houston, 2 Tex. 594.

*Vermont:* Judevine v. Hardwick, 49 Vt. 180.

*Wisconsin:* Collins v. Case, 23 Wis. 230.

Where one procures another to pursue and capture a horse thief, he will be entitled to the reward offered, notwithstanding such thief may have been actually apprehended and detained by the one employed. *Montgomery County v. Robinson*, 85 Ill. 174. So the law will not permit the employed agent of a county to make a profit for himself at the expense of the county by influencing the county court to disregard its duty. Even though the county commissioners be guilty of culpable negligence in the performance of their duty to protect the public interest, the county may recover the damage sustained by the act of the faithless agent. *Smith v. Mosely*, 74 Tex. 631.

tion of the agent for his own benefit. If the agent deals with the subject-matter of his agency, or, by departing from the instructions of his principal, obtains a better result than could have been obtained by following them, the principal can claim the advantage thus obtained, even though the agent may have contributed his own funds or responsibility in producing the result."<sup>159</sup> Thus, this principle applies and the agent is responsible to his principal for any profit he may make out of the sale of property, as where he sells for a greater price than that specified by, or represented to, the principal;<sup>160</sup> even though the agent may have stated, to the principal, that he would retain for his services as agent any sum realized above that for which he was authorized to sell.<sup>161</sup>

And the same is true in the case of profits made out of purchases, as where the agent purchases for a less price than that specified by the principal.<sup>162</sup> Thus, where an agent receives

<sup>159</sup> *Dutton v. Willner*, 52 N. Y. 319; *Williams v. Stevens*, L. R. 1 P. C. 352.

<sup>160</sup> *Wooster v. Nevills*, 73 Cal. 58; *Schoelkopf v. Leonard*, 8 Colo. 159; *Kerfoot v. Hyman*, 52 Ill. 512; *Merryman v. David*, 31 Ill. 404; *Love v. Hoss*, 62 Ind. 255; *Blanchard v. Jones*, 101 Ind. 542; *Stoner v. Weiser*, 24 Iowa, 434; *Denson v. Stewart*, 15 La. Ann. 456; *Cutler v. Demmon*, 111 Mass. 474; *Greenfield Sav. Bank v. Simons*, 133 Mass. 415; *Bain v. Brown*, 56 N. Y. 285; *Kramer v. Winslow*, 130 Pa. 484, 17 Am. St. Rep. 782; *Kramer v. Winslow*, 154 Pa. 637. And even if he sells at the price named, which is less than the market price, and himself becomes the purchaser, without making any attempt to procure purchasers at a higher price, and pays to his principal the money so obtained, the principal may maintain an action at law against him, without returning the money, to recover the difference between the market value and the price obtained. *Greenfield Sav. Bank v. Simons*, 133 Mass. 415.

<sup>161</sup> *Mulvane v. O'Brien*, 58 Kan. 463.

<sup>162</sup> *Northern Pac. R. Co. v. Kindred*, 3 McCrary, 627, 14 Fed. 77; *Ritchey v. McMichael* (Cal.) 35 Pac. 151; *Ely v. Hanford*, 65 Ill. 267; *Rising Sun Nat. Bank v. Seward*, 106 Ind. 264; *Keyes v. Bradley*, 73 Iowa, 589; *Bunker v. Miles*, 30 Me. 431, 50 Am. Dec. 632; *Boston v. Simmons*, 150 Mass. 461, 15 Am. St. Rep. 230; *Antiseptic Fiber Package Co. v. Klein*, 119 Mich. 225; *Crump v. Ingersoll*, 44 Minn. 84; *Kanada v. North*, 14 Mo. 615; *Wilson v. Wilson*, 4 Abb. Dec. (N. Y.) 621; *Duryea v. Vosburgh*, 138 N. Y. 621; *Yeaney v. Keck*, 183 Pa. 532; *Collins v. Case*, 23 Wis. 230.

from his principal a greater sum than he had paid for property purchased for the principal, the latter may recover the difference, deducting the amount of the agent's compensation,<sup>163</sup> unless the principal had expressly stipulated to pay the agent a given sum for the property, whatever it may cost the agent; in which case the agent would be entitled to any profit he might make by purchasing for less than the amount specified.<sup>164</sup>

So if an agent is employed for a given time at a specified compensation, his services during such time properly belong to his principal, and any earnings he may have received during such time, other than his specified compensation, should be given to his principal.<sup>165</sup> This rule does not apply, however, in case of mere gratuities acquired by the agent, from third persons, during the course of the agency.<sup>166</sup>

The reason for the above rule is that it is not merely intended to afford a remedy for discovered frauds, but to reach those which may be concealed, and also to prevent them by

<sup>163</sup> *Bunker v. Miles*, 30 Me. 431, 50 Am. Dec. 632; *Kramer v. Winslow*, 130 Pa. 484, 17 Am. St. Rep. 782; *McMillan v. Arthur*, 98 N. Y. 168; *Collins v. Case*, 23 Wis. 231.

<sup>164</sup> *Anderson v. Welser*, 24 Iowa, 428, where it is said: "In such a case the agent would not be the buyer and seller in the sense that because of incompatibility of interest, the transaction would be held invalid. He becomes the seller, and the purchaser, contracting with a knowledge of the facts, cannot insist upon the application of the rule that the agent purchased for his principal, and therefore such principal is to have the profit resulting from such purchase. It would seem to be a misuse of terms and ideas to apply the principles applicable and well understood between principal and agent to a case of the kind supposed. For, according to the theory of the instruction under consideration, the defendant would not be buying for plaintiff, but for himself, to enable him to execute a contract to convey."

<sup>165</sup> *Leach v. Hannibal & St. J. R. Co.*, 86 Mo. 27, 56 Am. Rep. 408; *Stansbury v. United States*, 1 Ct. Cl. (U. S.) 123. Thus, money paid to an agent, employed to insure his principal's property, by an agent of the insurance company for insuring in his company, belongs to the principal, as profits made during the course of the agency, beyond ordinary compensation. *Patterson v. Missouri Glass Co.*, 72 Mo. App. 492.

<sup>166</sup> *Aetna Ins. Co. v. Church*, 21 Ohio St. 492.

removing from agents all inducements to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency relates.<sup>167</sup>

**§ 407. Agent to sell must not himself be the purchaser.**

If an agent is employed to sell or lease property of his principal, he cannot sell or lease, directly or indirectly, to himself, without the principal's knowledge and consent, or unless his relations with the principal have been terminated. If he does so, the principal may set the transaction aside and recover the property, or if sold to a bona fide purchaser compel him to account for the proceeds, and it will be no defense for the agent to show that he acted in good faith, and that the transaction was in fact for the best interest of the principal. The law does not inquire in such a case whether there was any fraud, but gives the principal the absolute right to repudiate the transaction, because it will not allow an agent to take a position which is so inconsistent with his duty to his principal.<sup>168</sup> And this is true notwithstanding

<sup>167</sup> *Dutton v. Willner*, 52 N. Y. 312.

<sup>168</sup> *England*: *Bentley v. Craven*, 18 Beav. 75; *Crowe v. Ballard*, 2 Cox, 253.

*United States*: *Marsh v. Whitmore*, 21 Wall. 178; *Cleveland Ins. Co. v. Reed*, 1 Biss. 180, Fed. Cas. No. 2,889; *Michoud v. Girod*, 4 How. 503; *Robertson v. Chapman*, 152 U. S. 673.

*Alabama*: *Walker v. Palmer*, 24 Ala. 358.

*Arkansas*: *White v. Ward*, 26 Ark. 445; *Rogers v. Lockett*, 28 Ark. 290.

*California*: *Winter v. McMillan*, 87 Cal. 256, 22 Am. St. Rep. 243.

*Colorado*: *Finnerty v. Fritz*, 5 Colo. 174.

*Connecticut*: *Banks v. Judah*, 8 Conn. 145.

*Georgia*: *Roe v. Doe*, 31 Ga. 544.

*Illinois*: *Hughes v. Washington*, 72 Ill. 84; *Kerfoot v. Hyman*, 52 Ill. 512; *Prince v. Dupuy*, 163 Ill. 417.

*Indiana*: *Sturdevant v. Pike*, 1 Ind. 277.

*Iowa*: *Ingle v. Hartman*, 37 Iowa, 274.

*Kentucky*: *Butcher v. Krauth*, 14 Bush, 713; *Louisville Bank v. Gray*, 84 Ky. 565; *Dodge v. Black*, 21 Ky. L. R. 992, 53 S. W. 1039.

*Louisiana*: *Robertson v. Western M. & F. Ins. Co.*, 19 La. 227, 36 Am. Dec. 673.

*Maine*: *Parker v. Vose*, 45 Me. 54; *Matthews v. Light*, 32 Me. 305 (as to proper mode of redress for principal, see *Thompson v. Hallett*, 26 Me. 141).

the power to sell was executed upon a valuable consideration, paid by the agent.<sup>169</sup> "The law does not presume that such a transaction will always be impressed with fraud, but it furnishes an inducement to fraud, and affords opportunities to persons, who should always act with the most conscientious and scrupulous good faith, to abuse their trust; and therefore a total disability is enjoined, to take away all temptation."<sup>170</sup>

*Maryland:* Keighler v. Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600.

*Massachusetts:* Copeland v. Mercantile Ins. Co., 6 Pick. 198.

*Michigan:* People v. Township Board, 11 Mich. 222; Dwight v. Blackmar, 2 Mich. 330, 57 Am. Dec. 130; McNutt v. Dix, 83 Mich. 328; McKay v. Williams, 67 Mich. 547, 11 Am. St. Rep. 597; Ames v. Port Huron Log D. & B. Co., 11 Mich. 189, 83 Am. Dec. 731.

*Minnesota:* Tilleny v. Wolverton, 50 Minn. 419.

*Mississippi:* Murphey v. Sloan, 24 Miss. 658.

*Missouri:* Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304; Euneau v. Rieger, 105 Mo. 659.

*New Hampshire:* Remick v. Butterfield, 31 N. H. 70, 64 Am. Dec. 316.

*New Jersey:* Ruckman v. Bergholz, 37 N. J. Law, 437; Quinn v. Le Duc (N. J. Eq.) 51 Atl. 199.

*New York:* Cumberland Coal & Iron Co. v. Sherman, 30 Barb. 553; Bain v. Brown, 56 N. Y. 285; Moore v. Moore, 5 N. Y. 256.

*North Carolina:* Deep River Gold Min. Co. v. Fox, 39 N. C. (4 Ired. Eq.) 61.

*North Dakota:* Anderson v. First Nat. Bank, 6 N. D. 497; Clendenning v. Hawk, 10 N. D. 90.

*Oregon:* Savage v. Savage, 12 Or. 459.

*Tennessee:* Tynes v. Grimstead, 1 Tenn. Ch. 508; Tisdale v. Tisdale, 2 Sneed, 596, 64 Am. Dec. 775.

*Texas:* Scott v. Mann, 36 Tex. 157; Shannon v. Marmaduke, 14 Tex. 217; Satterthwaite v. Loomis, 81 Tex. 64; Armstrong v. O'Brien, 83 Tex. 635.

*Virginia:* Segar v. Edwards, 11 Leigh, 213; Moseley v. Buck, 3 Munf. 232, 5 Am. Dec. 508.

*Wisconsin:* Stewart v. Mather, 32 Wis. 344; Cook v. Berlin Woolen Mill Co., 43 Wis. 433.

This principle, however, can be taken advantage of only by persons whose interests are affected. It cannot be called in question by strangers to the property. Remick v. Butterfield, 31 N. H. 70, 64 Am. Dec. 316.

<sup>169</sup> Miller v. Louisville & N. R. Co., 83 Ala. 274, 3 Am. St. Rep. 722.

<sup>170</sup> Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304.



Thus, this rule is held to apply and the transaction liable to be repudiated by the principal, where an agent to sell, applies the property to the payment of his own debts;<sup>171</sup> or where he acquires title to property by raffling it off, and winning it;<sup>172</sup> or where, after he has taken an order for the sale and delivery of goods, he takes an assignment of such order from the purchaser to himself;<sup>173</sup> or where he purchases the property for himself at a public or foreclosure sale, which it was his duty to conduct,<sup>174</sup> and the fact that he has given his principal notice of his intention to purchase for himself at such a sale will not make the purchase a valid one.<sup>175</sup>

So this rule applies not only to a purchase by the agent himself directly, but it is also his duty not to sell, either directly or indirectly, to another person through whom he will acquire title to or some benefit in the property, without his principal's knowledge and consent.<sup>176</sup> Thus, an agent to sell cannot, without his principal's knowledge and consent, sell to his wife, either directly or through a third person;<sup>177</sup>

<sup>171</sup> *Parsons v. Webb*, 8 Me. 38, 22 Am. Dec. 220; *Barnett v. Daw*, 55 App. Div. (N. Y.) 202.

<sup>172</sup> *Hodgson v. Raphael*, 105 Ga. 480.

<sup>173</sup> *Off v. Inderrieden Co.*, 74 Ill. App. 105.

<sup>174</sup> *Adams v. Sayre*, 70 Ala. 318; *Kimball v. Ranney*, 122 Mich. 160, 80 Am. St. Rep. 548; *Rockford Watch Co. v. Manifold*, 36 Neb. 801; *Moore v. Moore*, 5 N. Y. 256; *Van Epps v. Van Epps*, 9 Paige (N. Y.) 237; *Momsen v. Atkins*, 105 Wis. 557.

<sup>175</sup> *Kimball v. Ranney*, 122 Mich. 160, 80 Am. St. Rep. 548.

<sup>176</sup> *Bookwalter v. Lansing*, 23 Neb. 291; *Green v. Knoch*, 92 Mich. 26; *McKay v. Williams*, 67 Mich. 547, 11 Am. St. Rep. 597; *Eldridge v. Walker*, 60 Ill. 230; *Parker v. Vose*, 45 Me. 54; *Fisher v. Budlong*, 10 R. I. 525; *Ingerson v. Starkweather*, Walk. (Mich.) 346. But the mere fact that a purchaser of land is a brother-in-law of an agent, who has power to sell, does not imply such confidence as to preclude him from becoming the purchaser of land. *Walker v. Carlington*, 74 Ill. 446.

<sup>177</sup> *Tyler v. Sanborn*, 128 Ill. 136, 15 Am. St. Rep. 97; *Green v. Hugo*, 81 Tex. 452, 26 Am. St. Rep. 824; *Reed v. Aubrey*, 91 Ga. 435, 44 Am. St. Rep. 49; *Smitz v. Leopold*, 51 Minn. 455; *McNutt v. Dix*, 83 Mich. 328; *Abrams v. Wingo*, 9 Kan. App. 884, 59 Pac. 661. Or to himself and wife. *Winter v. McMillan*, 87 Cal. 256, 22 Am. St. Rep. 243.

or to a firm of which he is a member;<sup>178</sup> or to an ostensible purchaser jointly with himself.<sup>179</sup> So the clerk of an agent to sell lands, who is employed or concerned in the affairs of the seller relating to the lands, is, alike with his principal, prohibited from purchasing, and if he does so, the seller may compel him to reconvey the lands, or account for their proceeds.<sup>180</sup>

The reason for this rule is that it is the duty of an agent, employed to sell, to use his best endeavors to sell his principal's property to third persons for the highest reasonable price, and not to act in any other capacity, incompatible or inconsistent with such duty; and whereas it is the purpose of one buying to always try to buy for the lowest possible price, by uniting in himself the incompatible characters of seller and buyer, he places himself in a position that is inconsistent with his duty to his principal. It is human nature for one to look more to his own interests than to those of another, and though this is not true in all cases, yet by the agent purchasing for himself that which he sells for his principal, he places himself in a position which tempts him to be unfaithful to his principal's interest. Such being the case, the law gives the principal an absolute right to repudiate or adopt the transaction at his election, though the agent may have acted with entire good faith in the transaction,

Such a sale, at common law, would clearly have been voidable, both because the wife then had no independent power to contract, and because the husband would have taken an estate during coverture in the property; and notwithstanding the modern statutes have empowered the wife to contract with her husband, and to hold a separate estate during coverture, still it has not denied to each all interest in the property of the other; the husband still has a pecuniary and relational interest in his wife's estate, and is prohibited from conveying property to her, for which he is agent to sell, without the full knowledge and consent of his principal. *Tyler v. Sanborn*, 128 Ill. 136, 15 Am. St. Rep. 97.

<sup>178</sup> *Fry v. Platt*, 32 Kan. 62 (or to a partner); *Francis v. Kerker*, 85 Ill. 190; *McDonald v. Lord*, 26 How. Pr. (N. Y.) 404; *Martin v. Moulton*, 8 N. H. 504.

<sup>179</sup> *Hughes v. Washington*, 72 Ill. 84.

<sup>180</sup> *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Hobday v. Peters*, 28 Beav. 349.

and paid as much for the property as could have been obtained from another.<sup>181</sup>

<sup>181</sup> As has been said in *Porter v. Woodruff*, 36 N. J. Eq. 174: "The general interests of justice, and the safety of those who are compelled to repose confidence in others, alike demand that the court shall always inflexibly maintain that great and salutary rule which declares that an agent employed to sell cannot make himself the purchaser, nor, if employed to purchase, can he be himself the seller. The moment he ceases to be the representative of his employer, and places himself in a position towards his principal where his interests may come in conflict with those of his principal, no matter how fair his conduct may be in the particular transaction, that moment he ceases to be that which his service requires and his duty to his principal demands. \* \* \* The reason of the rule is apparent: Owing to the selfishness and greed of our nature, there must, in the great mass of the transactions of mankind, be a strong and almost uneradicable antagonism between the interests of the seller and the buyer, and universal experience has shown that the average man will not, where his interests are brought in conflict with those of his employer, look upon his employer's interests as more important and entitled to more protection than his own. In such cases, the courts do not stop to inquire whether an agent has obtained an advantage or not, or whether his conduct has been fraudulent or not, when the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, in one of which he acted for himself and in the other pretended to act for another person, and to have secured for each the same measure of advantage that would have been obtained if each had been represented by a disinterested and loyal representative; they do not pause to speculate concerning the merits of the transaction, whether the agent has been able so far to curb his natural greed as to take no advantage, but they at once pronounce the transaction void because it is against public policy. The salutary object of the principal is not to compel restitution in case fraud has been committed or an unjust advantage has been gained, but to elevate the agent to a position where he can be tempted to betray his principal. Under a less stringent rule, fraud might be committed or unfair advantage taken, and yet, owing to the imperfections of the best of human institutions, the injured party be unable either to discover it or prove it in such manner as to entitle him to redress. To guard against this uncertainty, all possible temptation is removed and the prohibition against an agent acting in a dual character is made broad enough to cover all his transactions."

And again in *Michoud v. Girod*, 4 How. (U. S.) 555, Mr. Justice Wayne says: "The disability to purchase is a consequence of that relation between them which imposes on the one the duty to protect

**§ 408. Agent to purchase for principal must not purchase from himself.**

For the same reasons the above rule applies when an agent authorized to purchase or take a lease of property for his principal purchases or leases from himself, directly or indirectly, without the knowledge and consent of the principal. In such a case the principal has an absolute right to set the transaction aside, irrespective of any question of fraud or unfairness.<sup>182</sup> It is no answer, to an action against the agent, in such cases, that his intention was honest, and that he did better for his principal by selling him his own property, than he could have done by buying elsewhere.<sup>183</sup> And where such an agent purchases from a third person, but first takes title to the property in his own name, and then

the interests of the other, from the faithful discharge of which duty his own personal interests may withdraw him. In this conflict of interests the law wisely interposes. It acts not on the possibility that in some cases the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty."

<sup>182</sup> *England*: *Kimber v. Barber*, 8 Ch. App. 56; *Bentley v. Craven*, 18 Beav. 75. *Robinson v. Mallett*, L.R., 7, H.L., 901.

*United States*: *Michoud v. Girod*, 4 How. 503; *Bischoffsheim v. Baltzer*, 20 Fed. 890.

*Alabama*: *Spratt v. Wilson*, 94 Ala. 608.

*Connecticut*: *Disbrow v. Secor*, 58 Conn. 35.

*District of Columbia*: *Sunderland v. Kilbourn*, 3 Mackey, 506.

*Georgia*: *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435.

*Illinois*: *Ely v. Hanford*, 65 Ill. 267; *Tewksbury v. Spruance*, 75 Ill. 187.

*Louisiana*: *Florance v. Adams*, 2 Rob. 556, 38 Am. Dec. 226; *Beal v. McKiernan*, 6 La. (O. S.) 407.

*Maryland*: *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600.

*Michigan*: *People v. Township Board*, 11 Mich. 222.

*Minnesota*: *Friesenhahn v. Bushnell*, 47 Minn. 443.

*New Hampshire*: *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316.

*New York*: *Conkey v. Bond*, 36 N. Y. 427; *Taussig v. Hart*, 58 N. Y. 425; *Miller v. Curtiss*, 39 N. Y. St. Rep. 383; *Willink v. Vander-veer*, 1 Barb. (N. Y.) 599.

<sup>183</sup> *Taussig v. Hart*, 58 N. Y. 425.

sells directly to the principal, the burden is on him to show that he previously informed his principal of all the facts within his knowledge.<sup>184</sup>

**§ 409. Agent to purchase or lease for principal must not purchase or lease for himself.**

It is also a well settled rule that if an agent undertakes to purchase property for his principal, he cannot be permitted to deal in the matter of that agency for his own benefit and upon his own account; and if he purchases such property for himself and takes a conveyance thereto in his own name, without his principal's knowledge or consent, he will be considered in equity, although he makes such purchase with his own money, as holding it in trust for his principal, and will be ordered to convey it to the principal, upon a proper proceeding in equity for that purpose, accompanied by a repayment or tender of the amount of purchase-money and reasonable compensation.<sup>185</sup> And in states

<sup>184</sup> *Jackson v. Pleasanton*, 95 Va. 654.

<sup>185</sup> *England*: *Lees v. Nuttall*, 2 Mylne & K. 819; *Heard v. Pilley*, 4 Ch. App. 548; *James v. Smith* [1891] 1 Ch. Div. 384.

*United States*: *Rothwell v. Dewees*, 2 Black, 613; *Baker v. Whiting*, 3 Sumn. 476, Fed. Cas. No. 787; *Dodge v. Briggs*, 27 Fed. 160; *Jenkins v. Eldredge*, 3 Story, 183, Fed. Cas. No. 7,266.

*Alabama*: *McKinley v. Irvine*, 13 Ala. 681; *Firestone v. Firestone*, 49 Ala. 128.

*Arkansas*: *McMurry v. Mobley*, 39 Ark. 309; *Rhea v. Puryear*, 26 Ark. 344.

*California*: *Sandfoss v. Jones*, 35 Cal. 481; *Wells, Fargo & Co. v. Robinson*, 13 Cal. 133.

*Connecticut*: *Church v. Sterling*, 16 Conn. 388.

*Florida*: *Boswell v. Cunningham*, 32 Fla. 277.

*Georgia*: *Chastain v. Smith*, 30 Ga. 96.

*Illinois*: *Dennis v. McCagg*, 32 Ill. 429; *Switzer v. Skiles*, 8 Ill. 529, 44 Am. Dec. 723; *Vallette v. Tedens*, 122 Ill. 607, 3 Am. St. Rep. 502; *Follansbe v. Kilbreth*, 17 Ill. 522, 65 Am. Dec. 691.

*Indiana*: *Rising Sun Nat. Bank v. Seward*, 106 Ind. 264; *Ackenburgh v. McCool*, 36 Ind. 473; *Goldsberry v. Gentry*, 92 Ind. 193.

*Iowa*: *Judd v. Mosely*, 30 Iowa, 424; *Bryant v. Hendricks*, 5 Iowa, 256.

*Kansas*: *Fisher v. Krutz*, 9 Kan. 501; *Rose v. Hayden*, 35 Kan. 106, 57 Am. Rep. 145.

where an action of ejectment is an equitable as well as a legal remedy, the principal may bring an action of ejectment against the agent in such cases.<sup>186</sup> If the agent has sold and transferred the property, the proceeds in his hands will be impressed with a similar trust, and he will be compelled to account therefor.<sup>187</sup> But the principal is generally not obliged to take the land, or consider the purchaser as his trustee; he may elect to treat him as a debtor and claim the

*Louisiana:* New Orleans Exch. & Banking Co. v. Yorke, 4 La. Ann. 138, though this principle cannot prevent an agent from purchasing a judgment against his principal.

*Maine:* Matthews v. Light, 32 Me. 305; Brown v. Dwelley, 45 Me. 52.

*Massachusetts:* McDonough v. O'Neil, 113 Mass. 92.

*Minnesota:* Kraemer v. Deustermann, 37 Minn. 469.

*Mississippi:* Soggins v. Heard, 31 Miss. 426; Gillenwaters v. Miller, 49 Miss. 150.

*New Jersey:* Von Hurter v. Spengeman, 17 N. J. Eq. 185. And this is also true where the deed is taken in the name of the agent's wife. Bostleman v. Bostleman, 24 N. J. Eq. 103.

*New York:* Sweet v. Jacocks, 6 Paige, 355, 31 Am. Dec. 252; Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640; Reed v. Warner, 5 Paige, 650.

*North Carolina:* Hargrave v. King, 40 N. C. (5 Ired. Eq.) 430.

*Ohio:* Gashe v. Young, 51 Ohio St. 376; Williams v. Van Tuyl, 2 Ohio St. 336.

*Pennsylvania:* Wolford v. Herrington, 74 Pa. 311, 15 Am. Rep. 548; Eshleman v. Lewis, 49 Pa. 410; Peebles v. Reading, 8 Serg. & R. 484.

*South Carolina:* Hutchinson v. Hutchinson, 4 Desaus. 77.

*Texas:* Barziza v. Story, 39 Tex. 354.

*Vermont:* Pinnoch v. Clough, 16 Vt. 500, 42 Am. Dec. 521.

*Virginia:* Wellford v. Chancellor, 5 Grat. 39; Jackson v. Pleasanton, 95 Va. 654.

*Wisconsin:* Onson v. Cown, 22 Wis. 329.

Where a person assumes to act as agent for another to protect the interests of such other, under a decree in a foreclosure suit, and he redeems the property with his own funds, he will be held to hold the title thereto as a trustee for the benefit of his assumed principal, who is entitled to redeem as against him. Dennis v. McCagg, 32 Ill. 429.

<sup>186</sup> Rose v. Hayden, 35 Kan. 106, 57 Am. Rep. 145; McKay v. Williams, 67 Mich. 547; Peebles v. Reading, 8 Serg. & R. (Pa.) 484.

<sup>187</sup> Kraemer v. Deustermann, 37 Minn. 469. And see post, § 417.

money instead of the property;<sup>188</sup> unless the agent was instructed to take the title in his own name; but before he can require the principal to take the property, in such a case, the burden is on him to show that he was so instructed.<sup>189</sup>

Especially does the above rule apply where the principal has an interest in the property, and he simply employs the agent to purchase an outstanding adverse title for the purpose of protecting the principal's own title.<sup>190</sup> This outstanding adverse title may be very good or very bad; but whether good or bad, the doctrine cannot at all be tolerated that the agent may, in violation of his duties as agent, purchase for himself the outstanding adverse title, and hold the same adversely to his principal.<sup>191</sup>

The same rule applies in reference to a lease. If an agent is employed to secure or renew a lease for his principal, or knows that his principal is about to secure or renew the lease himself, he will not be permitted to take advantage of such knowledge, and secure the lease in his own name; and if he does so without his principal's knowledge or consent, he will be held to hold it in trust for his principal.<sup>192</sup> Thus, where the confidential agent of a lessee of a theatre, shortly before the lease expired, secretly procured a lease of the premises for a new term to himself, at a larger rent, denying to his principal that he was competing for the lease, he was held to hold the lease as trustee for his principal.<sup>193</sup>

The above rule does not apply however, if the agency is such that there is no special confidence and trust between the principal and agent, and it would be no breach of trust or fraud upon the part of the agent, to make the purchase in his own name, as where he is merely employed to bring the

<sup>188</sup> *Eshleman v. Lewis*, 49 Pa. 410.

<sup>189</sup> *Nelms v. Dougherty*, 20 Ky. L. R. 657, 45 S. W. 870.

<sup>190</sup> *Rose v. Hayden*, 35 Kan. 106, 57 Am. Rep. 145.

<sup>191</sup> *Rose v. Hayden*, 35 Kan. 106, 57 Am. Rep. 145.

<sup>192</sup> *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242; *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Burrell v. Bull*, 3 Sandf. Ch. (N. Y.) 15; *Hargrave v. King*, 40 N. C. (5 Ired. Eq.) 430.

<sup>193</sup> *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541.

parties together, to do their own transacting; or where the agency is in reference to matters collateral to the purchase of the property; and no resulting trust will arise in such cases, if the agent makes the purchase with his own money and takes the title to himself.<sup>194</sup> Nor does this rule apply if the agent abandons his agency and gives his principal notice thereof, and then purchases in his own name with his own money,<sup>195</sup> or where the property is received by the agent from the seller, after the agent has performed his full duty to his principal, and the agency has terminated.<sup>196</sup>

**§ 410. Same—Application of statute of frauds.**

There is some conflict in the cases, however, as to the effect of the statute of frauds, where an agent authorized to purchase land purchases it in his own name and takes title to himself. In some cases it is held that a trust in favor of the principal will not arise, unless the agreement between the principal and agent is in writing or unless the consideration, or some definite part of it, which was paid for the land, is furnished by the principal at the time of the purchase, and a subsequent payment will not suffice. Or in other words if the agreement between the parties is not in writing or no part of the purchase money is furnished by the principal at the time of the purchase, and the agent purchases the property in his own name, the principal cannot compel the agent to convey the property to him, by showing by parol that the purchase was made for his benefit or on his account.<sup>197</sup>

<sup>194</sup> *Collins v. Sullivan*, 135 Mass. 461.

<sup>195</sup> *First Nat. Bank v. Bissell*, 2 McCrary, 73, 4 Fed. 694; *Baker v. Whiting*, 3 Sumn. 476, Fed. Cas. No. 787.

<sup>196</sup> *Lamb Knit-Goods Co. v. Lamb*, 119 Mich. 568.

<sup>197</sup> *England: Bartlett v. Pickersgill*, 1 Eden, 515, 4 East, 577, note.

*Alabama: Andrews v. Jones*, 10 Ala. 460; *Firestone v. Firestone*, 49 Ala. 128.

*California: Hidden v. Jordan*, 21 Cal. 92; *Green v. Clark*, 31 Cal. 592.

*District of Columbia: Balloch v. Hooper*, 6 Mackey, 421.

*Illinois: Walter v. Klock*, 55 Ill. 362; *Perry v. McHenry*, 13 Ill. 227.

*Indiana: Irvine v. Ivers*, 7 Ind. 308, 63 Am. Dec. 420.



Some of these cases base their decisions more on the ground that a resulting trust does not arise in such cases, and hence it cannot be enforced. As has been said, "No subsequent arrangement, made after the purchase, nor any parol agreement existing before, nor parol declaration at the time, that the purchase is made for the benefit of some other person, will raise a trust in such other person's favor, in the absence of any other fraud than that which arises from the violation of the purchaser's parol promise or agreement, when the purchaser takes title in his own name and pays the consideration out of his own funds."<sup>198</sup> Thus it is held that where an agent is employed, by parol, to buy certain lands for his principal, and the agent buys the land in his own name, giving his own notes for the purchase money, and afterwards claims to hold the land in his own name, the principal cannot compel a conveyance of the lands to himself, and there is no trust which equity will enforce in the principal's favor.<sup>199</sup>

*Iowa:* Burden v. Sheridan, 36 Iowa, 125, 14 Am. Rep. 505.

*Maryland:* Dorsey v. Clarke, 4 Har. & J. 551.

*Massachusetts:* Parsons v. Phelan, 134 Mass. 109; Barnard v. Jewett, 97 Mass. 87.

*Missouri:* Allen v. Richard, 83 Mo. 55.

*New Jersey:* Dodd v. Wakeman, 26 N. J. Eq. 484; Wallace v. Brown, 10 N. J. Eq. 308.

*New York:* Botsford v. Burr, 2 Johns. Ch. 405; Steere v. Steere, 5 Johns. Ch. 1, 9 Am. Dec. 256; Levy v. Brush, 45 N. Y. 589.

*Ohio:* Watson v. Erb, 33 Ohio St. 35.

*Pennsylvania:* Nixon's Appeal, 63 Pa. 279; Jackman v. Ringland, 4 Watts & S. 149.

*Vermont:* Pinnock v. Clough, 16 Vt. 500, 42 Am. Dec. 521, but the statute was permitted to be pleaded in this case, on the ground that there was no fraud, under the circumstances of the case, for the agent to take the title in his own name.

Some authorities hold that where the agent furnishes the purchase money with the consent of the principal, it will be considered as a loan, and the agent will hold the property purchased in trust for his principal, and as security to himself for the money advanced. Rose v. Hayden, 35 Kan. 106, 57 Am. Rep. 145; Kendall v. Mann, 11 Allen (Mass.) 15; Sandfoss v. Jones, 35 Cal. 481; Soggins v. Heard, 31 Miss. 426.

<sup>198</sup> Perry v. McHenry, 13 Ill. 238.

<sup>199</sup> Burden v. Sheridan, 36 Iowa, 125, 14 Am. Rep. 505.

But the better opinion seems to be that the statute of frauds cannot be invoked as a defense by the agent, in such cases, for the reason that a court of equity will not permit the statute of frauds to be used as an instrument of fraud, and for the further reason that when a person through the influence of a confidential relation acquires title to property, obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief.<sup>200</sup>

**§ 411. To whom this principle applies.**

This principle, that an agent is not permitted to purchase or acquire an interest in property and hold it for his own benefit, where he has a duty to perform in relation to such property, which is inconsistent with the character of the purchaser on his own account for individual use, applies not only to private agents employed for the purpose of purchasing property for the principal, but it also applies to other agents, whether private or public, or quasi-public, whose duties are inconsistent with the character of purchaser. Thus it also applies to executors;<sup>201</sup> administrators;<sup>202</sup> guardi-

<sup>200</sup> *McCormick v. Grogan*, L. R. 4 H. L. 82; *Bond v. Hopkins*, 1 Schoales & L. 433; *Jenkins v. Eldridge*, 3 Story, 182, Fed. Cas. No. 7,266; *McMurry v. Mobley*, 39 Ark. 309; *Sandfoss v. Jones*, 35 Cal. 481; *Chastain v. Smith*, 30 Ga. 96; *Rose v. Hayden*, 35 Kan. 106, 57 Am. Rep. 145; *Cameron v. Lewis*, 56 Miss. 76; *Rose v. Bates*, 12 Mo. 30; *Kennedy v. Keating*, 34 Mo. 25; *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 644; *Sandford v. Norris*, 4 Abb. Dec. (N. Y.) 144; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Hargrave v. King*, 40 N. C. (5 Ired. Eq.) 430; *Barziza v. Story*, 39 Tex. 354. It was held in *Chastain v. Smith*, 30 Ga. 96, that, "where one person agrees, as agent, to buy land for another as his principal, and does buy it, and takes title in his own name, this title in his name stands affected with a resulting trust for the benefit of the principal by operation of law, and the case is not within the statute of frauds, the resulting trust being expressly excepted from the operation of the statute."

<sup>201</sup> *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Scott v. Gorton*, 14 La. 115, 33 Am. Dec. 578; *Jennison v. Hapgood*, 7 Pick. (Mass.) 1, 19 Am. Dec. 258; *McGowan v. McGowan*, 48 Miss. 553; *Obert v. Hammel*, 18 N. J. Law, 73; *Winter v. Geroe*, 5 N. J. Eq. 319; *Davoue*

ans;<sup>203</sup> officers and directors of a corporation;<sup>204</sup> sheriffs;<sup>205</sup> and to persons standing in any other fiduciary relation, or in any relation in which there may arise a conflict between the duty which the purchaser owes to the person with whom he is dealing and his own individual interests.<sup>206</sup>

### § 412. Ratification by the principal.

Since the law does not regard such transactions as absolutely void, but rather voidable at the election of the principal, it follows that the principal may, with a full knowledge of all the facts, ratify such transactions; and this ratification may be express, or, as in other cases, it may be presumed from the circumstances of the case, as by the princi-

*v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Dunlap v. Mitchell*, 10 Ohio, 117.

<sup>202</sup> *Coat v. Coat*, 63 Ill. 73; *Martin v. Wyncoop*, 12 Ind. 266, 74 Am. Dec. 209; *Hoffman v. Harrington*, 28 Mich. 90; *Sheldon v. Rice*, 30 Mich. 296, 18 Am. Rep. 136; *Dwight v. Blackmar*, 2 Mich. 330, 57 Am. Dec. 130; *Pearson v. Moreland*, 7 Smedes & M. (Miss.) 609, 45 Am. Dec. 319; *McGowan v. McGowan*, 48 Miss. 553; *Hoitt v. Webb*, 36 N. H. 158; *Mulford v. Minch*, 11 N. J. Eq. 16, 64 Am. Dec. 472; *Caldwell v. Caldwell*, 45 Ohio St. 512; *Green v. Sargeant*, 23 Vt. 466, 56 Am. Dec. 88.

<sup>203</sup> *Ford v. Wright*, 114 Mich. 122; *Scott v. Freeland*, 7 Smedes & M. (Miss.) 409, 45 Am. Dec. 310; *Obert v. Hammel*, 18 N. J. Law, 73; *Patton v. Thompson*, 55 N. C. (2 Jones, Eq.) 285; *Stiles v. Stiles*, 1 Lans. (N. Y.) 90.

<sup>204</sup> See *Clark & M. Corp.* 2289 et seq.

<sup>205</sup> *Mills v. Goodsell*, 5 Conn. 475, 13 Am. Dec. 90; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Perkins v. Thompson*, 3 N. H. 144; *Carter v. Harris*, 4 Rand. (Va.) 199.

<sup>206</sup> *Ex parte Lacey*, 6 Ves. 627; *Ex parte Bennett*, 10 Ves. 384; *Allen v. Gillette*, 127 U. S. 589; *Carr v. Houser*, 46 Ga. 477; *Freeman v. Harwood*, 49 Me. 195; *Ricketts v. Montgomery*, 15 Md. 46; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; *Ford v. Wright*, 114 Mich. 122; *Walton v. Torrey*, Har. Ch. (Mich.) 259; *Jamison v. Glascock*, 29 Mo. 191; *Dodd v. Wakemann*, 26 N. J. Eq. 484; *Torrey v. Bank of Orleans*, 9 Paige (N. Y.) 649; *Lytle v. Beveridge*, 58 N. Y. 592; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Campbell v. McLain*, 51 Pa. 200; *Everett v. Henry*, 67 Tex. 402; *Chandler v. Moulton*, 33 Vt. 245; *Newcomb v. Brooks*, 16 W. Va. 32.

pal not making his election to repudiate within a reasonable time, after he has obtained knowledge of all the facts.<sup>207</sup> Thus, where an agent sold corn of his principal to his own firm, and gave the principal a statement thereof, and no objection was made for two years, and the parties had a settlement of accounts, in which no allusion was made to the transaction, the principal thereby ratified the sale so made by the agent.<sup>208</sup>

**§ 413. When agent may purchase principal's property.**

The mere fact, however, that an agent is employed to purchase or sell property for his principal, does not impress upon him any particular incapacity to deal with the principal in respect to such property. Though the courts closely scrutinize all dealings between an agent and his principal during the continuance of the agency, yet they will not hold such dealings invalid if they have been conducted with entire good faith on the part of the agent, and with a full disclosure of all material facts within his knowledge. If the principal has a full knowledge of all the facts, the agent has

<sup>207</sup> *Crowe v. Ballard*, 2 Cox, 253; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Eastern Bank v. Taylor*, 41 Ala. 93; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Francis v. Kerker*, 85 Ill. 190; *Fountain Coal Co. v. Phelps*, 95 Ind. 271; *Sturdevant v. Pike*, Cart. (Ind.) 277; *Johnson v. Carrere*, 45 La. Ann. 847; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311; *Bassett v. Brown*, 105 Mass. 551; *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198; *Antiseptic Fiber Package Co. v. Klein*, 119 Mich. 225; *Mulford v. Minch*, 11 N. J. Eq. 16, 64 Am. Dec. 472; *Hyatt v. Clark*, 118 N. Y. 563; *Comstock v. Ames*, 1 Abb. Dec. (N. Y.) 411; *Campbell v. McLain*, 51 Pa. 200; *Pridgen v. Adkins*, 25 Tex. 389.

But a principal does not ratify a purchase made by his agent, employed to sell, at a foreclosure sale, or estop himself from claiming that it inures to his own benefit, by obtaining an order for a resale of the property and afterward, being unable to comply with the conditions of the order, or to effect a settlement with the agent, accepting surplus moneys arising from the sale, and then waiting several years before he files a bill against the agent for an accounting; and the defense of laches cannot prevail where the agent has at all times after his purchase denied the complainant's rights in the property. *Kimball v. Ranney*, 122 Mich. 160, 80 Am. St. Rep. 548.

<sup>208</sup> *Francis v. Kerker*, 85 Ill. 190.

the same right to deal with him as any other person has.<sup>209</sup> An agent may undoubtedly buy of his principal, or have an interest in the sale of property belonging to his principal; but in such cases the burden of proof is upon the agent to show that the principal had knowledge, not only of the fact that the agent was buying, but also of every material fact known to the agent which might affect the principal, and that, having such knowledge, he fully consented to the transaction.<sup>210</sup>

Where an agent employed to sell the property of his principal makes a full disclosure of all the facts concerning the property, takes no advantage of the situation and acts in good faith, he may purchase it himself from the principal; and if the consideration given is adequate, and the purchase is made by the agent with the principal's knowledge and consent, and the transaction is fair in every respect, the purchase will be upheld.<sup>211</sup> If, however, the

<sup>209</sup> *Uhlich v. Muhlke*, 61 Ill. 499; *Dobson v. Racey*, 8 N. Y. 216; *Rochester v. Levering*, 104 Ind. 562; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; and see cases cited in following notes.

<sup>210</sup> *Dunne v. English*, L. R. 18 Eq. 524; *Webb v. Marks*, 10 Colo. App. 429; *Tyler v. Sanborn*, 128 Ill. 136, 15 Am. St. Rep. 97; *Jansen v. Williams*, 36 Neb. 870; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Le Gendre v. Byrnes*, 44 N. J. Eq. 372; *Brown v. Post*, 1 Hun (N. Y.) 303; *Brock v. Barnes*, 40 Barb. (N. Y.) 521; *Peckham Iron Co. v. Harper*, 41 Ohio St. 108; *Jackson v. Pleasanton*, 95 Va. 654.

As has been said in *Rochester v. Levering*, 104 Ind. 568: "While a transaction of the character disclosed is not necessarily voidable at the election of the principal, a court of equity, upon grounds of public policy, will, nevertheless, subject it to the severest scrutiny. Its purpose will be to see that the agent, by reason of the confidence reposed in him by the principal, secures to himself no advantage from the contract. When the transaction is seasonably challenged, a presumption of its invalidity arises, and the agent then assumes the burden of making it affirmatively appear that he dealt fairly, and in the richest [strictest] of faith imparted to his principal all the information concerning the property possessed by him. The confidential relation and the transaction having been shown, the onus is upon the agent to show that the bargain was fair and equitable, that he gave all the advice within his knowledge pertaining to the subject of the sale and the value of the property, and that there was no suppression or concealment which might have influenced the

agent has not acted in good faith or has not made a full disclosure of the facts within his knowledge, the principal may repudiate the transaction and have the property reconveyed to him.<sup>212</sup> Thus a purchase will be upheld, where an agent,

conduct of the principal." And, again, as was said in *Nesbit v. Lockman*, 34 N. Y. 169, "Where persons, standing in a confidential relation, make bargains with, or receive benefits from, the persons for whom they are counsel, attorney, agent or trustee, the transaction is scrutinized with the extremest vigilance, and regarded with the utmost jealousy. The clearest evidence is required, that there was no fraud, influence, or mistake; that the transaction was perfectly understood by the weaker party; and, usually, evidence is required, that a third and disinterested person advised such party of all his rights. The presumption is against the propriety of the transaction, and the onus of establishing the gift or bargain to have been fair, voluntary and well understood, rests upon the party claiming, and this in addition to the evidence to be derived from the execution of the instrument conveying or assigning the property. This presumption is not, however, invincible; but it may be overcome by proof of the character already referred to."

<sup>211</sup> *Burke v. Bours*, 98 Cal. 171; *Rochester v. Levering*, 104 Ind. 562; *Ingle v. Hartman*, 37 Iowa, 274; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Gumbel v. Boyer*, 46 La. Ann. 762; *Moore v. Mandlebaum*, 8 Mich. 435; *Jansen v. Williams*, 36 Neb. 869; *Bookwalter v. Lansing*, 23 Neb. 291; *Fisher's Appeal*, 34 Pa. 29; *Kramer v. Winslow*, 154 Pa. 637; *Lane v. Black*, 21 W. Va. 617; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433. A mortgagee, with a power of attorney to sell, may become the purchaser of the mortgaged property through a third party, with the mortgagor's consent. *Dobson v. Racey*, 8 N. Y. 216.

If the agent of the maker of a mortgage note has no funds of the principal in his possession there is no reason why, on the request of the principal, he cannot buy for his own account the mortgage note and hold it as security for the amount advanced for the principal. *Gumbel v. Bayer*, 46 La. Ann. 762.

<sup>212</sup> *Jeffries v. Wiester*, 2 Sawy. 135, Fed. Cas. No. 7,254; *Wenham v. Switzer*, 51 Fed. 351; *McDonald v. Fithian*, 6 Ill. 269; *Prince v. Dupuy*, 163 Ill. 417; *Ingle v. Hartman*, 37 Iowa, 274; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Porter v. Woodruff*, 36 N. J. Eq. 174. An agent dealing with his principal for property in regard to which he stands in a fiduciary relation by reason of having had its care, and having collected the rents, paid the taxes, and the like, is bound to make to the principal the fullest disclosure of all the matters connected with it, within his knowledge, which it is important for the principal to know, in order to treat understandingly; and if

requested to find a purchaser at a fixed price for certain land, but being unable to do so purchases the land himself from the principal at the price named, having previously disclosed to his principal all the facts within his knowledge concerning the land and its value;<sup>213</sup> or where an agent purchases the property from another who had previously purchased it from him, as agent, if he had no intention at the time of the sale of colluding with the purchaser;<sup>214</sup> unless the purchase by the agent is soon after the sale, and before the purchase money has been paid.<sup>215</sup> Such a purchase will not be upheld, however, if the agent enters into an agreement with an ostensible purchaser to buy the land for the joint benefit of the purchaser and agent;<sup>216</sup> or if, where he purchases from his principal, he conceals the fact that a higher price could be obtained.<sup>217</sup>

Nor does the principle that an agent employed to sell property cannot himself become the purchaser apply where the agent acquires an interest in the property, after the termination of the agency, by subsequent agreement with the purchaser; for since the relation between the principal and agent is terminated, the agent has the same right as any other person to deal in the property.<sup>218</sup>

the agent, by the concealment of such facts and information, obtains the property at a greatly inadequate price, the sale will be set aside. *Norris v. Tayloe*, 49 Ill. 17, 95 Am. Dec. 568.

<sup>213</sup> *Rochester v. Levering*, 104 Ind. 562.

<sup>214</sup> *Robertson v. Chapman*, 152 U. S. 673. Thus where an agent in negotiating the sale of his principal's property reserves no profit to himself, other than the agreed commission, and no arrangement is made whereby he is to have any interest in the land, or in the profits to be derived by a subsequent sale by the purchaser, the fact that several weeks after the sale he enters into an agreement to sell the land for the purchaser, and to receive as a compensation one-half of the proceeds, after deducting the original purchase money and interest, will not invalidate the sale or authorize the original owner to set his agent's sale aside. *Glover v. Layton*, 145 Ill. 92.

<sup>215</sup> *Rosenberger's Appeal*, 26 Pa. 67.

<sup>216</sup> *Glover v. Layton*, 145 Ill. 92.

<sup>217</sup> *Moseley v. Buck*, 3 Munf. (Va.) 232, 5 Am. Dec. 508.

<sup>218</sup> *Walker v. Derby*, 5 Biss. 124, Fed. Cas. No. 17,068; *McGar v. Adams*, 65 Ala. 106; *McKinley v. Irvine*, 13 Ala. 681; *Walker v.*

**§ 414. Duty of agent not to act for both parties.**

It also follows from an agent's duty to exercise good faith and loyalty in his principal's interests that he will not be permitted to act as the agent of both parties in the same transaction, where the interests of such parties are in conflict, without the full knowledge and consent of the parties. When an agent, representing one party, also undertakes to represent the other, who has interests adverse to those of his first principal, he places himself in a position which demands of him incompatible and inconsistent duties. But, as has been seen in a previous section, it is an agent's duty to always remain loyal to his principal's interests, and to act in no capacity that will cause or tempt him to violate such duty. It is the duty, therefore, of an agent, acting in a matter involving the exercise of discretion, for one party not to act also for the other party in the same transaction, where the interests of the latter are adverse to those of his first principal, without the full knowledge and consent of both parties; and if he does so, the transaction may be avoided by either party,<sup>219</sup> and, as has been seen in a former chapter, the agent

*Carrington*, 74 Ill. 446; *Bucher v. Bucher*, 86 Ill. 377; *O'Reiley v. Bevington*, 155 Mass. 72; *Satterthwaite v. Loomis*, 81 Tex. 64.

<sup>219</sup> *England*: *Panama & S. P. Tel. Co. v. India Rubber, G. P. & Tel. Works Co.*, 10 Ch. App. 515.

*Connecticut*: *Potter's Appeal*, 56 Conn. 1, 7 Am. St. Rep. 272.

*Illinois*: *Fish v. Leser*, 69 Ill. 394; *Bensley v. Moon*, 7 Ill. App. 415.

*Iowa*: *Seymour v. Shea*, 62 Iowa, 708.

*Kentucky*: *Lloyd v. Colston*, 5 Bush, 587.

*Louisiana*: *Draughon v. Quillen*, 23 La. Ann. 237.

*Maine*: *Hinckley v. Arey*, 27 Me. 362.

*Maryland*: *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66.

*Massachusetts*: *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756.

*Michigan*: *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541.

*Minnesota*: *Crump v. Ingersoll*, 44 Minn. 84.

*Missouri*: *Robinson v. Jarvis*, 25 Mo. App. 421.

*New Jersey*: *Young v. Hughes*, 32 N. J. Eq. 372.

*New York*: *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; *Greenwood v. Spring*, 54 Barb. 375; *Carr v. National Bank & Loan Co.*, 167 N. Y. 375, 82 Am. St. Rep. 725.



will forfeit his right to compensation.<sup>220</sup> Thus, where an agent fraudulently colludes with the other party to a transaction and knowingly pays a greater price for property than it could have been purchased for, he is liable to his principal for the enhanced price.<sup>221</sup> But if the second employer knows of the agent's acting for an adverse party, at the time he employs him, he cannot recover damages from the agent for the latter's negligence in the course of such agency.<sup>222</sup>

Where, however, an agent's duties are not such as involve the exercise of discretion, as where he is a mere go-between, to bring the parties together, or where the interests of the parties are not in conflict, and his acting for one of them is not necessarily incompatible or inconsistent with his acting for the other, this rule does not apply; and it is not a breach of duty for him to act for both parties in such cases.<sup>223</sup>

*North Carolina:* Sumner v. Charlotte, C. & A. R. Co., 78 N. C. 289.

*Ohio:* Bell v. McConnell, 37 Ohio St. 396, 41 Am. Rep. 528.

*Pennsylvania:* Everhart v. Searle, 71 Pa. 256; Patterson v. Van Loon, 186 Pa. 367.

*Rhode Island:* Lynch v. Fallon, 11 R. I. 311, 23 Am. Rep. 458.

*Tennessee:* Tennessee Bank v. Moore, 3 Sneed, 544.

*Texas:* Centennial M. L. Ins. Co. v. Parham, 80 Tex. 518; Armstrong v. O'Brien, 83 Tex. 635.

*Wisconsin:* Meyer v. Hanchett, 39 Wis. 419, 43 Wis. 246.

<sup>220</sup> See ante, § 364, for a full discussion of this subject in reference to the agent's right to compensation.

<sup>221</sup> McMillan v. Arthur, 98 N. Y. 168.

<sup>222</sup> Ramspeck v. Pattillo, 104 Ga. 772, 69 Am. St. Rep. 197.

<sup>223</sup> Cottom v. Holliday, 59 Ill. 176; Shepherd v. Lanfear, 5 La. 336, 25 Am. Dec. 181; Hinckley v. Arey, 27 Me. 362; Casey v. Donovan, 65 Mo. App. 521; Nolte v. Hulbert, 37 Ohio St. 445 (as was said in this case: "The maxim that 'no man shall serve two masters' does not prevent the same person from acting as agent, for certain purposes, of two or more parties to the same transaction when their interests do not conflict, and where loyalty to the one is not a breach of duty to the other"); Northup v. Germania F. Ins. Co., 48 Wis. 420, 33 Am. Rep. 815.

In Scott v. Mann, 36 Tex. 157, it was held that when an agent sells the property at public outcry, and in the manner usual at trust or judicial sales, there is no legal principle prohibiting him from bidding it off for a third party.

Of course, if the principals, having a full knowledge that the agent is representing both of them, give their consent thereto, there will be no breach of duty on the agent's part, although it is a transaction involving the exercise of discretion, and in which the principal's interests are adverse.<sup>224</sup>

**§ 415. Acquisition of adverse rights by agent.**

The law is also well settled that an agent will not be allowed to acquire rights adverse to those of his principal by failing to perform the duties which he owes to his principal; nor to use his position or knowledge obtained therein, to acquire interests adverse to his principal; and if he does so, he will be held to hold such rights or interests in trust for his principal.<sup>225</sup> "For if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of persons relying upon their integrity."<sup>226</sup> For example, if it is the duty of an agent to purchase certain property, or to enter into a certain contract, for his principal, he cannot acquire rights as against the principal by neglecting to per-

<sup>224</sup> *Fitzsimmons v. Southern Exp. Co.*, 40 Ga. 330, 2 Am. Rep. 577; *Alexander v. Northwestern University*, 57 Ind. 466; *Leekins v. Nordyke*, 66 Iowa, 471; *Adams Min. Co. v. Senter*, 26 Mich. 73; *Colwell v. Keystone Iron Co.*, 36 Mich. 51; *De Steiger v. Hollington*, 17 Mo. App. 387; *Rowe v. Stevens*, 53 N. Y. 621. And see cases cited in note 219, *supra*.

<sup>225</sup> *Larey v. Baker*, 86 Ga. 468; *Lockhart v. Rollins*, 2 Idaho, 540; *Merryman v. David*, 31 Ill. 404; *Riehl v. Evansville Foundry Ass'n*, 104 Ind. 70; *McClendon v. Bradford*, 42 La. Ann. 160; *Comings v. Stuart*, 22 Me. 110; *Winn v. Dillon*, 27 Miss. 494; *Blount v. Robeson*, 56 N. C. (3 Jones Eq.) 73. An agent, employed to examine and ascertain how much and what part of the lands of his principal can be sold without inconvenience, cannot, after examining the property and recommending a sale of a portion thereof, purchase the property himself, and take a conveyance thereof for his own benefit. *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. (N. Y.) 553. An agent employed to do the annual assessment work on a mining claim, after a failure to do the work, cannot relocate the claim. *Argentine Min. Co. v. Benedict*, 18 Utah, 183.

<sup>226</sup> *Sugden, Vendors & Purchasers* (13th Ed.) 566; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 307.

form such duty and purchasing the property or entering into the contract for his own benefit. In such a case, the principal may compel him to account or hold him as a trustee.<sup>227</sup>

So, where it is the duty of an agent to pay the taxes on the land of his principal, as where he has the control and management of such land, but he neglects to do so, and then purchases the land for himself at a tax sale, without the principal's knowledge and consent, or without having renounced his agency and notified his principal of that fact, he will be held as trustee for his principal,<sup>228</sup> although the principal has not

<sup>227</sup> *Higgins v. Lansingh*, 154 Ill. 301; *Flint & P. M. R. Co. v. Dewey*, 14 Mich. 477; *Green v. Knoch*, 92 Mich. 26; *Mitchell v. Aten*, 37 Kan. 33, 1 Am. St. Rep. 231; *Trenton Banking Co. v. McKelway*, 8 N. J. Eq. 84; *Blake v. Buffalo Creek R. Co.*, 56 N. Y. 485; *Averell v. Barber*, 53 Hun (N. Y.) 636. See, also, *McClure v. Law*, 161 N. Y. 78, 76 Am. St. Rep. 262. An agent will not be protected as against his principal who is seeking to foreclose a mortgage on the land which such agent has purchased from an innocent holder of a deed therefor, when the claim to priority under such deed is based upon the negligence of the agent in delaying the recording of such mortgage. *Mitchell v. Aten*, 37 Kan. 33, 1 Am. St. Rep. 231.

<sup>228</sup> *Curtis v. Cisna*, 7 Biss. 260, Fed. Cas. No. 3,507; *Collins v. Rainey*, 42 Ark. 501; *Barton v. Moss*, 32 Ill. 50; *Gonzalia v. Bartelsman*, 143 Ill. 634; *Stanley v. McConnell*, 64 Ill. App. 591; *Young v. Iowa Tollers Protective Ass'n*, 106 Iowa, 447; *Smith v. Stephenson*, 45 Iowa, 645; *Ellsworth v. Cordrey*, 63 Iowa, 675; *Krutz v. Fisher*, 8 Kan. 90; *Fisher v. Krutz*, 9 Kan. 501; *Woodman v. Davis*, 32 Kan. 344; *Oldhams v. Jones*, 5 B. Mon. (Ky.) 458; *Matthews v. Light*, 32 Me. 305; *Huzzard v. Trego*, 35 Pa. 9; *Bartholemew v. Leech*, 7 Watts (Pa.) 472; *Franks v. Morris*, 9 W. Va. 664; *Fox v. Zimmermann*, 77 Wis. 414; *Gelsinger v. Beyl*, 80 Wis. 443. Thus, where one assumes the management and control of the land of another, he cannot acquire title to the land at a tax sale for a delinquency which occurred while he had control, although the fiduciary relation had ceased at the time of the sale. *Morris v. Joseph*, 1 W. Va. 256, 91 Am. Dec. 386. So where an agent of a mortgagee obtains a tax deed of property under his control, such deed may be avoided by the principal; though he may be required, as a condition, to reimburse his agent for any expenditures necessary to protect the principal's interests, unless the agent has rents and profits in his hands from the property sufficient to pay up the tax deed. *Dana v. Duluth Trust Co.*, 99 Wis. 663.

furnished him with funds with which to pay such taxes;<sup>229</sup> or though the principal neglects to reimburse the agent for money spent in purchasing the property at a tax sale, unless he has fully informed the principal of the sum needed.<sup>230</sup>

And where an agent is employed to make loans for his principal and to attend to all matters of security, and collection of interest and principal, he cannot purchase property mortgaged to secure the loan at a tax sale, and hold the title there-against his principal.<sup>231</sup> On the same principle, where it is the duty of an agent to compromise or pay outstanding claims against his principal, he cannot purchase such claims at a discount and enforce them against the principal for the full amount.<sup>232</sup> And an attorney or other agent, employed to examine a title and advise his client thereon, will not be permitted to purchase an outstanding adverse title and set it up against the client.<sup>233</sup>

#### § 416. Duty of agent to give notice to his principal.

The duty of an agent to act with good faith and loyalty towards his principal includes the duty on the part of the agent to communicate to the principal notice of any facts which come to his knowledge, in the course of the agency, and which may affect the interests of the principal, in order that the latter may take such steps as may be necessary for the protection of his interests; and for the failure to give such notice the agent will be held responsible in damages to his

<sup>229</sup> *Page v. Webb*, 9 Ky. L. R. 868, 7 S. W. 308; *Bowman v. Officer*, 53 Iowa, 640; *Continental L. Ins. Co. v. Perry*, 65 Iowa, 709.

<sup>230</sup> *Bowman v. Officer*, 53 Iowa, 640; *Krutz v. Fisher*, 8 Kan. 90. Or unless he first distinctly notifies the principal that he renounces the agency. *McMahon v. McGraw*, 26 Wis. 614.

<sup>231</sup> *Bush v. Froelich*, 14 S. D. 62; *Abrams v. Wingo*, 9 Kan. App. 884, 59 Pac. 661.

<sup>232</sup> *Noyes v. Landon*, 59 Vt. 569; *Davis v. Smith*, 43 Vt. 269; *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190; *Case v. Carroll*, 35 N. Y. 385; *Reed v. Norris*, 2 Mylne & C. 374.

<sup>233</sup> *Eoff v. Irvine*, 108 Mo. 378, 32 Am. St. Rep. 609; *Ringo v. Bins*, 10 Pet. (U. S.) 269; *Rogers v. Lockett*, 28 Ark. 290; *Hardenbergh v. Bacon*, 33 Cal. 356; *Fountain Coal Co. v. Phelps*, 95 Ind. 271; *Vallette v. Tedens*, 122 Ill. 607, 3 Am. St. Rep. 502; *Cameron v. Lewis*, 56 Miss. 76; *Smith v. Brotherline*, 62 Pa. 461. And see post, § 654.

principal.<sup>234</sup> For example, if an agent is authorized to sell property for a specified sum, and is to receive for his services all above that sum for which he might sell, good faith towards his principal requires of him that he disclose to the principal a fact affecting the value of the property, which he afterwards learns and of which the principal was ignorant when he fixed the price; and a sale by the agent on the basis of the price first fixed, without disclosing the fact he has learned, is a fraud upon the principal.<sup>235</sup> So, where he is authorized to sell for a certain price, and he sells for a greatly enhanced price, but conceals this fact from his principal, the agent is responsible to the principal for the difference.<sup>236</sup> And if he does disclose what purports to be the facts, but deceives his principal by telling him a wrong state of facts, he will be liable to his principal for deceit.<sup>237</sup> So where an agent sells the goods of his principal on credit, taking a note for the price, gives notice of the sale to his principal, and credits him in account with the amount of it, but omits to give notice of the nonpayment of the note at maturity, he becomes responsible for the whole amount of the debt, and it is not necessary, to enable the principal to recover, that he should prove that he has sustained any damage.<sup>238</sup>

The effect of such knowledge by the agent, as affecting rights between the principal and third persons, will be considered in a subsequent chapter.<sup>239</sup>

#### IV. ACCOUNTING BY AGENT.

##### § 417. Duty of agent to account.

It is the duty of an agent to account to his principal for

<sup>234</sup> *Sterling v. Smith*, 97 Cal. 343; *Norris v. Tayloe*, 49 Ill. 17, 95 Am. Dec. 568; *Prince v. Dupuy*, 163 Ill. 417; *Hegenmyer v. Marks*, 37 Minn. 6, 5 Am. St. Rep. 808; *First Nat. Bank v. Hayes*, 64 Ohio St. 100; *Devall v. Burbridge*, 4 Watts & S. (Pa.) 305; *Arrott v. Brown*, 6 Whart. (Pa.) 9; *Harvey v. Turner*, 4 Rawle (Pa.) 223; *Kramer v. Winslow*, 130 Pa. 484, 17 Am. St. Rep. 782.

<sup>235</sup> *Hegenmyer v. Marks*, 37 Minn. 6, 5 Am. St. Rep. 808.

<sup>236</sup> *Kramer v. Winslow*, 130 Pa. 484, 17 Am. St. Rep. 782.

<sup>237</sup> *White v. Merritt*, 7 N. Y. 352, 57 Am. Dec. 527.

<sup>238</sup> *Harvey v. Turner*, 4 Rawle (Pa.) 223.

<sup>239</sup> See post, § 474 et seq.

all money and property which has come into his hands, either from the principal or from third persons, by virtue of the agency, whether such agency is by express appointment or whether it is an assumed one.<sup>240</sup> As has been seen in a former section, all profits made by an agent out of his agency, beyond lawful compensation, properly belong to his principal.<sup>241</sup> He is bound, therefore, to account to the principal for all profits which he has received from his transactions, whether received for the principal or for himself without the knowledge of the principal and in violation of his duty,<sup>242</sup> and whether the transactions in which they were received

<sup>240</sup> *Topham v. Braddick*, 1 Taunt. 572; *St. Louis & T. R. Packet Co. v. McPeters*, 124 Ala. 451; *Jett v. Hempstead*, 25 Ark. 462; *Whitehead v. Wells*, 29 Ark. 99; *Wooster v. Nevills*, 73 Cal. 58; *Pettibone v. Pettibone*, 4 Day (Conn.) 178; *Sibley v. Ober*, 87 Ga. 55; *Bedell v. Janney*, 9 Ill. 193; *Heddens v. Younglove*, 46 Ind. 212; *Armstrong v. Smith*, 3 Blackf. (Ind.) 251; *Haas v. Damon*, 9 Iowa, 589; *Ross v. Noble*, 6 Kan. App. 361; *Sanford v. Lancaster*, 81 Me. 434; *Monitor M. F. Ins. Co. v. Young*, 111 Mass. 537; *Hemenway v. Hemenway*, 5 Pick. (Mass.) 389; *Torrey v. Bryant*, 16 Pick. (Mass.) 528; *Eaton v. Welton*, 32 N. H. 352; *Brown v. Brown*, 40 Hun (N. Y.) 418; *Hancock v. Gomez*, 58 Barb. (N. Y.) 490; *Haebler v. Luttgen*, 2 App. Div. 390, 158 N. Y. 693; *Robson v. Sanders*, 25 S. C. 116; *Glasgow v. Hood* (Tenn. Ch. App.) 57 S. W. 162; *Baldwin v. Potter*, 46 Vt. 402; *McVeigh v. Old Dominion Bank*, 26 Grat. (Va.) 188; *Ruffner v. Hewitt*, 7 W. Va. 585. Where an agent receives money from his principal, with which to pay employees of such principal, but he is discharged by a superior before he can pay it out, and he pays the balance, after deducting the amount due him, to such superior, who paid it to the employees, the agent would not be liable to his principal for such money. *Ford Lumber Co. v. Arvine*, 18 Ky. L. R. 711, 38 S. W. 137.

<sup>241</sup> See ante, § 406.

<sup>242</sup> *Imperial Mercantile Credit Ass'n v. Coleman*, L. R. 6 H. L. 189; *Glover v. Layton*, 145 Ill. 92; *Watson v. Union Iron & S. Co.*, 15 Ill. App. 509; *Salsbury v. Ware*, 183 Ill. 505; *Lafferty v. Jelley*, 22 Ind. 471; *Kimball v. Ranney*, 122 Mich. 160, 80 Am. St. Rep. 548; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Dutton v. Willner*, 52 N. Y. 312; *Willink v. Vanderveer*, 1 Barb. (N. Y.) 599. And see cases cited ante, § 406, note 158. And where an agent takes possession of land, and manages it, as agent for the owner, and not as tenant, he is liable for the proceeds thereof less his proper expenditures, but not for the rental value, in the absence of fraud or dereliction of duty. *Royston v. McCulley* (Tenn. Ch. App.) 59 S. W. 725.

were within the scope of his authority or not.<sup>243</sup> Thus, where he buys for less than the price fixed by, or represented to, the principal, he must account for the difference.<sup>244</sup> So, where he is authorized to sell property at a fixed price, and he sells it at a greater price, he must account to his principal for the excess.<sup>245</sup> So, where an agent is authorized to sell property at a price not less than a specified sum, it imposes upon the agent the duty of selling and accounting for the highest price obtainable,<sup>246</sup> and if he fails or neglects to account for the proceeds of property so sold, the proper remedy against him is an action on contract, and not one for conversion;<sup>247</sup> and if the principal proceeds for a breach of the contract, he may interpose it as a counter-claim in an action upon the contract brought against him by the agent.<sup>248</sup>

He may maintain against the agent an action in assumpsit for money had and received;<sup>249</sup> or if he refuses to turn

<sup>243</sup> *Watson v. Union Iron & S. Co.*, 15 Ill. App. 509.

<sup>244</sup> See ante, § 406, note 162.

<sup>245</sup> *Kerfoot v. Hyman*, 52 Ill. 512; *Merryman v. David*, 31 Ill. 404; *Kramer v. Winslow*, 130 Pa. 484, 17 Am. St. Rep. 782; and see cases cited ante, § 406, note 160. And this is true notwithstanding the agent may have stated to his principal that he would retain for his services as agent any sum realized above that for which he was authorized to sell. *Mulvane v. O'Brien*, 58 Kan. 463.

"If an agent to sell effects a sale to himself under the name of another person, he becomes, in respect to the property, a trustee for the principal, and, at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it." *Robertson v. Chapman*, 152 U. S. 673.

<sup>246</sup> *Miller v. Louisville & N. R. Co.*, 83 Ala. 274, 3 Am. St. Rep. 722.

<sup>247</sup> *Wright v. Duffie*, 23 Misc. (N. Y.) 338; *Walter v. Bennett*, 16 N. Y. 250; *Greentree v. Rosenstock*, 61 N. Y. 583; *Conaughty v. Nichols*, 42 N. Y. 83. See *Coleman v. Pearce*, 26 Minn. 123, holding him liable as for a conversion, if he wrongfully refuses to account when directed.

<sup>248</sup> *Coit v. Stewart*, 50 N. Y. 17.

<sup>249</sup> *Strickland v. Burns*, 14 Ala. 511; *English v. Devarro*, 5 Blackf.

over or account for property, upon the demand of the principal, and offer to pay the amount of charges and commissions, the principal may maintain an action of replevin therefor.<sup>250</sup> So where an agent has received money of his principal to be applied to a special purpose, but he wholly omits to perform that duty, and converts the money to his own use, an action *ex delicto* or action of *assumpsit* for money had and received may be maintained against him. But if he actually enters upon and performs the duties of the trust, neither of such actions can be maintained against him for the recovery of an alleged balance, but the principal's remedy in such case is by an action of account render, or bill in equity.<sup>251</sup>

**§ 418. To whom agent shall account.**

An agent owes this duty to his principal only, and he is not bound to account to anyone but his principal;<sup>252</sup> or, upon the death of the latter, to his representative<sup>253</sup> or heirs.<sup>254</sup> There being no privity of contract between the agent and a third person, in reference to the agency, he is not bound to account to such person for any property or money received by him, as agent, for his principal. This rule finds special application in cases where an agent appointed to transact a certain business appoints another as his agent to transact the business for him, the latter agent being ignorant of the first employment, or being in such a position that the primary agent only is his principal, in which case the second agent would be bound to account to his immediate principal only, the primary agent.<sup>255</sup>

Where an agent is appointed by two or more common

(Ind.) 588; *Seidel v. Peschkaw*, 27 N. J. Law, 427; *Eaton v. Welton*, 32 N. H. 352.

<sup>250</sup> *Terwilliger v. Beals*, 6 Lans. (N. Y.) 403.

<sup>251</sup> *Reesides v. Reeside*, 49 Pa. 322, 88 Am. Dec. 503.

<sup>252</sup> *Maw v. Pearson*, 28 Beav. 196; *Attorney-General v. Chesterfield*, 18 Beav. 596; *Tripler v. Olcott*, 3 Johns. Ch. (N. Y.) 473; *Toland v. Murray*, 18 Johns. (N. Y.) 24.

<sup>253</sup> *Clegg v. Baumberger*, 110 Ind. 536; *Carriger v. Whittington*, 26 Mo. 311, 72 Am. Dec. 212; *Simmons v. Simmons*, 33 Grat. (Va.) 461.

<sup>254</sup> *Ellas v. Lockwood*, 1 Clarke Ch. (N. Y.) 311.

<sup>255</sup> See cases cited in note 252, *supra*.



principals, he is not bound to account to each one of them individually, but to all of them together.<sup>256</sup>

**§ 419. Application of this rule to subagents.**

Whether or not it is a subagent's duty to account to the principal or to the original agent depends upon whether he is the agent of such principal, or whether he is the agent merely of the agent who employed him. If, as has been seen heretofore, his appointment is by the express or implied consent of the principal, a privity exists between him and such principal, and he is the agent of the latter; and consequently it is his duty to account directly to the principal for all money or property received by him by virtue of his agency.<sup>257</sup> If, on the other hand, the subagent is appointed by the primary agent, on the latter's own responsibility, without the express or implied consent of the principal, no privity exists between the principal and subagent, and the latter is the agent of the primary agent alone; and in such a case there would ordinarily be no duty upon the subagent to account to the principal,<sup>258</sup> but to the primary agent, who in such case is his principal.<sup>259</sup> But even in such a case, if the subagent has possession of money or property which belongs to the principal, and the latter notifies him of his rights before he parts with such possession, he may be compelled to account therefor to the principal.<sup>260</sup>

**§ 420. Duty of agent to keep accounts.**

It is the duty of an agent, whenever the nature of the agency is such as to render it necessary, to keep full and

<sup>256</sup> *Louisiana Board of Trustees v. Dupuy*, 31 La. Ann. 305; *Hatall v. Griffith*, 2 Crompt. & M. 679; *Heath v. Chilton*, 12 Mees. & W. 632.

<sup>257</sup> *Guelich v. National State Bank*, 56 Iowa, 434, 41 Am. Rep. 110. See ante, § 347.

<sup>258</sup> *Guelich v. National State Bank*, 56 Iowa, 434, 41 Am. Rep. 110. And see ante, § 347.

<sup>259</sup> *Montagu v. Forwood*, [1893] 2 Q. B. 350; *Stephens v. Badcock*, 3 Barn. & Adol. 354; *Tripler v. Olcott*, 3 Johns. Ch. (N. Y.) 473; *Toland v. Murray*, 18 Johns. (N. Y.) 24.

<sup>260</sup> See post, § 447.

correct accounts of his transactions, and of all receipts and disbursements, and to preserve all vouchers and other valuable papers, and if he fails to do so and a loss results, the loss will fall upon him and not upon the principal.<sup>261</sup> "An account" has been defined as "a detailed statement, something which will furnish to the person having the right thereto, information of a character which will enable him to make some reasonable test of its accuracy and honesty."<sup>262</sup> Thus, where a merchant employs a traveling agent for a certain length of time at a fixed salary, and agrees to pay in addition to it all his expenses not to exceed a certain sum per annum, he has a right to know that the expenses charged are legitimate business expenses, and the duty of the agent is not fulfilled by his reporting that he has spent a round sum of money in prosecuting his employment. It is his duty to keep and preserve true and correct statements of account.<sup>263</sup> If, however, "the principal has himself, by his interference, created or so contributed to such confusion as to render an absolutely satisfactory accounting impossible, the agent ought not to be held to the most rigid rule."<sup>264</sup>

In some cases it may be his duty to keep books, in which shall be correctly entered the transactions on account of his principal.<sup>265</sup> But in other cases it is not generally required that he shall keep his accounts in any particular form or manner. If he so keeps them that he is able at any time to show

<sup>261</sup> *Clarke v. Tipping*, 9 Beav. 284; *Gray v. Haig*, 20 Beav. 219; *Clark v. Moody*, 17 Mass. 145; *Hamilton v. Hamilton*, 15 App. Div. (N. Y.) 47; *Riley v. Bank of Allendale*, 57 S. C. 100; *Ridder v. Whitlock*, 12 How. Pr. (N. Y.) 208; *Ruffner v. Hewitt*, 7 W. Va. 586. Where an insurance agent agrees that the actual condition of his accounts with the company shall be determined by an inspection of his reports, in the absence of fraud or mistake the report of such inspector is conclusive. *Metropolitan L. Ins. Co. v. Long*, 65 Ill. App. 295; *Stevens v. Metropolitan L. Ins. Co.*, 13 App. Div. (N. Y.) 16.

<sup>262</sup> *Wolf Co. v. Salem*, 33 Ill. App. 616; *Moyses v. Rosenbaum*, 98 Ill. App. 7.

<sup>263</sup> *Moyses v. Rosenbaum*, 98 Ill. App. 7; *Wolf Co. v. Salem*, 33 Ill. App. 616.

<sup>264</sup> *Robbins v. Robbins* (N. J. Eq.) 3 Atl. 264.

<sup>265</sup> *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600.

to his principal the details or standing of the transaction, it will generally be sufficient. All that is usually required of him is that he shall be able at any time to show the state of affairs between himself and his principal, in reference to the transaction in which he is employed.

**§ 421. Commingling of property or funds.**

It is also the duty of an agent to keep the property and funds of his principal separate from his own, or, at least, to keep them in such a way that they can be separated for the purpose of accounting. If, either intentionally or through negligence, he allows the property or funds of his principal to become so commingled with his own that they cannot be separated when he is called upon to account, the loss must fall upon him, and the whole must be surrendered by him to the principal.<sup>266</sup> If an agent intentionally or negligently allows his principal's property or funds to become commingled with his own, and the whole mass is lost, the entire loss will fall upon the agent, although the circumstances may be such that, if there had been no commingling, the principal would have had to bear his part of the loss.<sup>267</sup> Thus, if an agent mixes the funds of his principal with funds of his own and of third persons, and a portion of the funds so mixed was subsequently stolen, but it was impossible to determine to whom the funds stolen actually belonged, the agent is liable

<sup>266</sup> *Clarke v. Tipping*, 9 Beav. 284; *Gray v. Haig*, 20 Beav. 219; *Yates v. Arden*, 5 Cranch, C. C. 526, Fed. Cas. No. 18,126; *Marine Bank v. Fulton Bank*, 2 Wall. (U. S.) 252; *Atkinson v. Ward*, 47 Ark. 533; *Hall v. Page*, 4 Ga. 428, 48 Am. Dec. 235; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62; *Greene v. Haskell*, 5 R. I. 447; *Williams v. Williams*, 55 Wis. 300, 42 Am. Rep. 708.

In *Safford v. Gallup*, 53 Vt. 292, it was held, that where an agent commingled the money of his principal with his own, without the knowledge of the principal, and with the commingled money purchased hides, in the execution of his agency, so far as the creditors of the agent are concerned, they belong to the principal; but if the agent without the knowledge or fault of the principal commingles his own property with that of his principal, so that the same is incapable of separation, he and the principal become tenants in common of such property, as to the agent's attaching creditors.

<sup>267</sup> *Bartlett v. Hamilton*, 46 Me. 435.

to account to the principal for the money received from him, even though a loss had occurred.<sup>268</sup> So, if an agent receives funds during the course of his agency, and it is necessary for him to deposit them in bank, he should do so, in such a manner that they are readily distinguishable as the funds of the principal. He should deposit them in a bank of good standing either in the name of the principal, or if he deposits them in his own or another name he should indicate on the books of the bank that they are the principal's. If he does so, he will not be liable for a loss through a failure of the bank.<sup>269</sup> If, however, he deposits them in his own name, without making such distinction, he will be responsible for the money so deposited, where the bank fails.<sup>270</sup>

**§ 422. Duty of agent to render accounts.**

An agent may be required to render accounts to his principal at stated times by express provisions in the contract of employment, or he may be required to do so by an established usage of the particular business, which becomes an implied term of his contract. In the absence of any agreement in this respect, express or implied, the rule is that it is the duty of an agent to render accounts of his dealings to his principal whenever they are demanded, or, in the absence of a demand, within what is a reasonable time under the circumstances of the particular case, unless the nature of the agency is such as to exclude such a duty.<sup>271</sup> Thus, where an agent has collected money for his principal, it is his duty to render an account or give notice thereof within

<sup>268</sup> *Mass. L. Ins. Co. v. Carpenter*, 2 Sweeny (N. Y.) 734.

<sup>269</sup> *Commercial & Agricultural Bank v. Jones*, 18 Tex. 811; *Hammon v. Cottle*, 6 Serg. & R. (Pa.) 290.

<sup>270</sup> *Wren v. Kirton*, 11 Ves. 377; *Robinson v. Ward*, 2 Car. & P. 60; *Naltner v. Dolan*, 108 Ind. 500, 58 Am. Rep. 61; *Cartmell v. Al-lard*, 7 Bush (Ky.) 482; *Norris v. Hero*, 22 La. Ann. 605; *Jenkins v. Walter*, 8 Gill & J. (Md.) 218, 29 Am. Dec. 539; *Mason v. Whitthorne*, 2 Cold. (Tenn.) 242; *Williams v. Williams*, 55 Wis. 300, 42 Am. Rep. 708.

<sup>271</sup> *Leake v. Sutherland*, 25 Ark. 219 (and in such a case the commencement of a suit is a sufficient demand); *Ruffner v. Hewitt*, 7 W. Va. 586.

a reasonable time,<sup>272</sup> in order that the principal may give him instructions in regard to the manner of remitting it; unless such instructions were given at the time of the employment, in which case he should remit without such notice. This rule is especially true in the case of agents or factors making collections for foreign principals.<sup>273</sup> Other cases, however, hold that, even without such instructions, good faith on the part of the agent requires that he should pay over the money as soon as collected, and unless he renders an account and pays over the money within a reasonable time after its collection, he may be considered as appropriating it to his own use.<sup>274</sup>

So where an agent sells goods for his principal, it is his duty to account for the proceeds within a reasonable time after such sales; and a reasonable time after the agent has received goods for sale it may be presumed that he has sold the goods and received the proceeds thereon and an action may be maintained against him therefor.<sup>275</sup>

#### § 423. Necessity for demand.

As a general rule a principal cannot maintain an action against his agent for an accounting or to recover money or property received by the agent, until he has made a demand upon the agent, and the latter has failed or refused to comply with such demand.<sup>276</sup> As in other cases, however, the

<sup>272</sup> *Whitehead v. Wells*, 29 Ark. 99; *Jett v. Hempstead*, 25 Ark. 463; *Dodge v. Perkins*, 9 Pick. (Mass.) 368; *McMahan v. Franklin*, 38 Mo. 549; *Lyle v. Murray*, 4 Sandf. (N. Y.) 590; *Williams v. Storrs*, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340.

<sup>273</sup> *Ferris v. Paris*, 10 Johns. (N. Y.) 285; *Murray v. Coster*, 20 Johns. (N. Y.) 576; *Lyle v. Murray*, 4 Sandf. (N. Y.) 590. And see post, § 852.

<sup>274</sup> *Bedell v. Janney*, 9 Ill. 193; *Lillie v. Hoyt*, 5 Hill (N. Y.) 395, 40 Am. Dec. 360; *Lyle v. Murray*, 4 Sandf. (N. Y.) 590.

<sup>275</sup> *Haas v. Damon*, 9 Iowa, 589; *Langley v. Sturtevant*, 7 Pick. (Mass.) 214; *Torrey v. Bryant*, 16 Pick. (Mass.) 528; *Eaton v. Welton*, 32 N. H. 352.

<sup>276</sup> *England*: *Topham v. Braddick*, 1 Taunt. 572.

*Alabama*: *Hammett v. Brown*, 60 Ala. 498; *Sally's Adm'rs v. Capps*, 1 Ala. 121.

*Arkansas*: *Taylor v. Spears*, 6 Ark. 381, 44 Am. Dec. 519; *Jett*

circumstances may be such as to render a demand unnecessary, as, for instance, where the agent has repudiated the agency and asserted a claim to the property or funds as against the principal;<sup>277</sup> or where he has agreed, beforehand, to pay over the money when collected;<sup>278</sup> or where there is a law imposing upon the agent a duty to account without a demand;<sup>279</sup> or where he has converted the property or money to his own use,<sup>280</sup> although the principal there-

*v. Hempstead*, 25 Ark. 462; *Palmer v. Ashley*, 3 Ark. 75; *Whitehead v. Wells*, 29 Ark. 99.

*California*: *In re Holdforth*, 1 Cal. 438; *Bushnell v. McCauley*, 7 Cal. 421.

*Illinois*: *Bedell v. Janney*, 9 Ill. 193.

*Indiana*: *Heddens v. Younglove*, 46 Ind. 212; *Judah v. Dyott*, 3 Blackf. 324, 25 Am. Dec. 112; *State v. Sims*, 76 Ind. 329; *Claypool v. Gish*, 108 Ind. 424.

*Iowa*: *Alexander v. Jones*, 64 Iowa, 207; *Haas v. Damon*, 9 Iowa, 589.

*Kentucky*: *Roberts v. Armstrong*, 1 Bush, 263, 89 Am. Dec. 624.

*Massachusetts*: *Clark v. Moody*, 17 Mass. 145.

*Missouri*: *Burton v. Collin*, 3 Mo. 315; *Cockrill v. Kirkpatrick*, 9 Mo. 697.

*New Hampshire*: *Hutchins v. Gilman*, 9 N. H. 359.

*New York*: *Baird v. Walker*, 12 Barb. 298; *Albany City F. Ins. Co. v. Devendorf*, 43 Barb. 444; *Cooley v. Betts*, 24 Wend. 203.

*North Carolina*: *Waring v. Richardson*, 33 N. C. (11 Ired.) 77; *Moore v. Hyman*, 34 N. C. (12 Ired.) 38; *Potter v. Sturges*, 12 N. C. (1 Dev.) 79; *Waddell v. Swann*, 91 N. C. 108.

*Pennsylvania*: *Krause v. Dorrance*, 10 Pa. 462, 51 Am. Dec. 496.

*Vermont*: *Hall v. Peck*, 10 Vt. 474.

The proof of a demand is not restricted to any particular form of words, but any declaration of the agent to the principal, which shows a denial of his right, puts him in the wrong, and gives to the principal a right of action. *Moore v. Hyman*, 34 N. C. (12 Ired.) 38.

<sup>277</sup> *Hammett v. Brown*, 60 Ala. 498; *King v. Foscue*, 91 N. C. 116; *Waddell v. Swann*, 91 N. C. 108; *Wiley v. Logan*, 95 N. C. 358; *Tillotson v. McCrillis*, 11 Vt. 477.

<sup>278</sup> *Mardis' Adm'rs v. Shackelford*, 4 Ala. 493; *Haebler v. Luttgen*, 2 App. Div. 390, 158 N. Y. 693.

<sup>279</sup> *Dodge v. Perkins*, 9 Pick. (Mass.) 368.

<sup>280</sup> *Brazier v. Fortune*, 10 Ala. 516; *Chapman v. Burt*, 77 Ill. 337; *Bedell v. Janney*, 9 Ill. 193; *Bunger v. Roddy*, 70 Ind. 26; *Terrell v. Butterfield*, 92 Ind. 1; *Bartels v. Kinnenger*, 144 Mo. 370. But

after took the agent's note for the amount so converted, and recovered a judgment thereon;<sup>281</sup> or where he has been guilty of such a breach of duty that he has not collected as large an amount as he otherwise would have collected;<sup>282</sup> or where he attempts to make a profit out of the agency for himself, in fraud of the principal's rights;<sup>283</sup> or where a demand would be impracticable or highly inconvenient;<sup>284</sup> or where he has delayed for an unreasonable length of time to render an account of sales made by him or to notify his principal that he has collected the money on such sales;<sup>285</sup> but if the principal has actual knowledge of such collection, the fact that the agent fails to notify him thereof will not excuse the principal from making a demand.<sup>286</sup>

"As a general rule in such cases, it may be presumed that payment has been delayed by reason of the want of safe and convenient means of transmission, or of some other good and sufficient cause, and that the recipient of the money, still considering himself as entitled to no more than enough to reasonably compensate him for his services in collecting it, will pay it over on demand. But, where so long a time has elapsed since the collection of the money as to rebut any such presumption in favor of the collector, he may well be considered as having appropriated it to his own use, and then, neither law nor reason requires that before he can be sued for his

the mere fact that an agent takes notes payable to himself for the sum due to his principal is not of itself such a conversion as will dispense with a demand for the proceeds of such note, before an action therefor. *Kidd v. King*, 5 Ala. 84.

<sup>281</sup> *Bartels v. Kinnenger*, 144 Mo. 370.

<sup>282</sup> *Dever v. Branch*, 18 Tex. 615.

<sup>283</sup> *Wooster v. Nevills*, 73 Cal. 58. And see ante, § 406.

<sup>284</sup> *Clark v. Moody*, 17 Mass. 145; *Dodge v. Perkins*, 9 Pick. (Mass.) 387; *Eaton v. Welton*, 32 N. H. 352.

<sup>285</sup> *Denton's Ex'rs v. Embury*, 10 Ark. 228; *Bedell v. Janney*, 9 Ill. 193; *Paris v. Hunter*, 10 Ill. App. 230; *Chapman v. Burt*, 77 Ill. 337; *Haas v. Damon*, 9 Iowa, 591; *McMahan v. Franklin*, 38 Mo. 548; *Cooley v. Betts*, 24 Wend. (N. Y.) 203; *Lillie v. Hoyt*, 5 Hill (N. Y.) 395, 40 Am. Dec. 360; *Drexel v. Raimond*, 23 Pa. 21; *Mitchell v. McLemore*, 9 Tex. 151.

<sup>286</sup> *Jett v. Hempstead*, 25 Ark. 462.

nonfeasance, he should be requested to do what his conduct sufficiently indicates his determination not to do."<sup>287</sup>

If the agent has a certain length of time in which to account, the principal has no right of action against him before the expiration of that time,<sup>288</sup> notwithstanding he should make a demand previous thereto.

#### § 424. Liability of agent for interest.

If an agent has faithfully performed his duty, and has been guilty of no negligence or default in accounting for the proceeds of his transactions, and holds himself in readiness to account, upon demand or when it is his duty to do so, he will not be liable for interest on such proceeds, until a demand has been made,<sup>289</sup> or unless he has received special instructions to remit the money as fast as collected;<sup>290</sup> unless, of course, he has expressly or impliedly agreed to pay interest thereon; or unless he has received interest, upon an investment of the proceeds, for which he must, of course, account.<sup>291</sup> Nor will he be liable for interest upon money,

<sup>287</sup> *Bedell v. Janney*, 9 Ill. 201.

<sup>288</sup> *Hall v. Page*, 4 Ga. 428, 48 Am. Dec. 235.

<sup>289</sup> *Turner v. Burkinshaw*, 2 Ch. App. 488; *Williams v. Baxter*, 3 McLean, 471, Fed. Cas. No. 17,715; *Gunn v. Howell*, 35 Ala. 144; *Nisbet v. Lawson*, 1 Ga. 275; *Hackleman v. Moat*, 4 Blackf. (Ind.) 164; *Gordon v. Zacharie*, 15 La. Ann. 17; *Wheeler v. Haskins*, 41 Me. 432; *Williams v. Storrs*, 6 Johns. (N. Y.) 353, 10 Am. Dec. 340; *Miller v. Clark*, 5 Lans. (N. Y.) 388; *Hyman v. Gray*, 49 N. C. (4 Jones) 155; *Rowland v. Martindale*, 1 Bailey Eq. (S. C.) 226; *Hauxhurst v. Hovey*, 26 Vt. 544.

<sup>290</sup> *Hauxhurst v. Hovey*, 26 Vt. 544.

<sup>291</sup> *Bassett v. Kinney*, 24 Conn. 267, 63 Am. Dec. 161; *Williams v. Storrs*, 6 Johns. (N. Y.) 353, 10 Am. Dec. 340. In *Landis v. Scott*, 32 Pa. 495, it was held that if an agent or trustee, in consequence of the pendency of legal proceedings between his principals or cestui que trust, is prevented from paying over the moneys in his hands, it is his duty to invest the funds, and, in default, he is chargeable with interest. And where an agent has interest-bearing securities in his possession belonging to his principal, the law presumes that he received interest thereon; and the burden is on him to prove that he had not received it; and without an explanation sufficient to relieve him from payment he is chargeable with the interest. *Blodgett v. Converse*, 60 Vt. 410.



which he is entitled to retain in his possession by reason of a lien he has upon it, during the continuance of such lien.<sup>292</sup>

But where he has neglected or refused to account for money in his possession belonging to his principal, as by refusing or neglecting to pay it over when it is his duty to do so, or by not applying it to the purpose for which it was given to him, he will be liable to his principal for interest thereon from the time of such neglect or default. Thus, when a demand has been made for an accounting, and he refuses or neglects to render an account within a reasonable time thereafter, he will be liable for interest from the time of such demand;<sup>293</sup> or where it is his duty to account without such demand, and he neglects to do so, he will be liable for interest from the time of such neglect;<sup>294</sup> or where he appropriates to his own use or wrongfully retains funds which have been received by him, for his principal, or for a special purpose, he will be liable for interest thereon from the time they were received or ought to have been paid over;<sup>295</sup> or where he has neglected to give his principal no-

<sup>292</sup> *Thompson v. Stewart*, 3 Conn. 171, 8 Am. Dec. 168.

<sup>293</sup> *Harsant v. Blaine*, 56 Law J. Q. B. 511; *Pearse v. Green*, 1 Jac. & W. 135; *Nisbet v. Lawson*, 1 Ga. 275; *Hackleman v. Moat*, 4 Blackf. (Ind.) 164; *Gordon v. Zacharie*, 15 La. Ann. 17; *Wheeler v. Haskins*, 41 Me. 432; *Board of Justices v. Fennimore*, 1 N. J. Law, 242; *Hyman v. Gray*, 49 N. C. (4 Jones) 155; *Hill v. Williams*, 59 N. C. (6 Jones Eq.) 242; *Porter v. Grimsley*, 98 N. C. 550; *Neal v. Freeman*, 85 N. C. 441. Where the report of an agent shows a balance in his hands, which he neglects to pay over on demand, the principal is entitled to interest on such balance, from the time he should have paid it over. *Miller v. McCormick Harvesting Mach. Co.*, 84 Ill. App. 571.

<sup>294</sup> *Dodge v. Perkins*, 9 Pick. (Mass.) 368.

<sup>295</sup> *Wolfe v. Findlay*, 6 Hare, 66; *Fry v. Fry*, 10 Jur. (N. S.) 983; *Short v. Shipwith*, 1 Brock. 103, Fed. Cas. No. 12,809; *Nisbet v. Lawson*, 1 Ga. 275; *Anderson v. State*, 2 Ga. 370; *Stern v. People*, 102 Ill. 557; *Chapman v. Burt*, 77 Ill. 338; *Rochester v. Levering*, 104 Ind. 562; *Taylor v. Knox's Ex'rs*, 5 Dana (Ky.) 466; *Gordon v. Zacharie*, 15 La. Ann. 17; *Beugnot v. Tremoulet*, 52 La. Ann. 454; *Hill v. Hunt*, 9 Gray (Mass.) 66; *Schisler v. Null*, 91 Mich. 321; *Kerr v. Laird*, 27 Miss. 544; *Miller v. Clark*, 5 Lans. (N. Y.) 390; *Tuers v. Tuers*, 100 N. Y. 196; *People v. Gasherie*, 9 Johns. (N. Y.) 71, 6 Am. Dec. 263; *Harrison v. Long*, 4 Desaus. (S. C.) 110;

tice, within a reasonable time, of the fact that he has collected money for him, or to account therefor, he will be liable for interest from the time that he should have given such notice or account.<sup>296</sup>

**§ 425. Application of statute of limitations to agent's liability.**

An agent, however, cannot be held to this liability for an accounting, for an indefinite length of time; and unless the principal brings his action against the agent within the time prescribed by statute, his claim may be effectually barred. The chief question in such cases is to determine when the principal's right of action accrues, or in other words when the statute begins to run. As has been seen in a preceding section, as a general rule, a principal has no right of action against his agent for failing to account, until he has made a demand for such accounting, and the agent has refused or neglected to comply therewith, subject to the exceptions there noted.<sup>297</sup> It may be stated as a general rule, therefore, that where the agency is a general or continuing one, the statute of limitations begins to run on the principal's right of action against his agent, from the time of the ter-

*Blodgett v. Converse*, 60 Vt. 410. Thus if an agent receives money to invest for his principal, but neglects to do so or converts it to his own use, he is liable for interest thereon from the time of its receipt, and without a previous demand. *Hill v. Hunt*, 9 Gray (Mass.) 66; *Dodge v. Perkins*, 9 Pick. (Mass.) 387; *Brown v. Southouse*, 3 Brown Ch. 107. And where an agent mixes the money of his principal with his own by depositing it in his general bank account, and draws it out and uses it in his own business, it is presumed that he has gained a benefit, and on failure to show how much he has derived from the use, he is chargeable for interest. *Blodgett v. Converse*, 60 Vt. 410.

<sup>296</sup> *Nisbet v. Lawson*, 1 Ga. 275; *Bedell v. Janney*, 9 Ill. 193; *Chapman v. Burt*, 77 Ill. 338; *Comegys v. State*, 10 Gill & J. (Md.) 175; *Dodge v. Perkins*, 9 Pick. (Mass.) 368; *Williams v. Storrs*, 6 Johns. (N. Y.) 353, 10 Am. Dec. 340; *Thorpe v. Thorpe*, 75 Vt. 34; *Hauxhurst v. Hovey*, 26 Vt. 544. A collector is liable for interest upon moneys remaining in his hands, after a reasonable time for paying them over. *Board of Justices v. Fennimore*, 1 N. J. Law, 242.

<sup>297</sup> See ante, § 423.

mination of the agency, or from the time the agent has rendered an accounting to his principal and offered to settle, or from the time the principal has made a demand upon the agent for an accounting, and the latter has refused or neglected to render it; and unless his action is brought within the period prescribed by statute, thereafter, the agent may plead the statute in bar of the principal's claim.<sup>298</sup>

<sup>298</sup> *England*: *Topham v. Braddick*, 1 Taunt. 572.

*Arkansas*: *Whitehead v. Wells*, 29 Ark. 99; *Jett v. Hempstead*, 25 Ark. 463.

*California*: *Baker v. Joseph*, 16 Cal. 173.

*Georgia*: *Teasley v. Bradley*, 110 Ga. 497, 78 Am. St. Rep. 113.

*Indiana*: *Dodds v. Vannoy*, 61 Ind. 89; *Judah v. Dyott*, 3 Blackf. 324, 25 Am. Dec. 112; *Lynch v. Jennings*, 43 Ind. 276.

*Kansas*: *Krutz v. Fisher*, 8 Kan. 90; *Green v. Williams*, 21 Kan. 64; *Voss v. Bachop*, 5 Kan. 59.

*Kentucky*: *Roberts v. Armstrong*, 1 Bush, 263, 89 Am. Dec. 624.

*Michigan*: *Ewers v. White*, 114 Mich. 266.

*New Hampshire*: *Hutchins v. Gilman*, 9 N. H. 360; *Sawyer v. Tappan*, 14 N. H. 352.

*New York*: *Baird v. Walker*, 12 Barb. 298.

*North Carolina*: *Hyman v. Gray*, 49 N. C. (4 Jones) 155; *Eger-ton v. Logan*, 81 N. C. 172.

*Pennsylvania*: *Jayne v. Mickey*, 55 Pa. 260. But this statute is held not to apply to unliquidated accounts between principal and agent. *Stiles v. Donaldson*, 2 Yeates (Pa.) 105.

*South Carolina*: *Lever v. Lever*, 1 Hill Eq. 62; *Hopkins v. Hop-kins*, 4 Strob. Eq. 207.

*Tennessee*: *Osborne v. Boswell* (Tenn. Ch. App.) 61 S. W. 96.

*Texas*: *Merle v. Andrews*, 4 Tex. 200.

*Virginia*: *Riverview Land Co. v. Dance*, 98 Va. 239.

*West Virginia*: *Rowan v. Chenoweth*, 49 W. Va. 286, 87 Am. St. Rep. 796.

But the presumption of payment or release arising from lapse of time will, when properly relied on, by analogy to the statute, defeat the action, where, under different circumstances, the statute would apply, unless the facts should be such as to repel the presumption. *Robert v. Armstrong*, 1 Bush (Ky.) 263, 89 Am. Dec. 624. Where a husband takes possession, as a general agent of his wife at the time of their marriage, and managed the property for her until his death, without in any way ever accounting to her, he occupied a fiduciary relation and the statute of limitations is held inapplicable. *Oliver v. Hammond*, 85 Ga. 323. In *Means v. Ross*, 106 La. 175, it was held that the accounting due by an agent to his principal does not fall within the prescription of three years.

In some cases it is held that after the lapse of a reasonable time, a demand will be presumed and the statute of limitations will begin to run from the time such demand would be presumed to have been made.<sup>299</sup> Thus, if an agent receives money from a principal from time to time to invest and collect the principal or interest, and to reinvest the money from time to time for the benefit of such principal, and it is contemplated by the agreement between the parties that the agent receiving the money would use it for the benefit of such principal, and there is no time specified when the money is to be returned, such agent holds the money subject to the demand of the principal, and no limitation runs against the principal in favor of the agent until there has been a demand and refusal,<sup>300</sup> or such a lapse of time that the law presumes a demand and refusal, or until an accounting has been rendered accompanied by an offer to settle, or his agent has notified the principal that he no longer holds the money as the principal but claims title to himself.<sup>301</sup>

But, as has been seen heretofore, there are cases in which the principal has a right of action against the agent without having first made a demand on him for an accounting. Thus, if the agency be special, and relate to isolated transactions, in regard to which the agent received special authority from his principal to act in those particular matters, then the statute of limitations will commence to run from each of those several transactions.<sup>302</sup> So a right of action accrues and the statute begins to run without a demand, from the time of collection, where the agent has expressly or impliedly promised to pay over the money as soon as collected, or where it is his duty by law to do so, or where a demand is impracticable or very inconvenient.<sup>303</sup> But the statute does

<sup>299</sup> *Teasley v. Bradley*, 110 Ga. 497, 78 Am. St. Rep. 113; *Stamford v. Tuttle*, 4 Vt. 82.

<sup>300</sup> *Teasley v. Bradley*, 110 Ga. 497, 78 Am. St. Rep. 113; *Baker v. Joseph*, 16 Cal. 173.

<sup>301</sup> *Teasley v. Bradley*, 110 Ga. 497, 78 Am. St. Rep. 113.

<sup>302</sup> *Hopkins v. Hopkins*, 4 Strob. Eq. (S. C.) 207; *Ritchey's Appeal*, 8 Pa. Super. Ct. 527; *Rowan v. Chenoweth*, 49 W. Va. 287, 37 Am. St. Rep. 796.

<sup>303</sup> *Hart's Appeal*, 32 Conn. 520; *Teasley v. Bradley*, 110 Ga. 497,

not take effect until the principal has notice that the agent has funds in his hands for which he should account; and if the agent neglects to give such notice, the statute does not begin to run, unless the principal has actual knowledge thereof from some other source, and the burden of proof is on the agent to show that the principal knew, or with ordinary care and diligence might have known, of the collection of the money, and made a demand.<sup>304</sup> But in some cases it will be presumed after the lapse of a reasonable time that the principal has such notice, and his suit may be barred by the statute running against it from such a time.<sup>305</sup>

**§ 426. When the principal is entitled to an accounting in equity.**

It is a settled principle of equity jurisprudence that a party cannot seek relief or redress in a court of equity where he has an adequate remedy at law. In accordance with this principle, a principal cannot go into a court of equity to compel his agent to account, on the mere ground of the relation of principal and agent, for it is evident that in many

78 Am. St. Rep. 113; *Cagwin v. Ball*, 2 Ill. App. 70; *Clark v. Moody*, 17 Mass. 145; *Campbell v. Boggs*, 48 Pa. 524; *Hopkins v. Hopkins*, 4 Strob. Eq. (S. C.) 207; *Estes v. Stokes*, 2 Rich. (S. C.) 133; *Lawrence University v. Smith*, 32 Wis. 587.

<sup>304</sup> *Whitehead v. Wells*, 29 Ark. 99; *Jett v. Hempstead*, 25 Ark. 463; *Schofield v. Woolley*, 98 Ga. 548, 58 Am. St. Rep. 315; *Teasley v. Bradley*, 110 Ga. 497, 78 Am. St. Rep. 113; *McDowell v. Potter*, 8 Pa. 189, 49 Am. Dec. 503. Thus the statute does not begin to run against the principal's action against an agent for defalcation, until the principal has discovered the misappropriation. *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74. So, in *Gale v. New York Hay Co.*, 54 App. Div. (N. Y.) 72, it was held that the doctrine that an account rendered and retained without objection becomes an account stated, does not apply to an account rendered by an agent to his principal, containing misstatements as to matters peculiarly within the agent's knowledge, and not readily discoverable by the principal.

<sup>305</sup> *McDonnell v. Montgomery*, 20 Ala. 313; *Voss v. Bachop*, 5 Kan. 59; *Mitchell v. McLemore*, 9 Tex. 151. Such a suit was held to be barred by not being brought within six years after the collection. *Hickok v. Hickok*, 13 Barb. (N. Y.) 632.

of such cases he has an adequate remedy in a court of law.<sup>306</sup> Thus, if the agency involves only a single transaction, and there is no fraud, or reason for a discovery in the case, a suit at law would give an adequate remedy and a bill in equity could not be maintained.<sup>307</sup> But where the relation existing between the principal and his agent is of a fiduciary character, matters of confidence and trust being involved, as distinguished from the ordinary relation of principal and agent,<sup>308</sup> or where the accounts between the parties are so complicated or numerous that a court of law cannot conveniently or expeditiously settle them,<sup>309</sup> the principal may maintain a bill in equity for an accounting.

Where such a bill is filed by the principal, after the termination of the agency, it is proper for the agent, by cross bill, to demand payment for his services and have such demand adjusted with the accounting, so that by its decree the court may give complete relief between the parties in respect to the agency.<sup>310</sup>

<sup>306</sup> *Navulshaw v. Brownrigg*, 2 De Gex, M. & G. 441; *Maxon v. Bright*, 4 Ch. App. 292; *Knotts v. Tarver*, 8 Ala. 743; *Powers v. Cray*, 7 Ga. 206; *Coquillard v. Suydam*, 8 Blackf. (Ind.) 24.

<sup>307</sup> *Navulshaw v. Brownrigg*, 2 De Gex, M. & G. 441; *Phillips v. Phillips*, 9 Hare, 471; *Halsted v. Rabb*, 8 Port. (Ala.) 63; *Coquillard v. Suydam*, 8 Blackf. (Ind.) 24; *Porter v. Spencer*, 2 Johns. Ch. (N. Y.) 171.

<sup>308</sup> *Makepeace v. Rogers*, 4 De Gex, J. & S. 649; *Moxon v. Bright*, 4 Ch. App. 294; *McIntyre v. McClenaghan*, 12 S. C. 185; *Thornton v. Thornton*, 31 Grat. (Va.) 212. As has been said: "Wherever the relation between the person who seeks an account and the person against whom he seeks it, partakes of a fiduciary character, a trust is reposed by the plaintiff in the defendant, and that that trust is not the same as is represented to exist in the ordinary employment of an agent, such as a builder or other tradesman. The fiduciary character of the employment imposes upon the person employed the duty of keeping accounts and of preserving vouchers; and a bill for an account in equity may be filed and sustained." *Makepeace v. Rogers*, 11 Jur. (N. S.) 215.

<sup>309</sup> *Barry v. Stevens*, 31 Beav. 258; *Blyth v. Whiffin*, 27 Law T. (N. S.) 330; *Knotts v. Tarver*, 8 Ala. 743; *Halsted v. Rabb*, 8 Port. (Ala.) 63; *Dunwiddle v. Kerley*, 6 J. J. Marsh. (Ky.) 501; *Hutchinson v. Van Voorhis*, 54 N. J. Eq. 439; *Taylor v. Tompkins*, 2 Heisk. (Tenn.) 89.

<sup>310</sup> *Hutchinson v. Van Voorhis*, 54 N. J. Eq. 439; *Shearman v. Morrison*, 149 Pa. 386.

**§ 427. Right of set-off or counterclaim.**

As a general rule, when a principal sues his agent for an accounting or to recover money which has come into his hands by virtue of the agency, the agent has the right of set-off or counterclaim in order to enforce demands which he has against the principal. Such right, however, cannot be asserted, if it would involve a violation of the duty owed by the agent to the principal.<sup>311</sup> Thus, it has been held that when an agent is specially employed to collect a claim due his principal, it is his duty to collect the same and pay it over to the principal, and that he will not be allowed to violate this duty by collecting the claim and then, without the principal's consent, setting it off or pleading it as a counterclaim against a demand which he has against the principal, and which existed at the time of his employment.<sup>312</sup> This principle applies generally whenever to allow an agent to assert the right of set-off or counterclaim against his principal would be to allow him to violate a duty assumed by him to apply the funds or property in his hands to some other purpose. In a Pennsylvania case, an agent who was authorized to collect certain rents and apply them, first, to the payment of certain debts due from the principal to third persons, and then to the payment of a mortgage debt due from the principal to the agent, collected the rents and applied the entire fund on the debt due him. It was held that this was a violation of his duty by the agent, and that he could not set off his own demand against the principal in an action by the latter to recover the money collected. The court said: "By accepting the letter of attorney, the defendant assumed the obligation and assented to the terms imposed on him. It thereby became his duty to collect the rents and pay over the same to the several persons in the order therein specified. His right to retain any portion thereof, or to apply it to the debt due himself was expressly

<sup>311</sup> *Middletown & H. Turnpike Road v. Watson*, 1 Rawle (Pa.) 330; *Tagg v. Bowman*, 108 Pa. 273, 56 Am. Rep. 204; *Id.*, 99 Pa. 376; *Ardesco Oil Co. v. North American Oil & Min. Co.*, 66 Pa. 375; *Simpson v. Pinkerton*, 10 Wkly. Notes Cas. (Pa.) 423.

<sup>312</sup> *Simpson v. Pinkerton*, 10 Wkly. Notes Cas. (Pa.) 423.

limited to the interest on the latter. His power to collect was coupled with the specific trust prescribed in the same instrument. Having received the money under authority of the plaintiff for a specific purpose, he cannot apply it to the payment of a previous indebtedness. It cannot thus be diverted from its legitimate purpose."<sup>813</sup>

**§ 428. Whether an agent may set up illegality of transaction.**

The authorities are not entirely in harmony as to the right of an agent to set up the illegality of a transaction as a defense to the principal's action to compel an accounting and payment of money in the agent's hands belonging to the principal. The determination of the question, however, seems to depend upon whether or not the principal requires any aid from the illegal transaction to maintain his action. As has been said, "the test whether a demand connected with an illegal act can be enforced is whether the plaintiff requires any aid from the illegal transaction to establish his case."<sup>814</sup> If the agent's obligation is so closely connected with the illegal transaction as to be inseparable from it, the principal cannot recover from the agent proceeds arising out of such illegal transaction. It may be stated as a rule, therefore, that where an agent has received money or property for the use of his principal, in the course of an illegal transaction, and it is necessary for the principal, in an action against the agent to recover the money or property, or for an accounting, to rely upon the illegal transaction as the gist of his action and the foundation of his recovery, the agent may set up the illegality for the purpose of defeating the principal's action, on the ground that to permit the principal to recover would be to recognize the illegal contract, and that the maxim *ex dolo malo non oritur actio* applies.<sup>815</sup> Where the proprietor of a lottery employs

<sup>813</sup> *Tagg v. Bowman*, 108 Pa. 273, 56 Am. Rep. 204; *Id.*, 99 Pa. 376.

<sup>814</sup> *Gilliam v. Brown*, 43 Miss. 641; *Simpson v. Bloss*, 7 Taunt. 246; *Roby v. West*, 4 N. H. 290.

<sup>815</sup> *Edgar v. Fowler*, 3 East, 222; *Jackson v. McLean*, 36 Fed. 213; *Skeels v. Phillips*, 54 Ill. 309; *Neustadt v. Hall*, 58 Ill. 172; *Craft*



a person to sell tickets and receive the proceeds, he cannot recover the proceeds from such agent, for the obligation to pay over the money received for the tickets is so connected with the illegal contract to sell them as to be inseparable, and a court will not lend its aid to enforce it;<sup>316</sup> but if such proceeds are paid over by the agent to another agent, employed to sell, with directions to pay them over to the proprietor of the lottery, they may be recovered by the latter from the second agent, for his obligation to pay over this money is disconnected from his illegal contract.<sup>317</sup>

Where, however, the principal bases his right to a recovery or accounting upon a promise or obligation of the agent collateral to or entirely disconnected from the illegal transaction, as upon the agent's implied promise to pay over or account for all money or property received by him for the use of his principal, it is not affected by the illegality of the transaction, and the agent cannot set up such illegality to defeat a recovery by the principal.<sup>318</sup> The law can-

v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171. But see *Snell v. Pells*, 113 Ill. 145; *Green v. Corrigan*, 87 Mo. 359; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Leonard v. Poole*, 114 N. Y. 371; *Lemon v. Grosskopf*, 22 Wis. 447, 99 Am. Dec. 58. But see *Kiewert v. Rindskopf*, 46 Wis. 481, 32 Am. Rep. 731. A court of equity will not entertain a bill filed to hold an agent responsible for the value of a bond placed in his hands for collection, which at that time was known by both parties to have been stolen, although the principal may have originally received it in good faith. *Kirk v. Morrow*, 6 Heisk. (Tenn.) 445.

<sup>316</sup> *Lemon v. Grosskopf*, 22 Wis. 447, 99 Am. Dec. 58; *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 253; *Udall v. Metcalf*, 5 N. H. 396; *Hunt v. Knickerbocker*, 5 Johns. (N. Y.) 326. Nor can money advanced to forward such sales be recovered. *Rolfe v. Delmar*, 7 Rob. (N. Y.) 80.

<sup>317</sup> *Lemon v. Grosskopf*, 22 Wis. 447, 99 Am. Dec. 58.

<sup>318</sup> *Bousfield v. Willson*, 16 Mees. & W. 185; *Tenant v. Elliott*, 1 Bos. & P. 3; *Farmer v. Russell*, 1 Bos. & P. 296; *Bridger v. Savage*, 15 Q. B. Div. 363; *McBlair v. Gibbes*, 17 How. (U. S.) 236; *Brooks v. Martin*, 2 Wall. (U. S.) 70; *O'Bryan v. Fitzgerald*, 48 Ark. 487; *First Nat. Bank v. Leppel*, 9 Colo. 594; *Ingram v. Mitchell*, 30 Ga. 547; *Snell v. Pells*, 113 Ill. 145; *Daniels v. Barney*, 22 Ind. 207; *Wilt v. Redkey*, 29 Ind. App. 199; *Willson v. Monticello*, 85 Ind. 10; *Nixon v. State*, 96 Ind. 111; *Chinn v. Chinn*, 22 La. Ann. 599;

not enforce an illegal contract, but if the agent of another has, in the prosecution of an unlawful enterprise for his principal, received money or other property belonging to the principal, he is bound to turn it over to him, and cannot shield himself from liability therefor on the ground of the illegality of the original transaction.<sup>319</sup> Thus, in accordance with this rule, it is held that a tax collector cannot refuse to account to the state for taxes, on the ground that they were illegally levied or collected,<sup>320</sup> that a town treasurer

*State v. Baltimore & O. R. Co.*, 34 Md. 344; *Gilliam v. Brown*, 43 Miss. 641; *Souhegan Bank v. Wallace*, 61 N. H. 24; *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140; *Alvord v. Latham*, 31 Barb. (N. Y.) 294; *Norton v. Blinn*, 39 Ohio St. 145; *Hertzler v. Geigley*, 196 Pa. 419, 79 Am. St. Rep. 724; *Smith v. Blachley*, 188 Pa. 550, 68 Am. St. Rep. 887; *Anderson v. Moncrieff*, 3 Desaus. Eq. (S. C.) 124; *Floyd v. Patterson*, 72 Tex. 202, 13 Am. St. Rep. 787; *Lovejoy v. Kaufman*, 16 Tex. Civ. App. 377; *Baldwin v. Potter*, 46 Vt. 402; *Klewert v. Rindskopf*, 46 Wis. 481, 32 Am. Rep. 731. Thus, where an agent sold prize packages of candies and collected the price, and refused to account for the moneys or for the samples of the prize candies, upon the ground of the illegality of the transaction, and the principal sued therefor, the court said: "When the money was so paid it became the plaintiff's money, and when it was received by the defendant as such agent, the law, in consideration thereof, implies a promise, on the part of the defendant, to pay it over to his principals, the plaintiffs; it is this obligation that the present action is brought to enforce; no illegality attaches to this contract. But the defendant insists that inasmuch as the plaintiffs could not have enforced the contract of sale as between themselves and the purchaser, therefore, as the purchaser has performed the contracts by paying the money to the plaintiffs through me, as their agent, I can now set up the illegality of the contract of sale to defeat an action brought to enforce the contract on my part to pay the money, that I as agent receive, over to my principal. In other words, because my principals did not receive the money on a legal contract, I am at liberty to steal the money, and appropriate it to my own use, and set my principals at defiance. We think the law is well settled otherwise, and the fact that the defendant acted as the agent of the plaintiffs in obtaining orders for the goods does not vary the case." *Baldwin v. Potter*, 46 Vt. 402.

<sup>319</sup> *Hertzler v. Geigley*, 196 Pa. 419, 79 Am. St. Rep. 724; and see other cases cited in note 318, supra.

<sup>320</sup> *Placer County v. Astin*, 8 Cal. 303; *Chandler v. State*, 1 Lea (Tenn.) 296; *Galbraith v. Gaines*, 10 Lea (Tenn.) 568. A collector

who has received the proceeds of taxes raised on an illegal vote cannot retain the money, but must pay it over to the town;<sup>321</sup> that, an agent who is entrusted with money to buy property at a judicial sale, under an agreement, one object of which was to prevent competition at the sale, cannot, after the agreement is executed, refuse to account for a surplus in his hands, on the ground that the agreement was against public policy;<sup>322</sup> and that an agent who has sold goods for his principal, collected the proceeds, and refused to pay them over, cannot defend against the claim of his principal thereto, on the ground that the sales were made without a license, and therefore were illegal.<sup>323</sup> So, where an agent is sued for the recovery of money which he had obtained to apply on a certain purchase, but which had not in fact been applied thereon, he cannot set up the objection that the agreement under which the land was purchased was by parol and therefore void by the statute of frauds.<sup>324</sup>

In a Georgia case, it was held that money deposited with an agent to purchase futures in grain may be recovered by the principal when no part of such money consists of profits made by the agent for the principal out of the illegal transaction, and in an action to recover it the principal need not invoke the contract to aid him, and the agent cannot set up its illegality to defeat the action for the money held as agent.

and his securities are liable for a "dog tax" collected, though the law imposing it be unconstitutional; and for penalties collected, though the act imposing the penalties is repealed. *Chandler v. State*, supra. So, where a tax collector has given bond to a town "to pay over the money collected to the treasurer," he is bound to pay over money voluntarily paid to him by the inhabitants, although the tax bills committed to him are imperfect and illegal, and although he has received no collector's warrant. *Johnson v. Goodridge*, 15 Me. 29.

<sup>321</sup> *Holderness v. Baker*, 44 N. H. 414; *Evans v. Trenton*, 24 N. J. Law, 764.

<sup>322</sup> *Hardy v. Jones*, 63 Kan. 8, 88 Am. St. Rep. 223.

<sup>323</sup> *Hertzler v. Geigley*, 196 Pa. 419, 79 Am. St. Rep. 724; or that it was otherwise contrary to law, *Anderson v. Moncrieff*, 3 Desaus. Eq. (S. C.) 124; *Holleman v. Bradley Fertilizer Co.*, 106 Ga. 156. See, also, *City of Albany v. Draper*, 23 Barb. (N. Y.) 425.

<sup>324</sup> *Willink v. Vanderveer*, 1 Barb. (N. Y.) 600.

But money won as profits in such a case cannot be recovered.<sup>325</sup>

Of course if the illegal transaction has not been carried out, and the principal repents of his illegal design, he may rescind, and the courts will aid him to recover his money or property paid or advanced to further the illegal act, and so prevent the thing from being done.<sup>326</sup> Thus, money advanced to an agent to carry out a gambling transaction may be recovered by the principal from such agent if it has not been paid over, in completion of such transaction.<sup>327</sup> But where the money so advanced has been paid over or lost in the transaction it cannot be recovered.<sup>328</sup>

**§ 429. Right of principal to follow trust funds or property.**

A principal may not only recover from the agent himself, property or funds received by the agent by virtue of the agency, but he may also, subject to limitations, follow them into the hands of third persons. It is a well settled rule that trust funds or property, or the proceeds of such property, may be followed and recovered, either in the hands of the trustee or of third persons, so long as they can be identified, until they have come into the hands of a person having a superior equitable right; and this rule applies with full force to property or funds in the hands of an agent impressed with a trust in favor of his principal. An agent holds the goods and proceeds of his principal upon an implied trust to dispose of the goods according to the directions of the principal, and to account for and pay over to him the pro-

<sup>325</sup> *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 99. See, also, *Samuels v. Oliver*, 130 Ill. 73. But see *Lovejoy v. Kaufman*, 16 Tex. Civ. App. 377, holding a broker responsible, to his principal, for profits realized in such a transaction, as for money had and received for his principal.

<sup>326</sup> *O'Bryan v. Fitzgerald*, 48 Ark. 487. *Perkins v. Clemm*, 23 Ark. 221.

<sup>327</sup> *McLain v. Huffman*, 30 Ark. 428; *Crandell v. White*, 164 Mass. 54; *Dauler v. Hartley*, 178 Pa. 23. See *Walker v. Johnson*, 59 Ill. App. 448.

<sup>328</sup> *Connor v. Black*, 132 Mo. 150; *Cunningham v. Fairchild* (Tex. Civ. App.) 43 S. W. 32; *Sowles v. Welden Nat. Bank*, 61 Vt. 375.

ceeds. The relation between the parties in respect to the proceeds is not that of debtor and creditor simply, but the money and securities are specifically the property of the principal. Such funds or property, or the proceeds of such property, then, may be followed and recovered by the principal in the hands of any person who has not an equitable right superior to that of the principal, so long as they can be traced and identified.<sup>329</sup> If the agent mixes the trust funds with funds of his own, so that they cannot be distinguished or identified, the principal cannot recover them specifically, but he has a charge upon the whole fund for the amount due him.<sup>330</sup> And if the agent makes payments out of such funds, he is presumed to pay out his own money, leaving a balance to cover the amount due to the principal.<sup>331</sup>

<sup>329</sup> *England*: Knatchbull v. Hallett, 13 Ch. Div. 696; In re District Bank, 11 Ch. Div. 772.

*United States*: National Bank v. Insurance Co., 104 U. S. 54.

*Arkansas*: Atkinson v. Ward, 47 Ark. 533.

*California*: Price v. Reeves, 38 Cal. 457; Mercier v. Hemme, 50 Cal. 606.

*Georgia*: Dotterer v. Pike, 60 Ga. 29; Planters' Bank v. Prater, 64 Ga. 609.

*Indiana*: Pugh v. Pugh, 9 Ind. 132; Riehl v. Evansville Foundry Ass'n, 104 Ind. 70.

*Iowa*: Burnett v. Gustafson, 54 Iowa, 86.

*Kansas*: Peak v. Ellicott, 30 Kan. 156, 46 Am. Rep. 90.

*New York*: Roca v. Byrne, 145 N. Y. 182, 45 Am. St. Rep. 599; Van Alen v. American Nat. Bank, 52 N. Y. 1; Baker v. New York Nat. Bank, 100 N. Y. 31, 53 Am. Rep. 150.

*Pennsylvania*: Farmers' & Mechanics' Nat. Bank v. King, 57 Pa. 202, 98 Am. Dec. 215.

*Vermont*: Velle v. Blodgett, 49 Vt. 270.

*Wisconsin*: McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287. If an agent takes the gold of his principal and converts it into currency or other property, the principal is not confined to his claim for gold, but may, instead thereof, claim the currency or other property. Greentree v. Rosenstock, 61 N. Y. 583.

<sup>330</sup> Frith v. Cartland, 2 Hem. & M. 417; Knatchbull v. Hallett, 13 Ch. Div. 696; Pennell v. Deffell, 4 De Gex, M. & G. 372; Peak v. Ellicott, 30 Kan. 156, 46 Am. Rep. 90; Farmers' & Mechanics' Nat. Bank v. King, 57 Pa. 202, 98 Am. Dec. 215; Continental Nat. Bank v. Weems, 69 Tex. 489, 5 Am. St. Rep. 85.

<sup>331</sup> Knatchbull v. Hallett, 13 Ch. Div. 696; National Bank v. In-

In case the agent becomes bankrupt, neither the property, nor its proceeds, would pass to the assignee in bankruptcy for general administration, but would be subject to the paramount claim of the principal.<sup>332</sup> As such trust funds or property never belong to the agent, his creditors will not be injured if they are turned over by the assignee to the principal. Thus, the proceeds of a draft delivered to a banker for collection are a trust fund in his hands, and in case of his insolvency, the drawer may enforce payment in full from his assignee, to the exclusion of other creditors.<sup>333</sup> So, where an agent deposits money in bank, stating that it is his principal's money, but desiring the officer to place it to his credit on the books of the bank, alleging that he might have occasion to use it for the benefit of his principal, the latter may follow and recover it in a court of equity.<sup>334</sup> And this rule is not affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substitutes other moneys therefor.<sup>335</sup>

insurance Co., 104 U. S. 54; *Importers' & Traders' Nat. Bank v. Peters*, 123 N. Y. 272; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85.

<sup>332</sup> *Knatchbull v. Hallett*, 13 Ch. Div. 696; *Pennell v. Deffell*, 4 De Gex, M. & G. 372 (but see *In re District Bank*, 11 Ch. Div. 772); *Thompson v. Perkins*, 3 Mason, 232, Fed. Cas. No. 13,972; *Peak v. Elllicott*, 30 Kan. 156, 46 Am. Rep. 90; *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; *Merrill v. Bank of Norfolk*, 19 Pick. (Mass.) 32; *Stoller v. Coates*, 88 Mo. 514; *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571; *Thompson v. Gloucester City Sav. Inst.* (N. J. Eq.) 8 Atl. 97; *Baker v. New York Nat. Bank*, 100 N. Y. 31, 53 Am. Rep. 150; *Duguid v. Edwards*, 50 Barb. (N. Y.) 297; *Roca v. Byrne*, 145 N. Y. 182, 45 Am. St. Rep. 599; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85; *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287. In *Cavin v. Gleason*, 105 N. Y. 256, it was held that, to entitle a trust creditor to such a preference, it must at least be made to appear that the fund or property of the insolvent remaining for distribution, includes proceeds of the trust estate.

<sup>333</sup> *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287.

<sup>334</sup> *Whitley v. Foy*, 59 N. C. (6 Jones Eq.) 34, 78 Am. Dec. 236. And see *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Importers' & Traders' Nat. Bank v. Peters*, 123 N. Y. 272.

<sup>335</sup> *Van Alen v. American Nat. Bank*, 52 N. Y. 1.

Although it is not necessary to trace the trust fund into some specific property in order to enforce the trust, yet it must appear that the agent's estate includes such trust fund. It is a general rule as well in a court of equity, as in a court of law, that in order to follow trust funds and subject them to the operation of the trust, they must be identified. And it will be sufficient to entitle a principal to enforce his trust against the agent's estate, if it appears that the fund or property of the agent remaining for distribution, includes the proceeds of the trust estate, although it may be impossible to point out the precise thing in which the trust fund has been invested.<sup>336</sup>

But the principal cannot both follow and recover the trust fund or property, and also compel the agent to pay over the amount misappropriated. He must make his election to pursue one or the other of these remedies, and having so elected and recovered judgment on one, he is barred from prosecuting the other.<sup>337</sup> Thus, where an agent fraudulently sells trust property in his possession, the principal may either disregard the sale, and take the property, or he may affirm the sale, and take the bond and mortgage, or other securities taken for the purchase money; but he cannot have both.<sup>338</sup> And the mere fact that the principal may bring a criminal prosecution against the agent, in such cases, does not prohibit him from following and recovering the trust fund or property.<sup>339</sup>

<sup>336</sup> *Frith v. Cartland*, 2 Hem. & M. 417; *Knatchbull v. Hallett*, 13 Ch. Div. 696; *National Bank v. Insurance Co.*, 104 U. S. 54; *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Cavin v. Gleason*, 105 N. Y. 256; *People v. City Bank of Rochester*, 96 N. Y. 32; *Farmers' & Mechanics' Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287; *Bowers v. Evans*, 71 Wis. 133. Compare *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85.

<sup>337</sup> *Murray v. Lylburn*, 2 Johns. Ch. (N. Y.) 441; *Riehl v. Evansville Foundry Ass'n*, 104 Ind. 70; *Barker v. Barker*, 14 Wis. 131.

<sup>338</sup> *Murray v. Lylburn*, 2 Johns. Ch. (N. Y.) 441.

<sup>339</sup> *Riehl v. Evansville Foundry Ass'n*, 104 Ind. 70. But see *Pascoag Bank v. Hunt*, 3 Edw. Ch. (N. Y.) 585; *Campbell v. Drake*, 39 N. C. (4 Ired. Eq.) 94, which hold otherwise. In referring to these

C. & S.—61.

The relation between a principal and his agent to sell goods is, however, subject to modification by express agreement, or by agreement implied from the course of business or dealing between them. The parties may so deal or so agree that the agent becomes a debtor to his principal for the proceeds of the sale, instead of a trustee, having the right to appropriate specific property to his own use.<sup>340</sup>

This doctrine as it relates to the rights and remedies of the principal against third persons, rather than his rights and remedies against the agent, will be more fully considered in a subsequent chapter.<sup>341</sup>

#### V. RIGHT OF AGENT TO DISPUTE PRINCIPAL'S TITLE

#### § 430. The general rule.

As a general rule, when an agent has come into the possession of money or property of his principal by virtue of his agency, and therefore by virtue of the fiduciary relation existing between him and his principal, he will not be allowed to deny or dispute his principal's title, when called upon by the latter to account.<sup>342</sup> Thus, where one has ac-

two cases, Elliott, J., in *Riehl v. Evansville Foundry Ass'n*, *supra*, says: "We have no doubt that these cases were not well decided. They are in conflict with the great weight of authority and are unsound in principle. The fact that an agent may be criminally prosecuted does not affect the right of the principal to get back his money. With quite as much reason might it be urged that the principal could not take from the embezzler the money, if found on his person, because he can be punished by a criminal prosecution, as to urge that the principal cannot follow the trust because the embezzler is liable to be punished by a prosecution at the instance of the state. There is no conceivable reason why the wronged employer may not secure his money, and the embezzler be also punished. The punishment is not to vindicate or reward the principal, but to protect the community from the criminal acts of embezzlers."

<sup>340</sup> *Baker v. New York Nat. Bank*, 100 N. Y. 31, 53 Am. Rep. 151; *Roca v. Byrne*, 145 N. Y. 182, 45 Am. St. Rep. 599.

<sup>341</sup> Post, § 558 et seq.

<sup>342</sup> *Roberts v. Ogilby*, 9 Price, 269; *Scott v. Crawford*, 4 Man. & G. 1031; *Hungerford v. Moore*, 65 Ala. 232; *Collins v. Tillou*, 26 Conn. 368, 68 Am. Dec. 398; *Farrow v. Edmundson*, 4 B. Mon. (Ky.) 605, 41 Am. Dec. 250; *Witman v. Felton*, 28 Mo. 601; *Von Hurter*



cepted the agency to sell land, and has received the money for it, he cannot deny the principal's title to the land, and retain the proceeds.<sup>343</sup> Or, having received money for the use of his principal, he is bound to pay it over, and cannot dispute his principal's title thereto, by setting up an adverse title in a stranger.<sup>344</sup>

§ 431. When this rule does not apply.

The general rule that an agent cannot dispute the title of his principal to property or funds which have come into his possession by virtue of his agency, only applies when to allow the agent to do so would be inconsistent with the relation existing between him and the principal, and with his duty to the principal. It does not apply so as to prevent an agent claiming title to property or funds received by virtue of his agency from showing, when sued therefor by the principal, that the principal's title has terminated or that the property or funds have been transferred by the principal to a third person, under whom he, the agent, claims title.<sup>345</sup> Nor does the general rule prevent an agent, when sued by the principal for property or funds received by him, from showing that he has been divested thereof, or that the property is demanded from him, by one holding a title paramount to that of the principal;<sup>346</sup> as where it is taken from him by due process of law;<sup>347</sup> or where he has been lawfully required to account elsewhere.<sup>348</sup>

*v. Spengeman*, 17 N. J. Eq. 185; *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 141; *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Hammond v. Christie*, 5 Rob. (N. Y.) 160; *Day v. Southwell*, 3 Wis. 657.

<sup>343</sup> *Collins v. Tillou*, 26 Conn. 368, 68 Am. Dec. 398; *Von Hurter v. Spengeman*, 17 N. J. Eq. 185.

<sup>344</sup> *Hancock v. Gomez*, 58 Barb. 490, 50 N. Y. 668; *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140; *Witman v. Felton*, 28 Mo. 601; or in himself, *Hungerford v. Moore*, 65 Ala. 232.

<sup>345</sup> *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Robertson v. Woodward*, 3 Rich. (S. C.) 251.

<sup>346</sup> *Biddle v. Bond*, 6 Best & S. 225; *Ross v. Edwards*, 73 Law T. (N. S.) 100; *Hunt v. Maniere*, 34 Law J. Ch. 142; *Doty v. Hawkins*, 6 N. H. 247, 25 Am. Dec. 459; *Bliven v. Hudson River R. Co.*, 36 N. Y. 403; *Western Transp. Co. v. Barber*, 56 N. Y. 544; *Burton v. Wilkinson*, 18 Vt. 186.

<sup>347</sup> *Bliven v. Hudson River R. Co.*, 36 N. Y. 403; *Van Winkle v.*

**§ 432. When agent may compel interpleader.**

It thus being an agent's duty to respect and not dispute his principal's title, he cannot, as a general rule, compel his principal to enter into an action of interpleader with a third person who claims an adverse or paramount title to the property or money which the agent has in his possession for the principal.<sup>349</sup> If, however, the title thus set up by the third party is one derived from the principal, since the property or funds were delivered into the agent's possession, the agent may compel an interpleader.<sup>350</sup> This is not an exception to the general rule, "because in such case the same debt or duty is claimed, and it is the act of the person entitled to such debt or duty which creates the equity of the party owning it."<sup>351</sup> The object of such an action is to determine the rights of two parties, who have adverse claims to the same interests in or title to property, which the agent has in his possession, and thus to protect the agent. But as a general rule if the agent pursues his duty to his principal, and does not dispute the principal's title, he will be protected if he turns the property over to the principal.

**VI. GRATUITOUS AGENTS.**

**§ 433. In general.**

A gratuitous agent is one who undertakes to perform serv-

United States Mail S. S. Co., 37 Barb. (N. Y.) 122; *Burton v. Wilkin-*  
*son*, 18 Vt. 186.

<sup>349</sup> *Day v. Southwell*, 3 Wis. 657.

<sup>340</sup> *Crawshaw v. Thornton*, 2 Mylne & C. 1; *Hatfield v. McWhorter*, 40 Ga. 269; *Tyus v. Rust*, 37 Ga. 574, 95 Am. Dec. 365; *Crane v. Burntrager*, 1 Cart. (Ind.) 165 (if he admits to either of the defendants that he is a wrongdoer); *Snodgrass v. Butler*, 54 Miss. 45; *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Atkinson v. Manks*, 1 Cow. (N. Y.) 691.

<sup>350</sup> *Crawford v. Fisher*, 1 Hare, 436; *Smith v. Hammond*, 6 Sim. 10; *Crawshaw v. Thornton*, 2 Mylne & C. 1; *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592; *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Hechmer v. Gilligan*, 28 W. Va. 750. When a principal has created a lien in favor of another person, on funds in the hands of his agent, the agent may file a bill of interpleader against his principal and the other claimant. *Smith v. Hammond*, supra.

<sup>351</sup> *Crawshaw v. Thornton*, 2 Mylne & C. 21.

ices for another without compensation, or gratuitously, and his obligations are not the same as those of an agent who undertakes to perform services for a compensation or promise of compensation. Since his promise to perform the services is without consideration, it is void, and he is under no legal obligation to perform, and incurs no liability if he refuses or neglects to do so.<sup>352</sup> It does not follow, however, that he cannot incur liability if he does in fact enter upon the performance of the services. While he cannot be compelled to perform his promise or be held liable to the principal for refusing or neglecting to do so, yet, if he does undertake to perform, he is under a legal obligation to obey instructions and to exercise due care and skill, and for a failure to do so, he will be liable to his principal.<sup>353</sup> "No man can compel another to render him acts of friendship or services of any kind, whether gratuitously, or with a view to remuneration. But, if the person applied to, consents to render the service, and undertakes the business, he is bound to act in conformity to the terms on which the request was made."<sup>354</sup> If a person gratuitously promises another to effect insurance on the latter's property, he incurs no liability if he afterwards refuses or neglects to do so; but he will be liable if he does attempt to effect insurance, and, by negligently omitting necessary formalities, takes out a policy upon which there can be no recovery.<sup>355</sup> So a banker or other agent, who undertakes gratuitously to make a loan,<sup>356</sup> or collec-

<sup>352</sup> *Balfe v. West*, 13 C. B. 466; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Morrison v. Orr*, 3 Stew. & P. (Ala.) 49, 23 Am. Dec. 319; *Spencer v. Towles*, 18 Mich. 9; *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Nixon v. Bogin*, 26 S. C. 611.

<sup>353</sup> *Wilkinson v. Coverdale*, 1 Esp. 75; *Walker v. Smith*, 1 Wash. C. C. 152, Fed. Cas. No. 17,087; *McGee v. Bast*, 6 J. J. Marsh. (Ky.) 453; *Passano v. Acosta*, 4 La. 26, 23 Am. Dec. 470; *Williams v. Higgins*, 30 Md. 404; *Spencer v. Towles*, 18 Mich. 9; *Marshall v. Ferguson*, 94 Mo. App. 175; *Hammond v. Hussey*, 51 N. H. 40, 12 Am. Rep. 41; *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Isham v. Post*, 141 N. Y. 100, 38 Am. St. Rep. 766; *Nixon v. Bogin*, 26 S. C. 611.

<sup>354</sup> *Walker v. Smith*, 1 Wash. C. C. 152, Fed. Cas. No. 17,087.

<sup>355</sup> *Wilkinson v. Coverdale*, 1 Esp. 75. See, also, *Thorne v. Deas*, 4 Johns. (N. Y.) 84.

<sup>356</sup> *Isham v. Post*, 141 N. Y. 100, 38 Am. St. Rep. 766; *Marshall v. Ferguson*, 94 Mo. App. 175.

tion,<sup>357</sup> for another, will be liable for any loss resulting from a failure to exercise reasonable skill and care. If an agent undertakes, gratuitously, to invest money for another, and disregards the positive instructions given as to the specific character of the security to be taken, he is liable, if the investment should fail.<sup>358</sup> If, however, after the investment be made, it is acquiesced in and sanctioned by the principal, with a full knowledge of the nature and character of the security taken, the agent is not liable.<sup>359</sup>

It is sometimes said that a gratuitous agent or bailee is only liable for gross negligence,<sup>360</sup> but this is too indefinite a rule to be of practical use. The term "gross negligence" conveys no very definite meaning, for what would be regarded as gross negligence under some circumstances would not be so regarded under other circumstances.<sup>361</sup> According to the best considered cases, a gratuitous agent or bailee, if he undertakes to perform the services which he has agreed to perform, is under an obligation to exercise such a degree of skill and care as is reasonable under all the circumstances,

<sup>357</sup> *Durnford v. Patterson*, 7 Mart. (O. S.; La.) 460, 12 Am. Dec. 514; *Passano v. Acosta*, 4 La. 26, 23 Am. Dec. 470; *Smedes v. Bank of Utica*, 20 Johns. (N. Y.) 372; *Opie v. Serrill*, 6 Watts & S. (Pa.) 264.

<sup>358</sup> *Williams v. Higgins*, 30 Md. 404.

<sup>359</sup> *Williams v. Higgins*, 30 Md. 404.

<sup>360</sup> *Shiells v. Blackburne*, 1 H. Bl. 158; *Haynie v. Waring*, 29 Ala. 263; *Skelley v. Kahn*, 17 Ill. 171; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Lampley v. Scott*, 24 Miss. 528; *Eddy v. Livingston*, 35 Mo. 487, 88 Am. Dec. 122; *Beardslee v. Richardson*, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596; *Lyons First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181; *Stanton v. Bell*, 9 N. C. (2 Hawks) 145; *Grant v. Ludlow*, 8 Ohio St. 1, 47; *Bellemire v. Bank of U. S.*, 4 Whart. (Pa.) 105, 33 Am. Dec. 46. In *Shiells v. Blackburne*, 1 H. Bl. 158, *Ld. Loughborough* said: "I agree with Sir William Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation is such as to imply skill, an omission of that skill is imputable to him as gross negligence."

<sup>361</sup> See *Hun v. Cary*, 82 N. Y. 65.

taking into consideration the nature of the undertaking and the risk to the interests involved; and if he fails in this duty he will be liable for the resulting loss or damage.<sup>362</sup> If an agent holds himself out as possessing professional or particular skill; or if he undertakes to act in a transaction that requires professional or particular skill, he is bound to exercise that skill, notwithstanding his services may have been performed gratuitously, to the same extent as though the services were to be paid for.<sup>363</sup> Thus, if a banker undertakes gratuitously to make a loan for another, he is bound to exercise "the skill and knowledge of a banker engaged in loaning money for himself and for his customers, because of the peculiar character and scope of his agency, because of his promise of careful attention, and because the contract was made in reliance upon his business character and skill."<sup>364</sup> But if he does not represent himself to have special skill, he is bound to exercise such skill as he actually possesses, and is responsible to his principal for any loss or damage that may be caused by his neglect to do so.<sup>365</sup>

The agent's liability in the above cases is properly in tort, and not in contract, for there is no contract, although it would seem that the principal's allowing the agent to act might be sufficient to support an action *ex contractu*. But

<sup>362</sup> *Preston v. Prather*, 137 U. S. 604; *Isham v. Post*, 141 N. Y. 100, 38 Am. St. Rep. 766; *Hun v. Cary*, 82 N. Y. 65; *Spencer v. Towles*, 18 Mich. 9; *Williams v. Higgins*, 30 Md. 404; *Passano v. Acosta*, 4 La. 26, 23 Am. Dec. 470. "Nothing in general is more unsatisfactory than attempts to define and formulate the different degrees of negligence, but even where the neglect which charges the mandatory is described as 'gross,' it is still true that if his situation or employment implies ordinary skill or knowledge adequate to the undertaking, he will be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge." *Isham v. Post*, 141 N. Y. 100, 38 Am. St. Rep. 766.

<sup>363</sup> *Shiells v. Blackburne*, 1 H. Bl. 158; *Beal v. South Devon R. Co.*, 3 Hurl. & C. 337; *Benden v. Manning*, 2 N. H. 289; *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Isham v. Post*, 141 N. Y. 100, 38 Am. St. Rep. 766.

<sup>364</sup> *Isham v. Post*, 141 N. Y. 100, 38 Am. St. Rep. 766.

<sup>365</sup> *Moffatt v. Bateman*, L. R. 3 P. C. 115; *Wilson v. Brett*, 12 Law J. Exch. 264, 11 Mees. & W. 113.

this does not apply to cases in which a principal intrusts property to an agent who is acting gratuitously. "A person's promise to receive and care for or carry the property of another without compensation therefor, could not be enforced against him if he should refuse to receive it. If, however, he does receive the property, the bailment, though gratuitous, will create an implied promise to use reasonable care in the safe custody of the property, and will support an express promise to undertake services in respect to it."<sup>366</sup>

#### VII. DEL CREDERE AGENTS.

##### § 434. In general.

A del credere agent is an agent who, in consideration of an additional compensation, agrees to guarantee to the principal the payment of debts which arise in the execution of the agency. Such an agency arises where an agent to sell goods, or a factor, in consideration of an increased commission, undertakes to guarantee to his principal the payment of debts due from the persons to whom he sells. He is said to sell on a del credere commission.

The question often arises whether a particular transaction is the creation of a del credere agency to sell goods, or a sale of goods. It depends, of course, upon the intent of the parties. It may be laid down as a general rule that if a person consigns goods to another under an agreement by which the consignee is to receive them, and sell them at prices fixed by the consignor, and guarantee payment by the purchasers, and account to the consignor periodically for the proceeds, retaining for himself an agreed commission, the transaction is a del credere agency, and not a sale

<sup>366</sup> *Coggs v. Barnard*, 2 Ld. Raym. 909; *Hart v. Miles*, 4 C. B. (N. S.) 371; *Robinson v. Threadgill*, 35 N. C. (13 Ired.) 39; *Beardslee v. Richardson*, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596; *Newhall v. Paige*, 10 Gray (Mass.) 366; *Clark v. Gaylord*, 24 Conn. 484; *Ames v. Taylor*, 49 Me. 381.

by the consignor to the consignee.<sup>368</sup> This question has been considered at some length in a former chapter.<sup>369</sup>

**§ 435. Whether a del credere agent is a mere surety or primarily liable.**

It is important to determine whether a del credere agent assumes a primary liability to the principal for the price of goods sold, as if they were sold to him, or whether his liability is merely that of a surety. If the former, then his contract is not within the statute of frauds as a promise to answer for the debt or default of another, and need not be in writing. But if he is merely in the position of a surety, and assumes no primary liability, the statute of frauds applies. The question may also be important in other connections. As to the nature of his liability, the courts do not agree, but the weight of authority is to the effect that he assumes an original and primary liability, and that his promise is not a promise to answer for the debt or default of another, within the statute of frauds.<sup>370</sup> Thus, where an agent agreed to sell machines for his principal, and to guarantee the payment of all notes and renewal of notes taken in payment for the machines, it was his duty to pay them when the makers failed to pay at maturity, and because he did not do so he was responsible for any loss resulting to the principal.<sup>371</sup> This doctrine will be further treated hereafter, in treating of factors, to which class of agents it is most usually applied.<sup>372</sup>

<sup>368</sup> *National Cordage Co. v. Sims*, 44 Neb. 148; *McClelland v. Scroggin*, 35 Neb. 536. See post, § 862.

<sup>369</sup> Ante, § 8.

<sup>370</sup> *Couturier v. Hastie*, 8 Exch. 40, 5 H. L. Cas. 673; *Wickham v. Wickham*, 2 Kay & J. 478; *Grove v. Dubois*, 1 Term R. 112; *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190; *Swan v. Nesmith*, 7 Pick. (Mass.) 220, 19 Am. Dec. 282; *Sherwood v. Stone*, 14 N. Y. 267; *Wolff v. Koppel*, 5 Hill (N. Y.) 458, 2 Denio, 368, 43 Am. Dec. 751; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Cartwright v. Greene*, 47 Barb. (N. Y.) 9; *Bradley v. Richardson*, 23 Vt. 720.

Contra, *Morris v. Cleasby*, 4 Maule & S. 566; *Hornby v. Lacy*, 6 Maule & S. 166.

<sup>371</sup> *Walter A. Wood Mowing & R. M. Co. v. Trexler*, 97 Ill. App. 170.

<sup>372</sup> See post, § 862.

## VIII. LIABILITY OF AGENT TO PRINCIPAL FOR ACTS OF SUBAGENT.

## § 436. In general.

The determination of the liability of an agent to his principal for the acts of a subagent, and also of the liability of the subagent to the principal, depend upon the question of appointment of subagents, or in other words upon the delegation of authority by an agent. As has been seen in a former chapter, the subject of delegation by an agent, properly divides itself into two heads, (1) the delegation of duties, and (2) the delegation of obligations.<sup>373</sup> Whether or not an agent may delegate his duties to a subagent is a very different question from whether or not he may delegate or transfer his obligations to the principal so as to impose them on the subagent and relieve himself. The first of these questions we have considered heretofore, in treating of the delegation of authority by an agent, and the latter question will be considered in the following sections.

## § 437. Delegation or transfer of obligation to subagents.

It is a general principle of the law of contracts that while a person may, with certain limitations, assign his rights under a contract, he cannot assign or transfer his liabilities thereunder, without the consent of the other party. "The reason for the rule lies, not only in the right of a person to know to whom he is to look for the satisfaction of his rights under a contract, but more particularly in his right to the benefit which he contemplates from the character, credit, and substance of the person with whom he has contracted."<sup>374</sup> It necessarily follows from this principle that an agent cannot, without the express or implied consent of his principal, transfer his obligations to the principal to a subagent, so as to relieve himself from the obligations which he has assumed, and compel the principal to look to the subagent.

<sup>373</sup> See ante, § 341.

<sup>374</sup> Hammon, Cont. 723.



**§ 438. Appointment of subagents—Distinguished from appointment of additional agents for principal.**

As was stated in a preceding chapter, an agent may be expressly authorized by his principal to appoint a subagent and delegate to him the performance of the whole or a part of his duties, and such authority may be implied from usage or necessity.<sup>375</sup> The fact, however, that an agent is thus authorized, expressly or impliedly, to appoint a subagent to discharge the duties which he has undertaken, does not necessarily relieve the agent from his obligations to his principal, so as to relieve him from liability for the neglect or default of the subagent. Nor does it necessarily create any privity between the principal and subagent so as to render the subagent liable to the principal. To determine the rights of the principal, it is necessary to ascertain whose agent the subagent is, whether he is a mere subagent in the proper sense of the term, an agent of the agent, or whether he is an additional agent of the principal only, appointed as such by the original agent under authority from the principal. This distinction is very important in this connection, and is one that is not often expressly made by the cases, although it is made in theory.

If a principal merely authorizes his agent to employ subagents in the execution of the agency, and not to employ additional agents for him, or if such authority only is implied, or if they are employed by the agent on his own responsibility, the subagents employed by the original agent are his agents, and not the agents of the principal. The only agent of the principal is the original agent and the principal has a right to look to him for the discharge of his obligations, and hold him liable for failure to discharge them, although such failure may have been due to the neglect or default of the subagent, and the original agent may have used due care in selecting him.<sup>376</sup> In such a case the

<sup>375</sup> See ante, chapter 12.

<sup>376</sup> *New Zealand & Australian Land Co. v. Watson*, 7 Q. B. Div. 374; *Meyerstein v. Eastern Agency Co.*, 1 Times Law R. 595; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276; *St. Louis, I. M. & S. R. Co. v.*

original agent has his remedy against the subagent, whose principal he is.<sup>377</sup> The principal, since there is no privity of contract between him and the subagent, has no remedy against the latter for his neglect or default, but must look to the original agent.<sup>378</sup>

On the other hand, if a principal authorizes his agent, not merely to employ subagents in the proper sense, but to make contracts employing additional agents for him (the principal), and the original agent, in pursuance of such authority, does employ additional agents for the principal, there is a privity between the principal and the additional agents (also generally spoken of as subagents). They are his agents and not the agents of the original agent. It follows that the original agent has performed his duty to his principal, in so far as the additional agents are concerned, if he has used due care in selecting them, and if he has done this, his principal cannot hold him liable for their neglect or default, but must look to them.<sup>379</sup> It also follows

Smith, 48 Ark. 317; *Barnard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 443; *Williamsburg City F. Ins. Co. v. Frothingham*, 122 Mass. 391; *Power v. First Nat. Bank*, 6 Mont. 251; *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289; *Ayrault v. Pacific Bank*, 47 N. Y. 570; *Franklin F. Ins. Co. v. Bradford*, 201 Pa. 32, 88 Am. St. Rep. 770; and other cases hereafter more specifically cited.

If an agent to collect and receive payment of bills, transmits them to his own private agent to receive the money, and place the amount when received to his private credit, payment to such agent is payment to the original agent, and if there be a failure, it is the loss of the latter and not of his principal. *Taber v. Perrot*, 2 Gall. 565, Fed. Cas. No. 13,721.

<sup>377</sup> *Barnard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 443; *Pownall v. Bair*, 78 Pa. 403; *Commercial Bank v. Red River Val. Nat. Bank*, 8 N. D. 382. Thus where Walter, an agent for the sale of machines, appointed Pownall his agent, and he appointed Bair to assist him, Bair to receive his compensation from Pownall for machines sold, and Bair sold four machines, one on credit, to a man who was insolvent, by reason of which there was a loss to a greater amount than the compensation for the sale of the four machines, for which loss Pownall was liable to Walter, he (Pownall) could recover the whole loss from Bair. *Pownall v. Bair*, *supra*.

<sup>378</sup> See the cases above cited. And see post, § 446.

<sup>379</sup> *Stone v. Cartwright*, 6 Term R. 411; *Dun v. City Nat. Bank*,

that they are liable directly to the principal.<sup>380</sup> And they are not liable to the original agent, for there is no privity between them.<sup>381</sup>

As was said by Judge Field in a Massachusetts case: "The principle which runs through the cases is that if an agent employs a subagent for his principal, and by his authority, express or implied, then the subagent is the agent of the principal, and is directly responsible to the principal for his conduct, and, so far as damage results from the conduct

58 Fed. 174; *Lawrence v. Stonington Bank*, 6 Conn. 521; *Davis v. King*, 66 Conn. 465, 50 Am. St. Rep. 104; *Loomis v. Simpson*, 13 Iowa, 532; *Guelich v. National State Bank*, 56 Iowa, 434, 41 Am. Rep. 110; *Ledoux v. Goza*, 4 La. Ann. 160; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13, 45 Am. Dec. 72; *Darling v. Stanwood*, 14 Allen (Mass.) 504; *Barnard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 443; *Bath v. Caton*, 37 Mich. 199; *Daly v. Butchers' & Drovers' Bank*, 56 Mo. 94, 17 Am. Rep. 663; *Hilton v. Newman*, 6 Mo. App. 304; *National Steamship Co. v. Sheahan*, 122 N. Y. 461; *McCants v. Wells*, 4 S. C. 381; *Louisville & N. R. Co. v. Blair*, 4 Baxt. (Tenn.) 407; *Campbell v. Reeves*, 3 Head (Tenn.) 226; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *Johnson v. Memphis*, 9 Lea (Tenn.) 125; *Ladonia Dry-Goods Co. v. Conyers* (Tex. Civ. App.) 58 S. W. 967; *Brown v. Lent*, 20 Vt. 529; and other cases hereafter cited. An agent certainly would not be liable to his principal for the acts of another who assumes to act as agent without his authority or privity. *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316. Where the nature of the business requires the appointment of a subagent, the agent is not ordinarily responsible for the negligence or misconduct of the latter, if reasonable diligence has been used in the choice of such subagent. *Ledoux v. Goza*, 4 La. Ann. 160.

As was said in *Loomis v. Simpson*, 13 Iowa, 532: "It must be remembered, however, that there is a wide difference between the employment of a servant or subagent by the factor, and the delegation of authority or a substitution. The factor may act through or by the hand of another, and yet there be no pretense that there has been a substitution in such a sense as to bind the principal. And until the fact of substitution, with the consent and approbation of the principal, is once established (or his subsequent ratification or confirmation), there can of course be no ground for claiming that his remedy is against the substitute, instead of the original agent."

<sup>380</sup> *Barnard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 443; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13, 45 Am. Dec. 72; and other cases above cited. Post, § 446.

<sup>381</sup> See the cases above cited. And see post, § 446.

of the subagent, the agent is only responsible for a want of due care in selecting the subagent; but if the agent, having undertaken to do the business of his principal, employs a servant or agent, on his own account, to assist him in what he has undertaken, such a subagent is an agent of the agent, and is responsible to the agent for his conduct, and the agent is responsible to the principal for the manner in which the business has been done, whether by himself, or by his servant or agent."<sup>382</sup>

Many of the cases cited in the preceding notes do not make the distinction between subagents and additional agents, in express language, but use the term "subagent" indiscriminately to indicate an agent of the original agent, or an agent employed by the original agent for the principal, with the latter's express or implied consent; yet they do make this distinction in theory, if not in fact, for in the cases holding the subagent to be the agent of the principal, such subagent strictly speaking is an additional agent of the principal, and not a subagent, although he is generally known by that name. But in the cases in which the subagent is held to be the agent of the original agent alone, he is called by the right name, for in such cases he is strictly a subagent—agent of an agent.

**§ 439. Where subagent is appointed by principal—By necessity.**

Of course if the additional agents are directly employed by the principal, and placed under the control of the original agent, the latter would not be liable for the acts of such additional agent, unless they were committed with his knowledge.<sup>383</sup> Thus, where an action was brought against the defendant for alleged negligence in blasting rocks, and it appeared that one Barker, who had contracted to do the masonry and stonework along a certain railroad, employed the defendant, as his general agent, to superintend the work, and that as such agent, the defendant gave to one

<sup>382</sup> *Barnard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 443.

<sup>383</sup> *Robinson v. Illinois Cent. R. Co.*, 30 Iowa, 401; *Michigan University v. Rose*, 45 Mich. 284; *Bath v. Caton*, 37 Mich. 199; *Brown v. Lent*, 20 Vt. 529.

Morris, who was a special agent of Barker, and had charge of the blasting, general directions relative to the particular blast, by which the injury complained of was incurred, and that the defendant, at the time of the blast and previously, was in another part paying no attention to the particular blast, it was held that the action should have been brought against Barker, or Morris, and that it could not be sustained against the defendant.<sup>384</sup>

So where a sudden emergency or unforeseen exigency arises, which imposes upon the agent the necessity of employing a subagent, the consent of the principal thereto will be implied, and the agent will not be responsible for the acts of such subagent if he has used due and proper diligence in selecting him.<sup>385</sup>

**§ 440. Illustrations—Conflict in application.**

There can be no question as to the abstract propositions stated in the preceding section, but much difficulty arises in their application, in determining in particular cases whether the employment of a subagent by an agent is merely the employment of an agent of his own to perform what he has undertaken for his principal, or the employment, under authority from the principal, express or implied, of another and additional agent for the principal; and in this there is much conflict in the decisions. Of course, the contract with the original agent may be so clear in its terms as to leave no doubt on this question. It is only when the contract is silent or ambiguous, or where the agent's authority to appoint subagents is implied, that difficulty arises. If a subagent employed with the consent, express or implied, of the principal to collect a note, wrongfully returns it to the maker, who destroys it, giving a renewal note in place thereof to the subagent, the principal agent is not answerable for the act of the subagent in surrendering the note.<sup>386</sup> But an attor-

<sup>384</sup> *Brown v. Lent*, 20 Vt. 529.

<sup>385</sup> *Bromley v. Coxwell*, 2 Bos. & P. 438; *Commercial Bank v. Martin*, 1 La. Ann. 344, 45 Am. Dec. 87; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648, 40 Am. Dec. 83. See ante, § 345.

<sup>386</sup> *Davis v. King*, 66 Conn. 465, 50 Am. St. Rep. 104.

ney at law receiving a note "for collection," against parties residing in another county, is responsible for the embezzlement of the proceeds by another attorney to whom he intrusts the business of collection.<sup>387</sup>

— **Commercial agencies.** Where a person applies to a commercial agency for information as to the credit and standing of a person residing in a distant place, and the agency expressly stipulates that the information is to be obtained mainly by subagents, and that the "actual verity or correctness of said information is in no manner guaranteed," the person making such application thereby authorizes the employment of a subagent to obtain such information, and the subagent so employed is the agent of the person applying for the information and not of the commercial agency, and the subagent, and not the commercial agency, is liable for the negligence or fraud of the subagent.<sup>388</sup>

#### § 441. Liability of collecting bank for neglect of notary.

Where it becomes necessary for a bank to use a notary in the course of the collection of negotiable paper for another, it is held, by the weight of authority, that if the bank exercises a proper degree of care and prudence in the selection of a competent notary and places the papers in his hands, it will not be liable for a loss caused by the negligence of the notary in the performance of his duties.<sup>389</sup> These cases

<sup>387</sup> *Cummins v. Heald*, 24 Kan. 600, 36 Am. Rep. 264.

<sup>388</sup> *Dun v. City Nat. Bank*, 58 Fed. 174.

<sup>389</sup> *Britton v. Niccolls*, 104 U. S. 757; *May v. Jones*, 88 Ga. 308, 30 Am. St. Rep. 154; *First Nat. Bank of Manning v. German Bank*, 107 Iowa, 543, 70 Am. St. Rep. 216; *Hyde v. Planters' Bank*, 17 La. 560, 36 Am. Dec. 621; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13, 45 Am. Dec. 72; *Citizens' Bank v. Howell*, 8 Md. 530, 63 Am. Dec. 714; *Warren Bank v. Suffolk Bank*, 10 Cush. (Mass.) 582; *Agricultural Bank v. Commercial Bank*, 7 Smedes & M. (Miss.) 592; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648, 40 Am. Dec. 83; *Bowling v. Arthur*, 34 Miss. 41; *First Nat. Bank of Gallipolis v. Butler*, 41 Ohio St. 519, 52 Am. Rep. 94; *Bellemire v. Bank of U. S.*, 4 Whart. (Pa.) 105, 33 Am. Dec. 46; *Stacy v. Dane County Bank*, 12 Wis. 629. To render the bank liable as a joint tortfeasor with a notary for negligently and maliciously procuring the latter to make a false protest

base their decisions principally on the ground that as the notary is a public officer, a bank employing him has a right to presume that he understands his business, and will perform his duties with due care and skill. "He is not a mere agent of the bank, but a public officer sworn to properly discharge his duties to the public. As such officer, the bank may not control his acts, nor dictate in what manner he shall perform his duties. If guilty of malfeasance in the performance of an official act, he, and not the bank, is responsible."<sup>390</sup>

In some states, however, it is held, that the relation existing between a bank and a notary, whom it has employed to present for payment paper which it has undertaken to collect, and to give notice to the proper parties, is that of principal and agent, and therefore the bank will be held liable to the owner of the paper for any injury he may sustain by reason of the notary's negligence or misconduct in the performance of his duties.<sup>391</sup>

of a draft, the malice of the bank in the transaction must be specially alleged and proved. *May v. Jones*, 88 Ga. 308, 30 Am. St. Rep. 154.

<sup>390</sup> *First Nat. Bank of Manning v. German Bank*, 107 Iowa, 543, 70 Am. St. Rep. 216.

And as has been said by the supreme court of the United States: "It is enough here that the notary was not, in this matter, the agent of the bankers. He was a public officer whose duties were prescribed by law, and when the notes were placed in his hands, in order that such steps should be taken by him as would bind the indorsers if the notes were not paid, he became the agent of the holder of the notes. For any failure on his part to perform his whole duty he alone was liable; the bankers were no more liable than they would have been for the unskillfulness of a lawyer of reputed ability and learning, to whom they may have handed the notes for collection, in the conduct of a suit brought upon them." *Britton v. Niccolls*, 104 U. S. 766.

<sup>391</sup> *American Exp. Co. v. Haire*, 21 Ind. 4, 83 Am. Dec. 334; *Bank of Lindsborg v. Ober*, 31 Kan. 599 (but this case is based on the finding that the statutes of Kansas do not authorize the notary to give notice); *Miranda v. City Bank*, 6 La. 740, 26 Am. Dec. 493 (but see *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13, 45 Am. Dec. 72, and *Hyde v. Planters' Bank*, 17 La. 560, 36 Am. Dec. 621, overruling this case); *Davey v. Jones*, 42 N. J. Law, 28, 36 Am. Rep. 505; *Ayrault v. Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489; *Thompson*

There is also some conflict in the authorities on the question of the liability of a bank in case the notary employed by it is a regular officer or employe of the bank. In some cases the bank is held liable for his negligence, because, on account of his relation to the bank, he is regarded as acting as agent of the bank, notwithstanding he is, at the same time, acting in his official capacity.<sup>392</sup> In other cases, however, it is held that a bank is not liable for the negligence of a notary prudently selected by it, though such notary is an officer or employe of the bank.<sup>393</sup>

**§ 442. Liability of collecting bank for neglect of correspondent bank, and other subagents.**

The question has frequently arisen with respect to the liability of banks receiving commercial paper for collection and employing other banks or persons to make the collection, or take proper steps when payment is refused. The question is whether the bank receiving the paper is liable to the principal,—the depositor,—for the neglect or default of the subagents employed by it, or whether such subagents only are liable, and the answer depends upon whether the subagents so employed are the agents of the receiving bank or of the depositor. The question may be set at rest by express provision or stipulation in the employment of the receiving bank. As to the liability in the absence of such a stipulation or provision, the decisions are in irreconcilable conflict.

Some of the courts hold that while a bank receiving for

v. *Bank of South Carolina*, 3 Hill (S. C.) 77, 30 Am. Dec. 354. *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289, makes the distinction that though the bank may be liable for neglect of a notary in respect to matters not strictly official, it may be otherwise as to acts purely official, and that, as the giving of a notice of non-acceptance was not a strictly official act the bank would be liable for the notary's neglect in giving it.

<sup>392</sup> *Wood River Bank v. Omaha First Nat. Bank*, 36 Neb. 744; *Gerhardt v. Boatman's Sav. Inst.*, 38 Mo. 60, 90 Am. Dec. 407; *Commercial Bank v. Barksdale*, 36 Mo. 563.

<sup>393</sup> *First Nat. Bank of Manning v. German Bank*, 107 Iowa, 543, 70 Am. St. Rep. 216; *May v. Jones*, 88 Ga. 308, 30 Am. St. Rep. 154.



collection commercial paper payable at a distant place has, from necessity, implied authority to employ subagents at the place of payment, such as other banks, it has no implied authority to employ such subagents as agents of the principal, that it is the only agent of the principal, the subagents being its agents, and that it is therefore liable to the principal for the neglect or default of the subagents, although it may, have used due care in selecting them.<sup>394</sup> It follows, of

<sup>394</sup> *England*: Van Wart v. Woolley, 3 Barn. & C. 439; Mackeray v. Ramsays, 9 Clark & F. 818.

*United States*: Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276; Dodge v. Freedman's Sav. & T. Co., 93 U. S. 379; Hoover v. Wise, 91 U. S. 308; Kent v. Dawson Bank, 13 Blatchf. 237, Fed. Cas. No. 7,714. Compare Bank of Wash. v. Triplett, 1 Pet. 35.

*Georgia*: Bailie v. Augusta Sav. Bank, 95 Ga. 277, 51 Am. St. Rep. 74.

*Kansas*: First Nat. Bank v. Craig, 3 Kan. App. 166. See Bank of Lindsborg v. Ober, 31 Kan. 599, where the second bank was employed by the express understanding of the owner of the paper, and therefore was liable to the latter for loss suffered through the negligence of such bank.

*Michigan*: Simpson v. Waldby, 63 Mich. 439. And see Finch v. Karste, 97 Mich. 20.

*Minnesota*: Streissguth v. National German-American Bank, 43 Minn. 50, 19 Am. St. Rep. 213. Compare Minneapolis Sash & Door Co. v. Metropolitan Bank, 76 Minn. 136, 77 Am. St. Rep. 609, which seems to recognize the other rule.

*Montana*: Power v. First Nat. Bank, 6 Mont. 251.

*New Jersey*: Titus v. Mechanics' Nat. Bank, 35 N. J. Law, 588.

*New York*: Allen v. Merchants' Bank, 22 Wend. 215, 34 Am. Dec. 289; Ayrault v. Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Naser v. First Nat. Bank, 116 N. Y. 492; Saint Nicholas Bank v. State Nat. Bank, 128 N. Y. 26; Castle v. Corn Exch. Bank, 148 N. Y. 122; Kirkham v. Bank of America, 26 App. Div. 110, 165 N. Y. 132.

*North Dakota*: Commercial Bank v. Red River Val. Nat. Bank, 8 N. D. 382.

*Ohio*: Reeves v. State Bank, 8 Ohio St. 465; First Nat. Bank of Gallipolis v. Butler, 41 Ohio St. 519, 52 Am. Rep. 94.

*South Dakota*: Sherman v. Port Huron Engine & T. Co., 8 S. D. 343. In Plymouth County Bank v. Gilman, 9 S. D. 278, 62 Am. St. Rep. 868, however, it was held that if a note secured by a mortgage is transferred to a bank as collateral security, which must be sent to a distant place for collection, it fulfills its implied requirement of

course, under these decisions, that the depositor cannot maintain an action against the subagents, and that the receiving bank can.<sup>395</sup>

The principle upon which these cases base their decisions is that the collecting bank contracts with its principal—the depositor—for results only, that is to collect the paper, and therefore stands in the relation of independent contractor to the depositor, and as such it must select its own means or agents for making the collections, and consequently is responsible for any negligence or default of such agents causing a loss to the depositor.<sup>396</sup>

reasonable diligence by placing such note for collection in the hands of an attorney having the reputation of being competent and reliable, and it is not answerable for the subsequent neglect of the attorney in the performance of the duties intrusted to him.

*Texas:* Schumacher v. Trent, 18 Tex. Civ. App. 17; State Nat. Bank v. Thomas Mfg. Co., 17 Tex. Civ. App. 214.

In *Bailie v. Augusta Sav. Bank*, 95 Ga. 277, 51 Am. St. Rep. 77, the court says: "In our opinion the sounder doctrine is that which holds the bank liable. The collection of checks, drafts, and other commercial paper constitutes an important feature of the business of banking as generally conducted, and for the transaction of this class of their business, banks have their regular correspondents in different parts of the country. In the selection of a correspondent, the customer for whom the collection is to be made is not consulted. As a rule, he does not know the name or the financial standing of the correspondent, and it is not contemplated that they shall have any communication with each other. Under these circumstances, we think a customer from whom a bank receives paper for collection has a right to assume, in the absence of any agreement to the contrary, that the undertaking of the bank comprehends the whole service to be performed, and that the agent employed by the bank in this service is its own agent, and not the agent of the customer."

<sup>395</sup> See the cases cited above.

<sup>396</sup> See *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 289. In this case it was said: "Whether a draft is payable in the place where the bank receiving it for collection is situated, or in another place, the holder is aware that the collection must be made by a competent agent. In either case there is an implied contract of the bank that the proper measures shall be used to collect the draft, and a right, on the part of its owner, to presume that proper agents will be employed, he having no knowledge of the agents. There is, therefore, no reason for liability or exemption from liability in the

The majority of courts, however, hold that where a bank receives for collection paper payable at another place, it has the implied authority not only to employ subagents at the place of payment, like another bank, but that it also has implied authority to employ them as agents, not of itself, but of its principal, the depositor, and thus bring them in privity with him; that when the receiving bank does employ such subagents, they become, in the absence of stipulation or agreement to the contrary, the agents of the depositor; that its duty is performed when it uses due care in selecting such subagents and forwarding the paper with proper instructions, and that, having performed this duty, it is not liable to the depositor for loss due to the default or neglect of the subagents.<sup>297</sup>

one case which does not apply to the other. And, while the rule at law is thus general, the liability of the bank may be varied by consent, or the bank may refuse to undertake the collection. It may agree to receive the paper only for transmission to its correspondent, and thus make a different contract, and become responsible only for good faith and due discretion in the choice of an agent. If this is not done, or there is no implied understanding to that effect, the same responsibility is assumed in the undertaking to collect foreign paper and in that to collect paper payable at home. On any other rule, no principal contractor would be liable for the default of his own agent, where from the nature of the business, it was evident he must employ subagents. The distinction recurs, between the rule of merely personal representative agency, and the responsibility imposed by the law on commercial contracts. This solves a difficulty and reconciles the apparent conflict of decisions in many cases. The nature of the contract is the test. If the contract be one for the immediate services of the agent, and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal services undertaken. But where the contract looks mainly to the thing to be done, and the undertaking is for the due use of all proper means to performance, the responsibility extends to all necessary and proper means to accomplish the object by whomsoever used."

<sup>297</sup> *Connecticut*: Lawrence v. Stonington Bank, 6 Conn. 521; East Haddam Bank v. Scovill, 12 Conn. 303.

*Illinois*: Aetna Ins. Co. v. Alton City Bank, 25 Ill. 243, 79 Am. Dec. 328; Waterloo Milling Co. v. Kuenster, 158 Ill. 259, 49 Am. St. Rep. 156; Carlinville Nat. Bank v. Wilson, 78 Ill. App. 339; Anderson v. Alton Nat. Bank, 59 Ill. App. 587.

*Indiana*: Irwin v. Reeves Pulley Co., 20 Ind. App. 101, distin-

According to these decisions, of course, the depositor can maintain an action against the subagents, and the receiving bank cannot.<sup>398</sup>

*guilshing Tyson v. State Bank*, 6 Blackf. 225, and *American Exp. Co. v. Haire*, 21 Ind. 4.

*Iowa*: *Guelich v. National State Bank*, 56 Iowa, 434, 41 Am. Rep. 110.

*Kentucky*: *Farmers' Bank & Trust Co. v. Newland*, 97 Ky. 464.

*Louisiana*: *Hyde v. Planters' Bank*, 17 La. 560; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13, 45 Am. Dec. 72; *Commercial Bank v. Martin*, 1 La. Ann. 344, 45 Am. Dec. 87.

*Maryland*: *Jackson v. Union Bank*, 6 Har. & J. 146; *Citizens' Bank v. Howell*, 8 Md. 530, 63 Am. Dec. 714.

*Massachusetts*: *Dorchester & Milton Bank v. New England Bank*, 1 Cush. 177; *Fabens v. Mercantile Bank*, 23 Pick. 330, 34 Am. Dec. 59.

*Mississippi*: *Bowling v. Arthur*, 34 Miss. 41; *Agricultural Bank v. Commercial Bank*, 7 Smedes & M. 592; *Tiernan v. Commercial Bank*, 7 How. 648, 40 Am. Dec. 83; *Third Nat. Bank v. Vicksburg Bank*, 61 Miss. 112, 48 Am. Rep. 78.

*Missouri*: *Daly v. Butchers' & Drovers' Bank*, 56 Mo. 94, 17 Am. Rep. 663; *American Exch. Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 451.

*Nebraska*: *First Nat. Bank v. Sprague*, 34 Neb. 318, 33 Am. St. Rep. 644.

*North Carolina*: *Planters' & Farmers' Nat. Bank v. First Nat. Bank*, 75 N. C. 534.

*Pennsylvania*: The courts in this state make a distinction between where a bank is employed merely to "transmit" the paper to another bank or agent, and where it is employed to collect. If it receives the paper for "transmission" only it is not liable for the defaults of its correspondent if it exercised due care in the selection of such correspondent; but it would be otherwise if it accepts the paper for "collection." See *Mechanics' Bank v. Earp*, 4 Rawle, 384; *Wingate v. Mechanics' Bank*, 10 Pa. 104; *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728.

*Tennessee*: *Bank of Louisville v. First Nat. Bank*, 8 Baxt. 101, 35 Am. Rep. 691; *Bank v. Cummings*, 89 Tenn. 609, 24 Am. St. Rep. 618; *Givan v. Bank of Alexandria* (Tenn. Ch. App.) 52 S. W. 923.

*Wisconsin*: *Stacy v. Dane County Bank*, 12 Wis. 629.

As was said in *Farmers' Bank & Trust Co. v. Newland*, 97 Ky. 464: The owner "must know the bank cannot send one of its officers or agents to such point to make the collection. He is presumed to know the method employed by banks in making such collections. He

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<sup>398</sup> See the cases above cited.

But the collecting bank, in such cases, does not act with due discretion, if it appoints a subagent whose duty it is to pay or who is interested, against the principal, in the payment of the note or draft, as where it transmits the paper directly to the bank on which it is drawn, though that is the only bank in the place; and in such cases the first bank will be liable to the depositor for a loss caused by the failure of the drawee;<sup>399</sup> and it cannot justify or excuse its negli-

knows that the bank must select some other bank or agency to aid in accomplishing the undertaking imposed on it. He has made the bank his agent for that purpose. He has employed the bank to do, through its method of making collection, that which would cost him much time and money to do himself. When he so engages the bank, and makes it his agent to make the collection, he does so with the implied understanding that the bank will follow the customary method in making such collections, which necessitates the selections of agents or correspondents at other points to carry out the undertaking, and the bank can only be held responsible for the exercise of due care and diligence in making such selection."

<sup>399</sup> *Farwell v. Curtis*, 7 Biss. 160, Fed. Cas. No. 4,690; *First Nat. Bank of Evansville v. Fourth Nat. Bank*, 56 Fed. 967; *German Nat. Bank v. Burns*, 12 Colo. 539, 13 Am. St. Rep. 247; *Drovers' Nat. Bank v. Anglo-American Packing & Prov. Co.*, 117 Ill. 100, 57 Am. Rep. 855 (distinguishing *Indig v. National City Bank*, 80 N. Y. 100); *Anderson v. Rodgers*, 53 Kan. 542; *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 76 Minn. 136, 77 Am. St. Rep. 609; *American Exch. Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 451; *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105, 61 Am. St. Rep. 550; *Briggs v. Central Nat. Bank*, 89 N. Y. 182, 42 Am. Rep. 285; *National Bank of Commerce v. Johnson*, 6 N. D. 180; *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728; *Wagner v. Crook*, 167 Pa. 259, 46 Am. St. Rep. 672; *Givan v. Bank of Alexandria* (Tenn. Ch. App.) 52 S. W. 923; *First Nat. Bank of Corsicana v. City Nat. Bank*, 12 Tex. Civ. App. 318. In the absence of instructions to do so, it is negligence for a bank to which a certificate has been intrusted for collection to send it direct to the drawer; and such negligence makes the sender liable for the loss resulting. *First Nat. Bank v. Citizens' Sav. Bank*, 123 Mich. 336.

In *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728, the court expresses this rule as follows: "We think the principle may be stated as a true one, as the plaintiff's counsel have presented it, that no firm, bank, corporation or individual can be deemed a suitable agent, in contemplation of law, to enforce in behalf of another a claim against itself. The only safe rule is to hold that

gence in this respect, by a notice printed upon the plaintiff's pass-book, in which the bank declares that in receiving checks or drafts on deposit, or for collection, it acts only as agent for its customer, and that "when forwarding items to other points, we select agents who are responsible according to our judgment and means of knowledge, but we assume no risk on account or responsibility on account of their omissions,

an agent, with whom a check or bill is deposited for collection, must transmit to a suitable subagent to demand payment in such manner that no loss can happen to any party, whether he be depositor and indorser or the indorsee and holder. We interpret the cases to which we have referred as establishing the rule of transmission to a suitable correspondent or agent to mean that such suitable agent must, from the nature of the case, be some one other than the party who is to make the payment. By no other rule can the rights of indorsers be protected, if it is the interest of the party who is to make the payment, to hinder, postpone, or defeat payment. This imposes no hardship on the institution undertaking to transmit for collection, which can always protect itself by stipulating that special instructions by the depositor shall be given, which will save the collecting bank from all risk or peril." And as was said in *Drovers' Nat. Bank v. Anglo-American Packing & Provision Co.*, 117 Ill. 100, 57 Am. Rep. 855: "The same person cannot be both debtor and creditor at the same time and in respect of the same debt. How then can he who is debtor be, at the same time and in respect of the same debt, the disinterested agent of the creditor? Can it be said to be reasonable care in selecting an agent, to select one known to be interested against the principal?—to place the principal entirely in the hands of his adversary? The interest of the creditor, when his debtor is failing, is that steps be taken promptly and prosecuted with vigor to collect his debt. But at such a time the inclination of the creditor quite often, and it may be sometimes his interest too, is to procrastinate. The debtor may often be interested in bringing about a compromise with his creditors, whereby his debt may be discharged for less than its face; but the creditor whose debt can all be collected by legal proceedings can never be interested in producing that result. Surely it could not be held reasonable care and diligence in an agent holding for collection the promissory note given by one individual to another individual, to send the promissory note to the maker, trusting to him to make payment, delay it, or destroy the evidences of indebtedness and repudiate the transaction, as his conscience might permit. If this would not be held reasonable care and diligence, why should the same conduct be held to be reasonable care and diligence when applied to a bank?"

negligence, or failure, should any occur;”<sup>400</sup> or by showing that it is usual and customary for banks to send checks and drafts, payable by other banks at distant points, to the drawee directly, by mail, though there is no other bank of good standing in the same town, for such a custom is unreasonable;<sup>401</sup> or by showing that the result would have been the same had a third party been selected to present the paper.<sup>402</sup>

Notwithstanding the fact that the latter of the two rules, above given, is supported by the majority of cases, and is based on good grounds, it seems that the rule holding a collecting bank responsible for the acts of the correspondent bank is the better rule. It is in accord with the principle of agency forbidding an agent to delegate his power in respect to matters involving the exercise of discretion, and the rule making an agent personally liable for the acts of his subagent, and it is only by bringing into the relation an implied agreement on the part of the depositor, in the case of paper payable at a distance, that the bank may employ third parties to act as agents of the depositor. The collection of checks, drafts, and other commercial paper constitutes one of the important features of banking as generally conducted, and for the transaction of this class of their business, banks usually have their regular correspondents in different sections of the country. When paper is put in their hands for collection, they generally select one of these

<sup>400</sup> *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 76 Minn. 136, 77 Am. St. Rep. 609.

<sup>401</sup> *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 76 Minn. 136, 77 Am. St. Rep. 609; *Drovers' Nat. Bank v. Anglo-American Packing & Prov. Co.*, 117 Ill. 100, 57 Am. Rep. 855; *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728; *American Exch. Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 451. But see *Kershaw v. Ladd*, 34 Or. 375; *Indig v. National City Bank*, 80 N. Y. 100; *Farmers' Bank & Trust Co. v. Newland*, 97 Ky. 464; *Heywood v. Pickering*, L. R. 9 Q. B. 428; *Bailey v. Bodenham*, 16 C. B. (N. S.) 288.

<sup>402</sup> *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 76 Minn. 136, 77 Am. St. Rep. 609; *American Exch. Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 451. But see *First Nat. Bank of Corsicana v. City Nat. Bank*, 12 Tex. Civ. App. 318.

correspondents without the customer, for whom the collection is to be made, being consulted, or as a rule knowing the name or financial standing of the correspondent. In fact, during the whole transaction, the customer has no communication with the correspondent and knows nothing of it. Is it then to be said that after the bank has selected a correspondent its responsibility is to cease and the customer is to look alone to the correspondent, of whom he knows nothing, for his redress in case of a loss? It seems that as a bank has the better facilities for choosing competent correspondents, it should be directly responsible to the customer for the negligence of such correspondent. Nor does this rule work any hardship on the collecting bank, in the majority of cases, because it has its remedy over against the correspondent bank for any loss suffered by reason of the latter's negligence.

**§ 443. Liability of correspondent bank to owner for money collected.**

In the preceding sections, we have considered the question of the liability of a correspondent bank for its acts of negligence or default; but when we come to consider its liability for money collected by it, different rules and principles present themselves. It may be stated generally that if a correspondent bank has in its possession money which it has collected for the owner, and it obtains notice of the latter's title before it has turned over the proceeds to the transmitting bank, or before it has made advances or given credit to the transmitting bank upon the faith of such collection; or before the transmitting bank has given the owner credit for the amount of such collection, the owner of the claim may recover such proceeds directly from the correspondent bank;<sup>408</sup> and under this rule the owner may recover

<sup>408</sup> *National Exch. Bank v. Beal*, 50 Fed. 355; *Beal v. National Exch. Bank*, 55 Fed. 894; *First Nat. Bank v. Bank of Monroe*, 33 Fed. 408; *Commercial Nat. Bank v. Hamilton Nat. Bank*, 42 Fed. 880; *Naser v. First Nat. Bank*, 116 N. Y. 493; *Boykin v. Bank of Fayetteville*, 118 N. C. 566; *Miller v. Farmers' & Mechanics' Bank*, 30 Md. 392. But see *Wyman v. Colorado Nat. Bank*, 5 Colo. 30, 40 Am. Rep. 133, holding, that where a banker is made the payee of a



the proceeds from the correspondent bank, though it has credited the amount to an intermediate collecting bank.<sup>404</sup>

But where there is an arrangement or it is a custom of the correspondent bank to receive paper, for collection, from the transmitting bank as the paper of the latter, or the correspondent bank has no notice that the paper does not belong to the transmitting bank, and it makes advances or gives credit to the latter upon the faith of such paper, it may retain the proceeds as against the owner to the extent of any unpaid balance of such advances or credit.<sup>405</sup> If, however, there is no such arrangement or mutual dealings between the banks, and no advances are made or credit given upon the faith of the particular paper, the correspondent bank, receiving such paper for collection, has no right to retain it or its proceeds as against the owner for an unpaid balance due from the transmitting bank.<sup>406</sup> Nor does a mere credit, or custom of crediting, by the correspondent bank to the transmitting bank instead of remitting, prevent the owner from recovering the proceeds.<sup>407</sup> Unless the correspondent bank becomes a bona

draft, intended only for collection by him, and he indorses the draft to a bank for collection and credit to his personal account at a time when he was indebted to such bank, the latter becomes a bona fide purchaser, and may retain the proceeds as against the original owner, though it was notified before it received the proceeds, but after the draft had been paid, that the draft was not the property of such banker when he so delivered it for collection. And for a good treatment of this subject, see Selover, *Bank Collections*, § 136 et seq.

<sup>404</sup> *Branch v. United States Nat. Bank*, 50 Neb. 470; *Boykin v. Bank of Fayetteville*, 118 N. C. 566; Selover, *Bank Collections*, p. 208.

<sup>405</sup> *Bank of Metropolis v. New England Bank*, 1 How. (U. S.) 234, 6 How. 212; *Wilson v. Smith*, 3 How. (U. S.) 763; *Rathbone v. Sanders*, 9 Ind. 217; *Carroll v. Exchange Bank*, 30 W. Va. 518. See Selover, *Bank Collections*, p. 214.

<sup>406</sup> *Millikin v. Shapleigh*, 36 Mo. 596; *Hoffman v. Miller*, 9 Bosw. (N. Y.) 334; *Van Amee v. Bank of Troy*, 8 Barb. (N. Y.) 312.

<sup>407</sup> *Lawrence v. Stonington Bank*, 6 Conn. 521; *Armstrong v. National Bank of Boyertown*, 90 Ky. 431; *Guignon v. First Nat. Bank*, 22 Mont. 140; *First Nat. Bank v. Gregg*, 79 Pa. 384; *Evansville Bank v. German-American Bank*, 155 U. S. 556; *Wilson v. Smith*, 3 How. (U. S.) 763; Selover, *Bank Collections*, pp. 215, 216.

fide holder for value, it acquires no better title to the paper sent to it for collection, than the transmitting bank had; and the mere fact that there is an unpaid balance against the transmitting bank in favor of the correspondent bank does not constitute the latter the bona fide holder for value as against the owner.<sup>408</sup> Nor would the correspondent bank be a bona fide purchaser and be entitled to retain proceeds from unpaid balance if it had notice of the owner's title, notwithstanding the provision of the negotiable instruments law.<sup>409</sup> Thus, where a correspondent bank receives paper indorsed "for collection," it thereby has notice that the paper was forwarded for collection only, that the indorser is still the owner of the paper and its proceeds, and that it cannot retain the proceeds on an indebtedness of the sending bank to the prejudice of the original owner.<sup>410</sup> And where, in addition to the original indorsement for collection, the paper, when transmitted to the correspondent bank, is accompanied

<sup>408</sup> *Commercial Bank v. Marine Bank*, 3 Keyes (N. Y.) 337; *Van Amee v. Bank of Troy*, 8 Barb. (N. Y.) 312; *McBride v. Farmers' Bank*, 26 N. Y. 450; *First Nat. Bank v. Strauss*, 66 Miss. 479; *Miller v. Farmers' & Mechanics' Bank*, 30 Md. 392; *Stevenson v. Fidelity Bank*, 113 N. C. 485. But this rule would seem to be different under the Negotiable Instruments Law. See Laws N. Y. 1897, c. 612, § 51; Pub. Laws N. C. 1899, c. 733, § 25.

<sup>409</sup> *People's Bank v. Jefferson County Sav. Bank*, 106 Ala. 524; *Stevenson v. Fidelity Bank*, 113 N. C. 485.

<sup>410</sup> *Evansville Bank v. German-American Bank*, 155 U. S. 556; *Fifth Nat. Bank v. Armstrong*, 40 Fed. 46; *Commercial Nat. Bank v. Hamilton Nat. Bank*, 42 Fed. 880; *People's Bank v. Jefferson County Sav. Bank*, 106 Ala. 524; *Lawrence v. Stonington Bank*, 6 Conn. 521; *First Nat. Bank of Crown Point v. First Nat. Bank of Richmond*, 76 Ind. 561, 40 Am. Rep. 261; *Claffin v. Willson*, 51 Iowa, 15; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553; *Sutherland v. First Nat. Bank*, 31 Mich. 230; *Third Nat. Bank v. Clark*, 23 Minn. 263; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40; *Northwestern Nat. Bank v. Bank of Commerce*, 107 Mo. 402; *Hoffman v. First Nat. Bank*, 46 N. J. Law, 604; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28, 11 Am. St. Rep. 612; *Naser v. First Nat. Bank*, 116 N. Y. 492; *National Citizens' Bank v. Citizens' Nat. Bank*, 119 N. C. 307; *People's Bank v. Citizens' Nat. Bank*, 119 N. C. 310; *National Bank of Commerce v. Johnson*, 6 N. D. 180; *Selover, Bank Collections*, pp. 220, 221.

by a letter of advice, also negating any title in the sending bank, the correspondent bank is doubly notified as to the ownership and cannot claim title to the paper or its proceeds for a debt of the sending bank.<sup>411</sup> But where the paper was originally indorsed in blank to the first bank, and by it indorsed for collection to the correspondent bank, the latter has no notice that the paper does not belong to the transmitting bank, and hence may retain the proceeds thereof for a general balance due to it by such bank, where it had been the custom and course of dealing between the banks to credit and debit such collections, and exchange statements periodically.<sup>412</sup>

**§ 444. Liability of collection agency for neglect of subagent.**

Where a collection agency undertakes to make a collection for another, in the absence of any agreement limiting its liability, it is generally held liable for the negligence or fraud of any subagents employed by it to make the collection.<sup>413</sup> Such agencies have their selected agents in every part of the country. From the very nature of such institutions, it must be concluded "that the public impression will be that the agency invited customers on the very ground of its facilities for making distant collections. It must be presumed from its business connections at remote points, and its knowledge of the agents chosen, the agency intends to undertake the performance of the service which the individual customer is unable to perform for himself. There is good reason therefore to hold that such an agency is liable for collections made by its own agents, when it undertakes

<sup>411</sup> *First Nat. Bank v. Bank of Monroe*, 33 Fed. 408; *People's Bank v. Jefferson County Sav. Bank*, 106 Ala. 524; *Williams v. Jones*, 77 Ala. 294; *Lawrence v. Stonington Bank*, 6 Conn. 521; *Selover, Bank Collections*, p. 223.

<sup>412</sup> *Vickrey v. State Sav. Ass'n*, 21 Fed. 773; *Doppelt v. National Bank of Republic*, 175 Ill. 432; *Cody v. City Nat. Bank*, 55 Mich. 379; *Selover, Bank Collections*, p. 223.

<sup>413</sup> *Bradstreet v. Everson*, 72 Pa. 124, 13 Am. Rep. 665; *Morgan v. Tener*, 83 Pa. 305; *Hoover v. Wise*, 91 U. S. 308; *Weyerhauser v. Dun*, 100 N. Y. 150; *Holt v. Tennent-Stribling Shoe Co.*, 69 Ill. App. 332.

the collection by the express terms of the receipt. If it does not so intend, it has it in its power to limit responsibility by the terms of the receipt."<sup>414</sup> Thus, where a mercantile agency received drafts from another and gave a receipt "for collection," and then transmitted the drafts to their agent at the place where payable, who collected them but failed to pay over the proceeds, the agency was held liable therefor.<sup>415</sup> So, where a collection agency employed to collect a claim placed it in the hands of an attorney, through whose misconduct it is lost, it is liable therefor in the absence of an express stipulation to the contrary in its receipt given for the claim.<sup>416</sup>

Such agencies may of course limit their liability by express contract with their principal, at the time of employment; as by putting terms, to that effect, in the receipt given for the paper to be collected, and such a contract is not contrary to any principle of law or public policy. Thus where one intrusts a claim for collection to a collecting agency, taking a receipt conditioned that the claim was to be transmitted to an attorney for collection or adjustment at the risk and on the account of the owner of the claim, and signing a similar agreement in the agency's books, it constituted such a contract, and the agency was not liable for the attorney's acts or default, in the absence of gross negligence in selecting him.<sup>417</sup>

**§ 445. Liability of express companies, undertaking collections, for acts of subagents.**

For the same reasons an express company, undertaking to make collections, is liable for the acts of subagents employed by it in making the collection. Thus, the plaintiff delivered a note to the agent of the American Express Co., at Brockport, N. Y., with directions to take it to San Francisco, where the maker resided, present it for payment, and "if not paid on presentation, have it sued and collected as soon as

<sup>414</sup> *Bradstreet v. Everson*, 72 Pa. 124, 13 Am. Rep. 665.

<sup>415</sup> *Bradstreet v. Everson*, 72 Pa. 124, 13 Am. Rep. 665.

<sup>416</sup> *Morgan v. Tener*, 83 Pa. 305.

<sup>417</sup> *Sauger v. Dun*, 47 Wis. 615, 32 Am. Rep. 789.

possible," the plaintiff supposing at the time that the line of that company extended to San Francisco. Such line, however, did not extend to San Francisco, but only to New York, at which place the note was delivered to the Wells, Fargo Express Co., to be forwarded by it to the place of destination. This was not a mere contract to forward, but to collect, and the Wells, Fargo Express Co., on receiving the note became the agent of the American Express Co., and the latter was liable to the plaintiff for all damages resulting from the negligence of the Wells, Fargo Express Co., in making the collection.<sup>418</sup> And the same principle applies where an express company employs a notary. Thus, where such a company receives for collection a bill of exchange drawn in one state and payable in another, and on the day before demand and protest should be made delivers it to a notary who makes such demand and protest one day before the maturity of the bill, whereby the drawers and indorsers are discharged, the acceptor being insolvent, the company will be liable to the holder for the amount of the bill and interest thereon.<sup>419</sup>

#### IX. LIABILITY OF SUBAGENT.

##### § 446. Liability of subagent to principal—To agent.

The same rules apply in determining a subagent's liability to the principal as applied in determining the agent's liability for the acts of a subagent. Whether, when a subagent has been appointed, he is directly liable to the principal for his acts, or whether he is responsible only to the agent who appointed him, depends upon whether, in the particular case, the subagent is the agent of the principal, or of the agent only. It has been seen in a former chapter, when and under what circumstances an agent may appoint a subagent, so as to constitute the latter an agent of the principal.<sup>420</sup> In accordance with the rules there laid down, it may be stated that where a subagent is appointed, by necessity, usage, or otherwise, by the express or implied consent of the principal, and a privity of contract exists between the

<sup>418</sup> *Palmer v. Holland*, 51 N. Y. 416, 10 Am. Rep. 616.

<sup>419</sup> *American Exp. Co. v. Haire*, 21 Ind. 4, 83 Am. Dec. 334.

<sup>420</sup> See ante, chapter 12.

principal and such subagent, the latter is considered an additional agent of the principal, and as such is liable directly to him for all acts committed, or transactions conducted, during the course of his agency.<sup>421</sup> If, on the other hand, the appointment is such that no privity exists between the principal and subagent, but the latter is the agent of the primary agent alone, then the subagent would be responsible to the primary agent alone for his acts or defaults, and not to the principal.<sup>422</sup> As has been said: "A subagent is accountable ordinarily only to his superior agent when employed without the assent or direction of the principal. But if he be employed with the express or implied assent of the principal, the superior agent will not be responsible for his acts. There is, in such a case, a privity between the subagent and the principal, who must therefore seek a remedy directly against the subagent for his negligence or misconduct."<sup>423</sup>

**§ 447. Liability of subagent for money collected.**

Where a subagent makes collections, under an appointment by an agent who had been employed to make such collections himself, and he receives the proceeds into his possession, he may be held responsible to the owner of the claim for such proceeds, although there may be no privity between him and the owner, if the latter gives him notice of his claim before he has paid over the amount collected to the agent employing him; or if he has not made advances or given

<sup>421</sup> *De Bussche v. Alt*, 8 Ch. Div. 286; *Dun v. City Nat. Bank*, 58 Fed. 174; *Wilson v. Smith*, 3 How. (U. S.) 763; *Guelich v. National State Bank*, 56 Iowa, 434, 41 Am. Rep. 110; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13, 45 Am. Dec. 72; *Hoffman v. Parry*, 23 Mo. App. 20; *Campbell v. Reeves*, 3 Head (Tenn.) 226; *Louisville & N. R. Co. v. Blair*, 4 Baxt. (Tenn.) 407; *Commercial & Agricultural Bank v. Jones*, 18 Tex. 811. See, also, *Osborne v. Rider*, 62 Wis. 235.

<sup>422</sup> *Attorney-General v. Chesterfield*, 18 Beav. 596; *Stephens v. Badcock*, 3 Barn. & Adol. 354; *Trafton v. United States*, 3 Story, 646, Fed. Cas. No. 14,134; *Guelich v. National State Bank*, 56 Iowa, 434, 41 Am. Rep. 110; *Stephens v. Bacon*, 7 N. J. Law, 1; *Commercial Bank v. Red River Val. Nat. Bank*, 8 N. D. 382; *Pownall v. Bair*, 78 Pa. 403.

<sup>423</sup> *Guelich v. National State Bank*, 56 Iowa, 434, 41 Am. Rep. 110.

credit to the agent on the faith of such claim, in ignorance of the owner's title, so as to stand in the position of a bona fide holder for value.<sup>424</sup> "The principle of this doctrine is reasonable, and consistent with the character of the action of assumpsit for money had and received. There are many cases in which that is supported without any privity between the parties other than what is created by law. Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to this action, although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has legal or equitable ground for retaining it, the law creates the privity and the promise."<sup>425</sup> In order that the subagent may lay claim to such proceeds as a bona fide holder, he must have made his advances or given credit to the agent upon the faith of such claim, or otherwise become entitled thereto, in ignorance of the owner's title. If the paper constituting the claim shows on its face that the agent is employed to collect only, or the owner's superior title otherwise appears, the subagent cannot retain the proceeds in his hands against the owner's claim there-to.<sup>426</sup>

<sup>424</sup> *First Nat. Bank v. Reno*, 3 Fed. 257; *First Nat. Bank v. Bank of Monroe*, 33 Fed. 408; *Wallis v. Shelly*, 30 Fed. 747; *Gaines v. Miller*, 111 U. S. 395; *First Nat. Bank of Crown Point v. First Nat. Bank of Richmond*, 76 Ind. 561, 40 Am. Rep. 261; *Miller v. Farmers' & Mechanics' Bank*, 30 Md. 392; *Hall v. Marston*, 17 Mass. 575; *Dickerson v. Wason*, 47 N. Y. 439, 7 Am. Rep. 455; *Grant v. Seltsinger*, 2 Pen. & W. (Pa.) 525. Compare *Hyde v. First Nat. Bank*, 7 Biss. 156, Fed. Cas. No. 6,970; *Hoover v. Wise*, 91 U. S. 308. A foreign principal may sue a subagent for money received in course of the agency. *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291. Where the principal agent forwards collections to a subagent, and directs the latter to make any use of the funds other than the usual one of their application to the payment of the debt of the principal, and such subagent complies with such direction, he becomes responsible therefor to the principal. *Milton v. Johnson*, 79 Minn. 170.

<sup>425</sup> *Hall v. Marston*, 17 Mass. 579.

<sup>426</sup> *In re Armstrong*, 33 Fed. 405; *First Nat. Bank v. Bank of Monroe*, 33 Fed. 408; *First Nat. Bank of Crown Point v. First Nat. Bank of Richmond*, 76 Ind. 561, 40 Am. Rep. 261; *Cecil Bank v. Farmers'*

Unless the subagent becomes a purchaser or holder for value, he can have no better title to the claim or its proceeds than the original agent had;<sup>427</sup> and if he has notice of the principal's title, the mere existence of a balance due to him from the original agent will not be sufficient to constitute him such a holder for value.<sup>428</sup> And this is also held

Bank, 22 Md. 148; *Miller v. Farmers' & Mechanics' Bank*, 30 Md. 392; *Blaine v. Bourne*, 11 R. I. 119, 23 Am. Rep. 429; *City Bank v. Weiss*, 67 Tex. 333, 60 Am. Rep. 29.

<sup>427</sup> *McBride v. Farmers' Bank*, 26 N. Y. 450; *Dickerson v. Wason*, 47 N. Y. 439, 7 Am. Rep. 455; *First Nat. Bank v. Bank of Monroe*, 33 Fed. 408.

<sup>428</sup> *People's Bank v. Jefferson County Sav. Bank*, 106 Ala. 524; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Stevenson v. Fidelity Bank*, 113 N. C. 485; *Grant v. Seitsinger*, 2 Pen. & W. (Pa.) 525; *Blaine v. Bourne*, 11 R. I. 119, 23 Am. Rep. 429; *Milton v. Johnson*, 79 Minn. 170.

Where two joint owners of property put it into the hands of an agent to sell, on their joint account, and such agent placed it in the hands of a subagent to sell, the latter cannot retain the proceeds thereof to satisfy his demand against one of the joint owners, and the other joint owner as part owner, and as the agent of his co-owner, may maintain an action, in his own name, against the subagent for such proceeds. *Murray v. Toland*, 3 Johns. Ch. (N. Y.) 569.

<sup>429</sup> *First Nat. Bank v. Strauss*, 66 Miss. 479; *McBride v. Farmers' Bank*, 26 N. Y. 450; *Dickerson v. Wason*, 47 N. Y. 439, 7 Am. Rep. 455. This was so in North Carolina prior to the Negotiable Instruments Law in that state. *Stevenson v. Fidelity Bank*, 113 N. C. 485.

It is so held in Massachusetts, as where an attorney, being entrusted with a note for collection, deposited it in a bank for collection, without stating on whose account, and the bank collected it and applied the amount on a debt due the bank by the attorney, and the attorney becoming bankrupt, the bank settled with his assignee including the amount collected. The owner of the note could not recover the proceeds of such collection a year afterwards when he first heard of it. *Wood v. Boylston Nat. Bank*, 129 Mass. 358, 37 Am. Rep. 366.

And as was said in *McBride v. Farmers' Bank*, 26 N. Y. 454: "The decisions of our courts have been uniform from the time *Codington v. Bay*, 20 Johns. (N. Y.) 637, was determined, that before the holder of a note can acquire a better title to it than the person had from whom he received it, he must pay a present valuable consideration therefor; and that receiving it in payment of, or as security for, an antecedent debt is not such a consideration. *Rosa v.*



to be true even though the subagent has no notice of the owner's title.<sup>429</sup> Thus, a bank receiving from another bank notes for collection obtains no better title to them, or the proceeds thereof, than the transmitting bank had, unless it becomes a purchaser for value; and it is not such a purchaser by reason of its having a balance against the transmitting bank, and from having discounted notes for the latter upon its indorsement.<sup>430</sup>

But where, by an agreement between principal and agent, the latter places the amount of the claim to the principal's credit as soon as the claim is received, the principal being entitled to draw against such account as cash, the principal thereby transfers his title to such claim, and he cannot follow it or its proceeds into the hands of a subagent receiving it in good faith and in due course of business from the agent for collection.<sup>431</sup> If the principal and agent expressly or impliedly agree that the agent may employ a subagent to collect money for the principal, the principal may consider the subagent as his own agent, and, when the subagent has received money for him, may maintain an action against him for money had and received.<sup>432</sup>

Brotherson, 10 Wend. (N. Y.) 86; *Stalker v. McDonald*, 6 Hill (N. Y.) 93; *Youngs v. Lee*, 12 N. Y. 551. The case is not altered materially by a long course of dealing between the parties, by which the holder of the note has been in the habit of receiving payment of balances due him in notes, or because he has omitted to collect a balance due him, by reason of an exception or promise of payment of it in notes, or in consequence of his omission to collect it after taking such a note in payment of it. He has not in either case, parted with or paid any present valuable consideration for the note; and if he fails to collect it or hold it, he is in no worse situation legally, than he was before receiving it. He has only been disappointed by not obtaining payment of an antecedent debt; and that consideration is insufficient to prevent the true owner of the note from claiming the same or its avails."

<sup>429</sup> *McBride v. Farmers' Bank*, 26 N. Y. 450. See ante, § 443.

<sup>431</sup> *Clark v. Merchants' Bank*, 2 N. Y. 380; *Scott v. Ocean Bank*, 23 N. Y. 289; *Ayres v. Farmers' & Merchants' Bank*, 79 Mo. 421, 49 Am. Rep. 235.

<sup>432</sup> *Wilson v. Smith*, 3 How. (U. S.) 763; *Miller v. Farmers' & Mechanics' Bank*, 30 Md. 392.

## **CHAPTER XV.**

### **LIABILITIES OF THE PRINCIPAL TO THIRD PERSONS.**

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#### I. LIABILITY OF DISCLOSED PRINCIPAL ON CONTRACTS.

#### § 448. In general.

This subject has been fully treated in former chapters, in treating of an agent's authority, its extent and construction;<sup>1</sup> for whatever an agent is authorized to do on behalf of another is necessarily binding on such other. It is the object, therefore, of this subdivision, to state the most general rules governing a principal's liability for the acts or contracts of his agent, referring more particularly to former sections where such liability is fully discussed from the standpoint of an agent's authority. This is done to avoid a needless repetition of rules and citation of cases, for it

<sup>1</sup> See ante, chapter 8.

is evident that the rules governing an agent's power to do certain things on behalf of another, and those governing the liability of such other therefor, are essentially the same and are supported by the same cases.

**§ 449. In case of actual authority.**

The object of the creation of an agency is ordinarily to bring the principal, acting by the agent, into contract relations with third persons. Whenever a person may make a contract or do an act himself, he may do so through an agent, and in such case he will be bound by the contract or act to the same extent precisely as if he had made the contract or done the act personally. If an agent has actual authority from his principal to make a particular contract, or to do a particular act, and such authority is sufficient in form, and the agent in making the contract or doing the act discloses his principal and makes or does it in his name, there can be no difficulty in holding the principal liable. The only difficulty in this connection is in determining whether the agent had authority, which is generally a question of fact and construction,<sup>2</sup> whether the authority was sufficient in form,<sup>3</sup> and whether the agent has properly executed it.<sup>4</sup> These questions have already been considered in other chapters.<sup>5</sup> As has been seen, an actual authority may be conferred expressly by the principal, or may be implied from his acts, or it may under some circumstances arise from necessity.<sup>6</sup> And a principal cannot authorize his agent to do illegal or immoral acts, or any acts that he cannot do himself, and is not bound by contracts of that character entered into by an agent, although he had previously authorized them.<sup>7</sup>

**§ 450. In case of unauthorized contracts.**

Of course, a person is not liable on a contract made or act done by another in his name but without any authority

<sup>2</sup> Ante, §§ 70, 72.

<sup>3</sup> Ante, § 213 et seq.

<sup>4</sup> Ante, § 238 et seq.

<sup>5</sup> See the above references.

<sup>6</sup> Ante, §§ 61, 62.

<sup>7</sup> See ante, § 38 et seq.

from him, unless an authority is created by law, as is sometimes the case,<sup>8</sup> or unless he is estopped by his conduct from denying that there was authority in fact,<sup>9</sup> or unless he has ratified the contract or act.<sup>10</sup> And even though a person may be in fact the agent of another, he cannot bind the latter, in the absence of elements of estoppel, or ratification, by a contract in excess of his authority, the remedy of the third person in such a case being against the agent.<sup>11</sup> The only difficulty in such a case is in construing the authority conferred upon the agent and determining whether his act was within it.<sup>12</sup>

Where it is stipulated or agreed that the authority of an agent shall not begin until a certain day in the future, or until the happening of some contingency or performance of some condition, the principal is not liable, in the absence of elements of estoppel,<sup>13</sup> on a contract entered into by the agent before the agency commenced, although the agent may have been appointed by words in praesenti.<sup>14</sup>

**§ 451. Where contract or act is apparently authorized.**

To render a principal liable on contracts made or acts done by his agent, it is not always necessary that the contract or act shall have been within the agent's actual authority. It is sufficient if the contract or act was within his apparent authority, provided the principal is responsible for the appearance of authority. The rule is, that if a principal, either intentionally or negligently, clothes his agent with apparent authority to make a particular contract, or to do a particular act, and thus holds him out as having such authority, he will be liable to persons who in good faith deal with the agent in reliance on his apparent authority,

<sup>8</sup> See ante, chapter 5.

<sup>9</sup> Ante, § 55 et seq.; post, § 451.

<sup>10</sup> Ante, § 148.

<sup>11</sup> *Jackson v. National Bank of McMinnville*, 92 Tenn. 154, 36 Am. St. Rep. 81; *Rice v. Peninsular Club*, 52 Mich. 87. As to the agent's liability, see post, § 577 et seq.

<sup>12</sup> Ante, § 211 et seq.

<sup>13</sup> Ante, § 211.

<sup>14</sup> *Rathbun v. Snow*, 123 N. Y. 343.

although the agent may in fact have exceeded his authority, and acted contrary to the instructions of his principal. In such a case, as against third persons who act in good faith and with ordinary prudence, the principal is estopped to deny that the agent had the authority which he appeared to have and assumed to exercise.<sup>15</sup>

The only difficulty in applying this principle is in determining, (1) whether particular contracts or acts were within the apparent scope of the agent's authority, (2) whether the principal was responsible for such appearance of authority, and (3) whether the person dealing with the agent acted in good faith, with ordinary prudence, and in reliance on the appearance of authority. If all these questions are answered in the affirmative, and ordinarily they are questions of fact,<sup>16</sup> the principal is liable. But if either question is answered in the negative, the principal is not liable. It is not enough that the agent may have been clothed with apparent authority. It is further necessary that the person contracting with him shall have relied upon such apparent authority.<sup>17</sup> It is also necessary that the third person shall have acted with ordinary prudence in relying on such apparent authority. If he was negligent in doing so, his negligence is the proximate cause of his loss, and the principal is not liable.<sup>18</sup>

And the above rule is true notwithstanding the agent may have exceeded or violated private instructions given to him by his principal, of which the third party had no knowledge, and concerning which he was not put upon inquiry.<sup>19</sup> If, however, the party dealing with the agent had knowledge of the restrictions or limitations put upon the agent's authority by the principal's instructions, the rule would be otherwise. In such a case the third party cannot be said to rely

<sup>15</sup> See ante, §§ 208, 209.

<sup>16</sup> *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516; *Franklin Bank Note Co. v. Mackey*, 83 Hun (N. Y.) 511.

<sup>17</sup> *Rail v. City Nat. Bank*, 3 Tex. Civ. App. 557; *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5; *Edwards v. Dooley*, 120 N. Y. 540.

<sup>18</sup> *Hazeltine v. Miller*, 44 Me. 177; *Peabody v. Hoard*, 46 Ill. 242; *Rail v. City Nat. Bank*, 3 Tex. Civ. App. 557.

<sup>19</sup> See ante, § 206.

on the agent's apparent authority, in dealing with him, and he cannot hold the principal liable for any act or contract of the agent in excess of such restriction or limitation, although such act or contract was within the agent's apparent authority, and would have been binding on the principal, but for such restriction or limitation.<sup>20</sup>

**§ 452. Duty of person dealing with agent to ascertain his authority.**

It follows from this rule, that it is the duty of one dealing with an agent to use all reasonable and proper endeavors to ascertain the latter's authority,<sup>21</sup> so as to determine whether or not the act or contract he is transacting or negotiating with such agent is within the latter's powers; and in doing this he must go to the proper sources, available to him, for obtaining such information, and not rely on what the agent might tell him in reference thereto. A person dealing with an agent has no right to rely upon the mere representations of the agent as to his authority. If he relies on them alone he cannot hold the principal liable on the ground that the transaction was within the apparent scope of the agent's authority.<sup>22</sup> It is the third person's duty, therefore, to make all proper inquiries to ascertain the extent of the agent's powers, and to determine whether the act or contract about to be consummated comes within the province of the agency, and will or will not bind the principal; and the burden of proof is on him to show that the contract or act relied upon was within the scope of the agent's authority. If he does not do so, and the agent's acts or contracts are beyond the scope of his powers, the third party has no right or claim against the principal thereon.<sup>23</sup>

**§ 453. Liability on contracts of general agents.**

As has been seen in a former chapter, a general agent may do all acts within the apparent scope of his authority,

<sup>20</sup> See ante, § 206.

<sup>21</sup> See ante, § 210.

<sup>22</sup> *Rathbun v. Snow*, 123 N. Y. 343; *Hurley v. Watson*, 68 Mich. 531.

<sup>23</sup> See ante, § 210.



although such acts may have been done contrary to private instructions, of which the party dealing with the agent has no notice or concerning which he is not put upon inquiry.<sup>24</sup> In accordance with this principle, then, a principal is liable to a third person dealing with his general agent, for all acts done or contracts made, within the apparent scope of such agent's authority, although such acts or contracts may have been in excess of secret instructions given to the agent by his principal.<sup>25</sup> This does not mean, however, that the general agent's authority is unlimited, and that he can bind his principal by all contracts made. They must be such contracts or acts as pertain to the due prosecution of the business in which he is employed.<sup>26</sup>

**§ 454. Liability on contracts of special agents.**

A principal is likewise liable for all acts done or contracts made by a special agent within the actual or apparent scope of his authority; but it must be remembered that the scope of a special agent's authority is narrower than that of a general agent, and the third party is probably held to a stricter duty of ascertaining the limits of authority in cases of special agents than those of general agents. The character of the agency notifies the third person that there are certain restrictions or limitations on the agent's powers, and that unless the agent acts within them the principal will not be liable for his acts or contracts in the absence of a subsequent ratification.<sup>27</sup> Thus, this would be true if the

<sup>24</sup> See ante, § 202 et seq.

<sup>25</sup> See ante, § 206.

<sup>26</sup> See ante, § 203.

<sup>27</sup> See ante, §§ 204, 206. And see Fenn v. Harrison, 1 Term R. 757; Montgomery Furniture Co. v. Hardaway, 104 Ala. 100; Wheeler v. McGuire, 86 Ala. 398; Sioux City Nursery & Seed Co. v. Magness, 5 Colo. App. 172; Yates v. Yates, 24 Fla. 64; Phoenix Ins. Co. v. Gray, 107 Ga. 110; Thomas v. Atkinson, 38 Ind. 256; Reitz v. Martin, 12 Ind. 306, 74 Am. Dec. 215; Johnson v. Wingate, 29 Me. 404; Lister v. Allen, 31 Md. 543, 100 Am. Dec. 78; Brown v. Johnson, 12 Smedes & M. (Miss.) 398, 51 Am. Dec. 118; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Dowden v. Cryder, 55 N. J. Law, 329; Joseph v. Struller, 25 Misc. (N. Y.) 173; Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Pacific Biscuit

agent's authority was in writing, as where it is contained in a power or letter of attorney. It is the third party's duty in such cases to call for the written authority and take notice of the limitations and restrictions contained therein, and unless the agent's contract or act was strictly in accordance with such written authority, the principal would not be bound thereby.<sup>28</sup> And especially is this so if a written authority is essential to the agency,<sup>29</sup> or if the nature of the agency or the manner of performing it, otherwise indicates that his authority is contained in a written instrument.<sup>30</sup> Thus if a draft is accepted by the drawer through an agent "p. p. a.," which may be found to mean "per power attorney," these letters are notice to a bank discounting the draft that the agent depended for his authority to sign upon a written document, and the bank takes its chances if it does not call for the production of the power.<sup>31</sup>

But, of course, if the principal's instructions to the agent were private in their nature, of which the third party had no notice, or concerning which he was not put upon inquiry, he would not be bound thereby, and he could maintain an action against the principal on any act or contract within the apparent scope of the agent's authority notwithstanding the act or contract was in excess of such private instructions.<sup>32</sup>

*Co. v. Dugger*, 40 Or. 362; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. 503, 78 Am. Dec. 390; *Carmichael v. Buck*, 10 Rich. Law (S. C.) 332, 70 Am. Dec. 226; *Ellis v. Wait*, 4 S. D. 454; *Morton v. Morris*, 27 Tex. Civ. App. 262; *Blane v. Proudft*, 3 Call (Va.) 207, 2 Am. Dec. 546.

<sup>28</sup> *Quay v. Presidio & F. R. Co.*, 82 Cal. 1; *Frink v. Roe*, 70 Cal. 296; *Rawson v. Curtiss*, 19 Ill. 456; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Stainback v. Read*, 11 Grat. (Va.) 281, 62 Am. Dec. 648; *Wells v. Michigan Mut. L. Ins. Co.*, 41 W. Va. 131.

<sup>29</sup> *Nixon v. Hyserott*, 5 Johns. (N. Y.) 58.

<sup>30</sup> *Attwood v. Munnings*, 7 Barn. & C. 278; *Mount Morris Bank v. Gorham*, 169 Mass. 519. See, also, *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Morton v. Morris*, 27 Tex. Civ. App. 262.

<sup>31</sup> *Mount Morris Bank v. Gorham*, 169 Mass. 519.

<sup>32</sup> See ante, § 206.

**§ 455. Distinction between general and special agents.**

It is sometimes said that there is a distinction between general and special agencies, as to the liability of the principal for the acts of one or the other; that a principal will be bound by the acts of his general agent, within the scope of his authority, although he violates his private instructions and directions in doing such acts; but that in the case of a special agent the principal will not be bound if such agent exceeds his special and limited authority, unless he has been held out as having a greater authority, within which he has acted.<sup>33</sup> But there is, in fact, no such distinction, and it is thought to arise from a failure to distinguish between an agent's authority and his instructions. Whether the agency be a general or a special one, the principal is liable only for such acts or contracts as are done or made by the agent within the scope of the authority which the principal has led the third person to believe the agent possessed. And in neither case can the principal escape this liability by private or secret instructions of which the third party has no notice. Many of the cases fail to distinguish between the instructions given to a special agent as part of, or a limitation on, his authority, and such instructions as are given to him privately and do not properly constitute an element of his authority, and it is here that the supposed distinction between the two classes of agents seems to arise. The general rule, therefore, that a principal is liable for the acts or contracts done or made by an agent within the apparent scope of his authority, applies alike to general and special agencies. And once it is ascertained what the agent's apparent authority is, and whether or not the act or contract is within such authority, there is no difficulty in determining the principal's liability.<sup>34</sup>

**§ 456. Effect of fraud and corrupt agreements between the agent and the third party.**

If an agent in contracting with a third person on behalf

<sup>33</sup> See Story, Ag. (8th Ed.) § 126, and many other authorities using similar expressions. And see ante, § 199.

<sup>34</sup> See ante, § 451.

of his principal is guilty of a fraud upon the principal, or breach of trust, to which the third party is privy, or if the third party enters into an agreement with the agent to pay him a commission or other reward for making or bringing about the contract, the contract is voidable at the option of the principal. It is not void, and the third person cannot avoid it if the principal chooses to hold him, but the principal may repudiate it because of the fraud.<sup>35</sup> "Any agreement or understanding," said Judge Lurton in a federal case, "between one principal and the agent of another, by which such agent is to receive a commission or reward if he will use his influence with his principal to induce a contract, or enter into a contract for his principal, is pernicious and corrupt, and cannot be enforced at law. \* \* \* Such agreements are a fraud upon the principal, which entitle him to avoid a contract made through such agency."<sup>36</sup>

## II. LIABILITY OF UNDISCLOSED PRINCIPAL ON CONTRACTS.

### § 457. In general.

It frequently happens that a person, in entering into a contract in his own name, is in fact acting as the agent of another and for his benefit, and that he does not disclose the fact that he is acting as agent to the other party, or that, although he may disclose the fact that he is acting for another, does not disclose the name of his principal. In such a case, these three questions arise: (1) Whether the other party to the contract can maintain an action thereon against the undisclosed principal; (2) whether he can maintain an action against the agent; and (3) whether the undisclosed principal can maintain an action against him. The law answers all three of these questions in the affirmative. The first question will be considered here, reserving the other two for subsequent chapters.

It is thoroughly well settled in the law of agency that when a simple contract, oral or in writing, other than a negotiable

<sup>35</sup> *City of Findlay v. Pertz*, 66 Fed. 427; *Wassell v. Reardon*, 11 Ark. 705, 54 Am. Dec. 245; *Herman v. Martineau*, 1 Wis. 151, 60 Am. Dec. 368.

<sup>36</sup> *City of Findlay v. Pertz*, 66 Fed. 427.

instrument, is in fact entered into by one of the parties thereto as the authorized agent of another, but in his own name, and without disclosing to the other party the name of the principal, or even the fact that he is contracting as agent at all, the other party to the contract, while he has a right to sue the agent on the contract,<sup>37</sup> may, at his option, maintain an action against the undisclosed principal, when discovered,<sup>38</sup> subject to exceptions which will hereafter be

<sup>37</sup> Post, § 568.

<sup>38</sup> *England*: *Watteau v. Fenwick* [1893] 1 Q. B. 346; *Higgins v. Senior*, 8 Mees. & W. 834; *Cothay v. Fennell*, 10 Barn. & C. 671; *Trueman v. Loder*, 11 Adol. & E. 594; *Thomson v. Davenport*, 9 Barn. & C. 78.

*United States*: *Ford v. Williams*, 21 How. 287; *Pope v. Meadow Springs Distilling Co.*, 20 Fed. 35.

*Connecticut*: *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *Appeal of National Shoe & Leather Bank*, 55 Conn. 469.

*Georgia*: *Mickleberry v. O'Neal*, 98 Ga. 42, 52.

*Illinois*: *Fishback v. Brown*, 16 Ill. 74; *Hopkins v. Snedaker*, 71 Ill. 450.

*Indiana*: *Woodford v. Hamilton*, 139 Ind. 481, 486.

*Kansas*: *Freund v. Hixon*, 6 Kan. App. 919, 49 Pac. 640.

*Kentucky*: *Wilson v. Thompson*, 1 Metc. 123, 126.

*Louisiana*: *Hyde v. Wolf*, 4 La. 234, 23 Am. Dec. 484.

*Maine*: *Upton v. Gray*, 2 Me. 373; *Maxcy Mfg. Co. v. Burnham*, 89 Me. 538, 56 Am. St. Rep. 436.

*Maryland*: *Henderson v. Mayhew*, 2 Gill, 393, 41 Am. Dec. 434; *Mayhew v. Graham*, 4 Gill, 363; *York County Bank v. Stein*, 24 Md. 447.

*Massachusetts*: *Huntington v. Knox*, 7 Cush. 371; *National L. Ins. Co. v. Allen*, 116 Mass. 398; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314; *Schendel v. Stevenson*, 153 Mass. 351.

*Mississippi*: *Simmons Hardware Co. v. Todd*, 79 Miss. 163.

*Missouri*: *Richardson v. Farmer*, 36 Mo. 36, 88 Am. Dec. 129; *Higgins v. Dellinger*, 22 Mo. 397.

*Nebraska*: *Lamb v. Thompson*, 31 Neb. 448; *Cheshire Prov. Inst. v. Feusner*, 63 Neb. 682.

*New Jersey*: *Borcherling v. Katz*, 37 N. J. Eq. 150; *Elllott v. Bodine*, 59 N. J. Law, 567.

*New York*: *Taintor v. Prendergast*, 3 Hill, 72, 38 Am. Dec. 618; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Kayton v. Barnett*, 116 N. Y. 625; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 61; *Jessup v. Steurer*, 75 N. Y. 617.

*Oregon*: *Du Bois v. Perkins*, 21 Or. 189.

explained;<sup>39</sup> unless to hold the principal liable would be inconsistent with the terms of a written contract between the agent and third party, or in other words, unless it was expressly contracted that the agent alone should be liable.<sup>40</sup> This, at first thought, would seem to be directly opposed to the general principle of the law of contracts, that a contract cannot impose a liability upon a person who is not a party to it,<sup>41</sup> but this principle is held inapplicable because of the doctrine of identity of principal and agent. The principal, although not named in the contract or disclosed at all, is regarded as becoming a party thereto through the agent. The minds of the parties meet because, as was said in substance in a New York case, the agent's mind is his undisclosed principal's mind.<sup>42</sup> The doctrine applies even though it may appear that the other party to the contract would not have contracted with the undisclosed principal, had he known it, and so stated to the agent at the time of making the contract.<sup>43</sup>

*Pennsylvania:* *Smith v. Plummer*, 5 Whart. 89, 34 Am. Dec. 530; *Hubbert v. Borden*, 6 Whart. 91; *Hubbard v. Tenbrook*, 124 Pa. 291, 10 Am. St. Rep. 585; *Youghiogheny Iron & Coal Co. v. Smith*, 66 Pa. 340.

*South Carolina:* *Episcopal Church v. Wiley*, 2 Hill Ch. 584, 30 Am. Dec. 386; *Bacon v. Sondley*, 3 Strob. 542, 51 Am. Dec. 646.

*South Dakota:* *Garvin v. Pettee*, 15 S. D. 266.

*Texas:* *Sanger v. Warren*, 91 Tex. 472, 66 Am. St. Rep. 913.

*Vermont:* *Coverly v. Braynard*, 28 Vt. 738.

*Virginia:* *Waddill v. Seebree*, 88 Va. 1012, 29 Am. St. Rep. 766.

*West Virginia:* *Poole v. Rice*, 9 W. Va. 73.

<sup>39</sup> Post, § 459 et seq.

<sup>40</sup> *Humble v. Hunter*, L. R. 12 Q. B. 310; *United Kingdom Mut. S. S. Assur. Ass'n v. Nevill*, 19 Q. B. Div. 110; *Montgomerie v. United Kingdom Mut. S. S. Ass'n* [1891] 1 Q. B. 370; *Darrow v. Horne Produce Co.*, 57 Fed. 463. Or unless a clear intent to give exclusive credit to the agent is shown, or such intent is to be inferred from the custom of trade. *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618.

<sup>41</sup> *Hammon*, Cont. 708.

<sup>42</sup> *Follett, C. J.*, in *Kayton v. Barnett*, 116 N. Y. 625. See, also, *Cothay v. Fennell*, 10 Barn. & C. 671.

<sup>43</sup> *Kayton v. Barnett*, 116 N. Y. 625. As was said in this case: "Notwithstanding the assertion of the plaintiffs that they would

The liability of an undisclosed principal is the same as that of a disclosed principal; and secret limitations upon the agent's authority can no more be set up by the principal in the one case than in the other. "Once it is established that the defendant was the real principal," it was said in a late English case, "the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority—which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise, in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal."<sup>44</sup>

This doctrine applies, however, only where the act or contract of the agent is within the scope of his authority, or, if unauthorized, has been acquiesced in or ratified by the principal. An undisclosed principal, like a disclosed one, cannot be held liable on a contract entered into without his authority, express or implied, although entered into on his behalf, unless he subsequently ratifies it.<sup>45</sup> While an un-

not sell to the defendants, they, through the circumvention of Bishop and the defendants, did sell the property to the defendants, who have had the benefit of it, and have never paid the remainder of the purchase-price pursuant to their agreement. Bishop was the defendants' agent. Bishop's mind was, in this transaction, the defendants' mind, and so the minds of the parties met, and the defendants having, through their own and their agent's deception, acquired the plaintiffs' property by purchase, cannot successfully assert that they are not liable for the remainder of the purchase-price because they, through their agent, succeeded in inducing the plaintiffs to do that which they did not intend to do, and, perhaps, would not have done had the defendants not dealt disingenuously."

<sup>44</sup> *Watteau v. Fenwick* [1893] 1 Q. B. 346. And see *Hubbard v. Tenbrook*, 124 Pa. 291, 10 Am. St. Rep. 585.

<sup>45</sup> *Mechanics' Bank v. Columbia Bank*, 5 Wheat. (U. S.) 326;

disclosed principal is not permitted to deny that his agent had full authority, where he allows him to act as principal, this rule does not apply where the agent was not given any authority to act as principal, and it is not shown that the principal allowed him to do so or had reason to suppose that the agent was acting outside of his authority.<sup>46</sup> Thus, in a late English case, it was held that a contract made by a person in his own name, but intending to act for another in making it, though without authority from him, can be ratified by that other person, even though the intending agent did not disclose to the other party, at the time of making the contract, that he was acting for some one else.<sup>47</sup>

It has been held that if the person dealing with an undisclosed agent elects to hold the principal liable he must do so within a reasonable time after he has discovered who the principal is, otherwise the latter could not be held liable.<sup>48</sup> But in a late New York case, where an action was brought against both the principal and agent in such a case, it was held that such election need not be made until the case is closed.<sup>49</sup>

**§ 458. Application of this doctrine to written contracts.**

The doctrine that an undisclosed principal may be sued on a contract made by his agent applies, not only to oral contracts, but also to simple contracts in writing, other than negotiable instruments,<sup>50</sup> for it is well settled that the rule excluding parol evidence to contradict or vary a written contract does not prevent the admission of parol evidence to show that a person executing a written contract in his own name did so in fact as the agent of an undisclosed prin-

*Mickleberry v. O'Neal*, 98 Ga. 42; *Waddill v. Seabee*, 88 Va. 1012, 29 Am. St. Rep. 766; *Laing v. Butler*, 37 Hun (N. Y.) 144; *Robinsons v. Lincoln Sav. Bank*, 85 Tenn. 363; *Rawlings v. Neal*, 126 N. C. 271, 35 S. E. 597. And see cases cited in preceding notes.

<sup>46</sup> *Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. Rep. 340.

<sup>47</sup> *Durant v. Roberts* [1900] 1 Q. B. 629.

<sup>48</sup> *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Smethurst v. Mitchell*, 1 El. & El. 622, 28 Law J. Q. B. 241.

<sup>49</sup> *Tew v. Wolfsohn*, 77 App. Div. (N. Y.) 454.

<sup>50</sup> See post, § 464.



cipal, as this is not discharging the agent from his liability on the contract, but is merely showing that an additional party is also liable thereon.<sup>51</sup> The doctrine applies to contracts required to be in writing by the statute of frauds.<sup>52</sup>

<sup>51</sup> *Higgins v. Senior*, 8 Mees. & W. 834; *Ford v. Williams*, 21 How. (U. S.) 287; *Darrow v. Horne Produce Co.*, 57 Fed. 463; *Edwards v. Gildemeister*, 61 Kan. 141; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314; *Eastern R. Co. v. Benedict*, 5 Gray (Mass.) 561, 66 Am. Dec. 384; *National L. Ins. Co. v. Allen*, 116 Mass. 398; *Chandler v. Coe*, 54 N. H. 561; *Gates v. Brower*, 9 N. Y. 205, 59 Am. Dec. 530; *Hubbert v. Borden*, 6 Whart. (Pa.) 91.

As was said in *Chandler v. Coe*, supra: "The reason for the rule," excluding parol evidence to contradict or vary a written contract, "is that the written instrument furnishes the best evidence of the actual agreement; that it is more probable that the contract which the parties intended to make can be correctly ascertained from what was written than from the testimony of witnesses. But the party seeking to bring in an unknown principal starts by admitting that the contract was written according to the agreement; that his intention was to look to the agent alone, just as he would admit his intention was if the contract had been merely verbal. How could he deny, whether the contract was verbal or written, that he intended to look to the agent, if he did not know that any principal existed? The spirit of the rule, therefore, is not violated by giving him a right, in the case of a written as in the case of a verbal contract, to bring in the party who had the beneficial interest in the transaction."

<sup>52</sup> *Trueman v. Loder*, 11 Adol. & E. 589; *Beckham v. Drake*, 9 Mees. & W. 79; *McConnell v. Brillhart*, 17 Ill. 354; *Hypes v. Griffin*, 89 Ill. 134; *Tewksbury v. Howard*, 138 Ind. 103; *Butler v. Kaulback*, 8 Kan. 669; *Violett v. Powell*, 10 B. Mon. (Ky.) 347; *Lerned v. Johns*, 9 Allen (Mass.) 419; *Sanborn v. Flagler*, 9 Allen (Mass.) 477; *Williams v. Bacon*, 2 Gray (Mass.) 387; *Byington v. Simpson*, 134 Mass. 169; *Mantz v. Maguire*, 52 Mo. App. 136; *Borcherling v. Katz*, 37 N. Y. Eq. 150; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Dykers v. Townsend*, 24 N. Y. 57; *Hargrove v. Adcock*, 111 N. C. 166; *Waddill v. Seebree*, 88 Va. 1012, 29 Am. St. Rep. 766.

Compare, however, *Repetti v. Malsak*, 6 Mackey (D. C.) 366; *Clampet v. Bells*, 39 Minn. 272 (where the above rule, of introducing parol evidence to charge an undisclosed principal on a contract entered into by an agent in his own name, was held not to apply because in this case, upon the face of the contract, no one was bound).

But it does not apply to contracts under seal,<sup>53</sup> or negotiable instruments.<sup>54</sup>

**§ 459. Exceptions to rule that action may be maintained against undisclosed principal.**

To the general rule that where a person enters into a contract in his own name, but in fact for an undisclosed principal, the other party has an option, either to sue the agent on the contract, or to sue the undisclosed principal when discovered, there are several exceptions.

(1) His right to sue the principal is to some extent subject to the state of accounts between the principal and the agent.

(2) He cannot sue the principal if, after discovering the undisclosed principal, he has elected to hold the agent instead, for he cannot hold both, nor proceed first against one, and then against the other.

(3) The rule does not apply to contracts under seal.

(4) Nor does it apply to negotiable instruments.

**§ 460. Exception based upon state of accounts between the principal and agent.**

(a) **In general.**—The first exception, namely, that based upon the state of accounts between the principal and his agent, is thoroughly well settled, but there is a conflict of authority as to its extent.

Some of the cases sustain the broad doctrine that the other party to the contract cannot maintain an action thereon against the undisclosed principal instead of against the agent, if the state of accounts between the principal and the agent is such that, to allow an action against the principal would alter the same to the prejudice of the principal, without requiring that the principal shall have been induced or led to pay or settle with the agent, so as to bring about such a state of accounts, by any conduct or negligence on the part of the other party to the contract. In the leading English case on this subject,<sup>55</sup> the doctrine is laid down thus broadly. It

<sup>53</sup> Post, § 463.

<sup>54</sup> Post, § 464.

<sup>55</sup> *Thomson v. Davenport*, 9 Barn. & C. 78.

was said by Lord Tenderden in that case: "I take it to be a general rule, that if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal."<sup>56</sup> It will be noticed that this dictum as to the exception under consideration is very broad, and does not require any fault or elements of estoppel against the other party to the contract. It merely requires, in order that a case may come within the exception, that an action against the undisclosed principal would alter the state of accounts between him and the agent to his prejudice. In most of the cases in the United States, the doctrine thus laid down by Lord Tenderden has been followed, and it has been held, irrespective of any question as to the conduct of the other party to the contract, that the undisclosed principal cannot be sued, if before suit or demand he has paid or settled with the agent, in good faith, on the assumption of the agent alone being liable, so that he would be prejudiced and sustain a loss if he were to be held liable to the other party.<sup>57</sup>

<sup>56</sup> *Thomson v. Davenport*, 9 Barn. & C. 78, 86.

<sup>57</sup> *Fradley v. Hyland*, 37 Fed. 49; *Clealand v. Walker*, 11 Ala. 1058, 46 Am. Dec. 238; *Bush v. Devine*, 5 Har. (Del.) 375; *Ketchum v. Verdell*, 42 Ga. 534, 539; *Thomas v. Atkinson*, 38 Ind. 248; *Emerson v. Patch*, 123 Mass. 541; *Knapp v. Simon*, 96 N. Y. 289; *McCullough v. Thompson*, 45 N. Y. Super. Ct. 449; *Laing v. Butler*, 37 Hun (N. Y.) 144. In this case the court says: "Where the purchase has been made by the agent upon credit, authorized by the principal, but without disclosing his name, and payment is subsequently made by the principal to the agent in good faith before the agency is disclosed to the seller, then the principal would not be liable."

But see *Hyde v. Wolf*, 4 La. 234, 23 Am. Dec. 484, holding that the principal when discovered is bound, though the agent buys in his own name, unless the principal was induced to settle with the agent, in consequence of a receipt or other documents furnished

(b) **Qualification of this doctrine.**—The above stated doctrine has been qualified by the later cases in England, and it is now held there that the other party to the contract may sue the undisclosed principal when discovered, notwithstanding the principal has paid or settled with the agent, and will therefore sustain a loss if held liable to the other party, unless the principal was led to make such payment or settlement by the conduct of the other party. In the leading case on this view,<sup>58</sup> the language of Lord Tenderden above quoted was said to be mere dictum, as was in fact the case, and was held to be too broad. The exception was in this case expressly restricted to cases in which the payment by the principal to the agent was induced by some conduct on the part of the other party, so that it would be unjust to hold him liable. The case was one in which the plaintiffs had sold goods to a person who was buying for an undisclosed principal. Parke, B., in stating the exception, said: "If the conduct of the seller would make it unjust for him to call upon the buyer for the money; as, for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal. It would be unjust for him to do so. But I think there is no case of this kind where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant or to induce him to alter his position."<sup>59</sup>

In a still later English case,<sup>60</sup> a distinction was made in the application of the exception, between cases in which the agent contracts apparently as principal, without disclosing the existence of his principal, and cases in which he profess-

by the seller. And to the same effect *York County Bank v. Stein*, 24 Md. 448; *Brown v. Bankers' & Brokers' Tel. Co.*, 30 Md. 39; *Schepfin v. Dessar*, 20 Mo. App. 569.

<sup>58</sup> *Heald v. Kenworthy*, 10 Exch. 739.

<sup>59</sup> *Heald v. Kenworthy*, 10 Exch. 739.

<sup>60</sup> *Armstrong v. Stokes*, L. R. 7 Q. B. 598.

es to contract for another, but does not disclose the name of his principal, it being held that in the former case the broad rule applies that the principal cannot be sued if he has paid or settled with the agent, irrespective of whether he was induced to do so by conduct of the other party, while in the latter case the principal can be sued, notwithstanding his settlement with the agent, unless it was induced by the conduct of the other party. In a later case, however, this distinction was repudiated, and it was held that the latter rule applies alike in both cases.<sup>61</sup> So that the rule in England now may be said to be that where an agent contracts in his own name, for an undisclosed or unnamed principal, and the latter has been induced, by the conduct of the party dealing with the agent, to reasonably believe that the agent has settled with such third party, or that the third party has given exclusive credit to the agent, and by reason of such belief the principal settles with the agent, so that it would be to his prejudice to again hold him liable, the third party cannot bring an action against him on such contract.<sup>62</sup> But a mere reasonable delay by the third party to proceed against the principal does not furnish a sufficient inducement to the principal to settle with the agent, unless there are other special circumstances which taken together with the delay, mislead the principal.<sup>63</sup>

(c) **Summary.**—No doubt all courts agree that the other party to a contract cannot maintain an action against an undisclosed principal, where he has by his own representations, unreasonable delay, or other conduct, led or induced the principal to pay or settle with the agent.<sup>64</sup>

<sup>61</sup> *Irvine v. Watson*, 5 Q. B. Div. 414. See, also, *Davison v. Donaldson*, 9 Q. B. Div. 623.

<sup>62</sup> *Heald v. Kenworthy*, 10 Exch. 739; *Smyth v. Anderson*, 7 C. B. 21; *Wyatt v. Hertford*, 3 East, 147; *MacClure v. Schemell*, 20 Wkly. Rep. 168; *Horsfall v. Fauntleroy*, 10 Barn. & C. 755.

<sup>63</sup> *Davison v. Donaldson*, 9 Q. B. Div. 623; *Irvine v. Watson*, 5 Q. B. Div. 102. But see *Smethurst v. Mitchell*, 1 El. & El. 623.

<sup>64</sup> *Heald v. Kenworthy*, 10 Exch. 739 (citing and approving on this ground, *Wyatt v. Marquis of Hertford*, 3 East, 147; *Kymer v. Suwercropp*, 1 Camp. 110; *Smyth v. Anderson*, 7 C. B. 21); *Davison v. Donaldson*, 9 Q. B. Div. 623.

Although the rule now followed by the English courts is a just and reasonable one, it certainly seems that the rule followed in the majority of American cases is equally as, if not more, just and reasonable. The third party deals, throughout the transaction, with the agent as principal, and trusts to his credit, and it is not making his position otherwise than he supposed it to be, by requiring him to continue to look to such agent for his satisfaction, where the principal has in good faith paid or settled his accounts with the agent, before he was discovered. It is true that he is thereby deprived of his right to go against the principal also, but he is placed in no worse position than he had when he entered into the transaction with the agent, as principal. Of course, if the principal does not make such settlement with the agent in good faith, but for the express purpose of defrauding the third party of his right to hold him liable, a different question would arise; and the principal might still be held liable in such a case.

**§ 461. Exception in case of election to hold agent.**

A second exception to the general rule allowing an action against an undisclosed principal is where the other party to the contract has made his election to hold the agent. When a person acts for an undisclosed principal in contracting with another, the latter may hold the agent as the sole contracting party,<sup>65</sup> or he may hold the principal. But he cannot hold both. Nor can he proceed first against the agent, and then, if he fails to collect his claim, proceed against the principal. He simply has an option to proceed against either the one or the other and when he has once made his election to hold the agent, he cannot proceed against the principal.<sup>66</sup> And this rule applies, as shall be seen in a subse-

<sup>65</sup> Post, § 568.

<sup>66</sup> *Thompson v. Davenport*, 9 Barn. & C. 78; *Addison v. Gandasequi*, 4 Taunt. 574; *Paterson v. Gandasequi*, 15 East, 62; *Kendall v. Hamilton*, 4 App. Cas. 504; *Pope v. Meadow Spring Distilling Co.*, 20 Fed. 35; *Clealand v. Walker*, 11 Ala. 1053, 46 Am. Dec. 238; *Jones v. Aetna Ins. Co.*, 14 Conn. 501; *Bush v. Devine*, 5 Har. (Del.) 375; *Hyde v. Wolf*, 4 La. 234, 23 Am. Dec. 484; *Brown v. Bankers' & Brokers' Tel. Co.*, 30 Md. 39; *Kingsley v. Davis*, 104

quent chapter,<sup>67</sup> not only where the principal is undisclosed or unnamed, but also where the principal is known to the third party. As shall there be seen, credit may be given to the agent instead of the principal, although the transaction is carried on in behalf of a known principal. Of course, if the principal is known and the act is done in his behalf, the presumption is that credit is given to, or it is intended to charge, him, but this presumption is not conclusive, and it may be shown that the third party gave exclusive credit to the agent.<sup>68</sup>

**§ 462. What facts constitute an election.**

No general rule can be stated as to what shall be an election in any given case. An election to hold the agent liable so as to bar an action against the principal may be established by showing an express statement by the other party to that effect, but this is not necessary; it may be inferred from his conduct, such as his words or acts, or other circumstances surrounding the case. But the conduct relied upon, to be conclusive, should be such as to show a final and unequivocal election; or in other words should be such as would lead a reasonably prudent man, acting in good faith, to conclude that the third party had elected to hold the agent only. In general, the question of election is one of fact to be determined by the jury, with proper instructions from the court,<sup>69</sup> but there may no doubt be cases in which the act of the third party in regard to his dealings with or proceedings against the agent, with full knowledge of the facts and freedom of choice, may be such as to preclude him in

Mass. 178; *Silver v. Jordan*, 136 Mass. 319; *Schepflin v. Dessar*, 20 Mo. App. 569; *Chandler v. Coe*, 54 N. H. 561; *Booth v. Barron*, 29 App. Div. (N. Y.) 66; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Maple v. Railroad Co.*, 40 Ohio St. 313, 48 Am. Rep. 685; *Beymer v. Bonsall*, 79 Pa. 298; *Ahrens v. Cobb*, 9 Humph. (Tenn.) 643.

<sup>67</sup> See post, § 566.

<sup>68</sup> See post, § 565.

<sup>69</sup> *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Calder v. Dobell*, L. R. 6 C. P. 486; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51.

Although the rule now followed by the English courts is a just and reasonable one, it certainly seems that the rule followed in the majority of American cases is equally as, if not more, just and reasonable. The third party deals, throughout the transaction, with the agent as principal, and trusts to his credit, and it is not making his position otherwise than he supposed it to be, by requiring him to continue to look to such agent for his satisfaction, where the principal has in good faith paid or settled his accounts with the agent, before he was discovered. It is true that he is thereby deprived of his right to go against the principal also, but he is placed in no worse position than he had when he entered into the transaction with the agent, as principal. Of course, if the principal does not make such settlement with the agent in good faith, but for the express purpose of defrauding the third party of his right to hold him liable, a different question would arise; and the principal might still be held liable in such a case.

**§ 461. Exception in case of election to hold agent.**

A second exception to the general rule allowing an action against an undisclosed principal is where the other party to the contract has made his election to hold the agent. When a person acts for an undisclosed principal in contracting with another, the latter may hold the agent as the sole contracting party,<sup>65</sup> or he may hold the principal. But he cannot hold both. Nor can he proceed first against the agent, and then, if he fails to collect his claim, proceed against the principal. He simply has an option to proceed against either the one or the other and when he has once made his election to hold the agent, he cannot proceed against the principal.<sup>66</sup> And this rule applies, as shall be seen in a subse-

<sup>65</sup> Post, § 568.

<sup>66</sup> *Thompson v. Davenport*, 9 Barn. & C. 78; *Addis* sequi, 4 Taunt. 574; *Paterson v. Gandasequi*, 15 E. v. Hamilton, 4 App. 504; *Pope v. Meadows* Co., 20 Fed. 35; *Cleal* Walker, 11 Ala. Jones v. Aetna Ins. Conn. 501; (Del.) 375; *Hyde* 4 La. 224. Bankers' & Broker 30 M.





point of law from afterwards proceeding against the principal.<sup>70</sup>

It is necessary, however, before the third party can be held to have made an election, that he should have a full knowledge of all the facts, and of his rights in the case. He must have knowledge not only of the agency, but also of the name and circumstances of the principal, and of the fact that he has a right to elect whom he will hold liable. He cannot be held to have made an election where he gives credit to the agent, if he did not know that he could elect, or if he did not know the principal.<sup>71</sup> Thus, where the third party does not know that the agent is acting for another, or if he knows that fact, but does not know who the principal is, he cannot be held to have made an election and be concluded from holding the principal liable, when discovered, by the fact that he accepts promissory notes or acceptances of the agent in payment for goods sold to him,<sup>72</sup> nor by the fact that he debited the agent with the goods so sold.<sup>73</sup> Where, however, the party dealing with the agent knows of the principal's liability and of his own right to hold him liable, but he nevertheless accepts the agent's promissory note in payment, without doing anything to show an intention to hold the principal liable, he thereby elects to hold

<sup>70</sup> *Curtis v. Williamson*, L. R. 10 Q. B. 57.

<sup>71</sup> *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Dunn v. Newton*, 1 Cab. & E. 278; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *Henderson v. Mayhew*, 2 Gill (Md.) 393, 41 Am. Dec. 434.

<sup>72</sup> *Robinson v. Read*, 9 Barn. & C. 449; *Marsh v. Pedder*, 4 Camp. 257; *Pope v. Meadow Spring Distilling Co.*, 20 Fed. 35; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 176; *Keller v. Singleton*, 69 Ga. 703; *Chandler v. Coe*, 54 N. H. 561.

The fact that an agent, in signing his principal's name to a note, added thereto a middle initial, which made the name identical with his own, does not justify a legal conclusion that the payee of the note gave credit to the agent and accepted his individual note as evidence of his personal liability. *Clealand v. Walker*, 11 Ala. 1058, 46 Am. Dec. 238.

<sup>73</sup> *Thomson v. Davenport*, 9 Barn. & C. 78; *Guest v. Burlington Opera-House Co.*, 74 Iowa, 457; *Raymond v. Crown & Eagle Mills*, 2 Metc. (Mass.) 319.

the agent alone, and he cannot afterwards go against the principal.<sup>74</sup>

It has been held that the fact that the other party has brought an action against the agent, after the principal is discovered, although evidence tending to show an election, is not conclusive, so as to necessarily constitute an election.<sup>75</sup> Nor is proof that the party has recovered a judgment against the agent, which is unsatisfied, conclusive proof of an election.<sup>76</sup> "The doctrine of election, in its general application, is inequitable and harsh, and it should not be applied to an action brought upon a contract made by an agent without disclosing his principal, until the debt has been satisfied by one or the other."<sup>77</sup>

**§ 463. Exception in case of contracts under seal.**

The doctrine allowing an action against an undisclosed principal does not apply to contracts under seal. It is well settled, at common law, that no person can sue or be sued

<sup>74</sup> Paterson v. Gandasequi, 15 East, 62; Addison v. Gandasequi, 4 Taunt. 574; Curtis v. Williamson, L. R. 10 Q. B. 57; Clealand v. Walker, 11 Ala. 1058, 46 Am. Dec. 238; Palge v. Stone, 10 Metc. (Mass.) 160, 43 Am. Dec. 420; French v. Price, 24 Pick. (Mass.) 13; James v. Bixby, 11 Mass. 34; Green v. Tanner, 8 Metc. (Mass.) 411; Schipflin v. Dessar, 20 Mo. App. 569; Ames Packing & Prov. Co. v. Tucker, 8 Mo. App. 95.

<sup>75</sup> Curtis v. Williamson, L. R. 10 Q. B. 57; Ferry v. Moore, 18 Ill. App. 135; Raymond v. Crown & Eagle Mills, 2 Metc. (Mass.) 319; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51. And especially is this so where the fact of agency is not discovered until after suit is brought against the agent. Steele Smith Grocery Co. v. Potthast, 109 Iowa, 413.

<sup>76</sup> Maple v. Railroad Co., 40 Ohio St. 313, 48 Am. Rep. 685; Beymer v. Bonsall, 79 Pa. 298; Tew v. Wolfsohn, 77 App. Div. (N. Y.) 454. And see Jones v. Aetna Ins. Co., 14 Conn. 501. But see Kingsley v. Davis, 104 Mass. 178; Ahrens v. Cobb, 9 Humph. (Tenn.) 643; Priestly v. Fernie, 3 Hurl. & C. 977, and Kendall v. Hamilton, 4 App. Cas. 504, holding that a judgment against an agent who contracts in his own name, though unsatisfied, is a bar to an action against the principal on the contract. Though if the judgment is afterwards set aside the principal may then be held liable. Partington v. Hawthorne, 52 J. P. 807.

<sup>77</sup> Tew v. Wolfsohn, 77 App. Div. (N. Y.) 458.

upon a contract under seal except the parties who are named or described in the instrument; and under this rule where a person enters into a contract under seal in his own name, but as agent for an undisclosed principal, whether the existence of the principal is undisclosed, or his name merely, the other party cannot maintain an action against the principal.<sup>78</sup> The rule does not apply, of course, where a seal is unnecessarily affixed to an instrument, so that it may be rejected as surplusage, and the instrument treated as a simple contract; or as the rule has been stated: "When a sealed contract has been executed in such form that it is, in law, the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face and he has received the benefit of performance by the other party and has ratified and confirmed it by acts in pais, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement."<sup>79</sup> But it is held that where the instrument is one that was required at common law to be under seal, as a deed, bond, etc., the fact that a statute renders it unnecessary to place a seal upon it does not affect this rule of holding the agent alone liable thereon, as the statute merely dispenses with a formality, and does not undertake to give a deed executed without a seal a different status from what it would have had before if executed with a seal.<sup>80</sup>

<sup>78</sup> *Pickering's Claim*, 6 Ch. App. 525; *Chesterfield Colliery Co. v. Hawkins*, 3 Hurl. & C. 677; *Clarke v. Courtney*, 5 Pet. (U. S.) 350; *Badger Silver Min. Co. v. Drake*, 88 Fed. 48, 31 C. C. A. 378; *Jones v. Morris*, 61 Ala. 518; *Sanders v. Partridge*, 108 Mass. 556; *Borchertling v. Katz*, 37 N. J. Eq. 150; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Kiersted v. Orange & A. R. Co.*, 69 N. Y. 343, 25 Am. Rep. 199; *Tuthill v. Wilson*, 90 N. Y. 423; *Sanger v. Warren*, 91 Tex. 472, 66 Am. St. Rep. 913. And see ante, §§ 293-309.

<sup>79</sup> *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Moore v. Granby Min. & Smelting Co.*, 80 Mo. 86; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Dubois v. Delaware & Hudson Canal Co.*, 4 Wend. (N. Y.) 285; *Lancaster v. Knickerbocker Ice Co.*, 153 Pa. 427; *Stowell v. Eldred*, 39 Wis. 614. 90 Mich. 392

<sup>80</sup> *Sanger v. Warren*, 91 Tex. 472, 66 Am. St. Rep. 913.

**§ 464. Exception in the case of negotiable instruments.**

Nor does the general rule that an undisclosed principal may be sued apply to negotiable instruments. By a technical but well established rule of the law merchant, only those persons who are parties to a negotiable instrument can be sued upon it. If, therefore, a person signs a negotiable note, draws or accepts a bill, or indorses a bill or note, in his own name, but in fact as agent for an undisclosed principal, he alone is liable, and the principal cannot be sued. This is true whether the existence of the principal, or merely his name, is undisclosed.<sup>81</sup>

"Though," under such a statute, "a seal may not now be necessary, to a conveyance of a legal estate in lands, yet the instrument, the deed of conveyance, which it must still be termed, though shorn of its dignity of a seal, retains all the operation and effect of a deed sealed at common law. Its covenants may be as comprehensive, and whatever they may be, are as obligatory, and its recitals are as incapable of being gainsaid, as if it were sealed with the greatest formality. The estoppel which a sealed instrument, or its covenants, created at common law, is now claimed by the appellee, shall be attached to the conveyance by the agents of the appellant. And we cannot doubt that the estoppel which at common law grew out of the covenants, or the recitals of a sealed instrument, attaches now to an unsealed conveyance of the legal estate in lands." *Jones v. Morris*, 61 Ala. 524.

<sup>81</sup> *Ducarrey v. Gill*, *Moody & M.* 450; *Siffkin v. Walker*, 2 Camp. 308; *Dessau v. Bours*, 1 McAll. 20, Fed. Cas. No. 3,825; *Heaton v. Myers*, 4 Colo. 59; *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225; *Graham v. Campbell*, 56 Ga. 258; *Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 175; *Kenyon v. Williams*, 19 Ind. 45; *American Ins. Co. v. Stratton*, 59 Iowa, 696; *Thurston v. Mauro*, 1 Greene (Iowa) 231; *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Fuller v. Hooper*, 3 Gray (Mass.) 341; *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396; *Brown v. Parker*, 7 Allen (Mass.) 337; *Slawson v. Loring*, 5 Allen (Mass.) 342, 81 Am. Dec. 750; *Bartlett v. Hawley*, 120 Mass. 92; *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, 24 Am. St. Rep. 351; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *De Witt v. Walton*, 9 N. Y. 571; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Rochester Bank v. Monteath*, 1 Denio (N. Y.) 405, 43 Am. Dec. 681; *Collins v. Buckeye State Ins. Co.*, 17 Ohio St. 215, 93 Am. Dec. 612; *Anderton v. Shoup*, 17 Ohio St. 125; *Arnold v. Sprague*, 34 Vt. 402; *Rand v. Hale*, 3 W. Va. 495, 100 Am. Dec. 761.

For a full treatment of this subject see ante, §§ 310-330, in reference to execution of negotiable instruments by an agent.

In applying this exception, however, care must be taken to distinguish cases in which the paper is not clearly made by the agent alone, but there is an ambiguity on its face as to whether it was intended to bind the agent or the principal. In such a case parol evidence is admissible to remove the ambiguity and show the intention.<sup>82</sup> Most of the courts hold that the mere addition of the word "agent," "cashier," etc., to a name signed to negotiable paper, does not create an ambiguity, so as to allow parol evidence that it was intended to bind another as principal.<sup>83</sup>

### III. EFFECT OF ADMISSIONS AND DECLARATIONS OF AGENT.

#### § 465. Inadmissibility to prove fact of agency or the nature or extent of authority.

As has been seen in a former chapter, when parol evidence is admissible to prove the fact of agency or the nature or extent of the authority conferred upon an agent, the agent himself is a competent witness to prove the same.<sup>84</sup> It is very different, however, when it is sought to introduce for such purpose the admissions or declarations of the agent or alleged agent. Nothing is better settled than the rule that the admissions and declarations of an alleged agent or of an agent, not known to and acquiesced in by the principal or alleged principal, are not admissible for the purpose, either of proving the fact of agency, or of establishing the nature or extent of his authority.<sup>85</sup> To hold otherwise would be

<sup>82</sup> See ante, §§ 327-330.

<sup>83</sup> See cases cited ante, note 81. And see ante, § 313 et seq.

A different rule applies where the word "agent," "cashier," etc., follows the name of the payee. See ante, § 313 et seq.

<sup>84</sup> Ante, § 66.

<sup>85</sup> *United States*: *James v. Stookey*, 1 Wash. C. C. 330, Fed. Cas. No. 7,184; *Union Guaranty & Trust Co. v. Robinson*, 79 Fed. 420.

*Alabama*: *Parker v. Bond*, 121 Ala. 529; *Tanner & D. Engine Co. v. Hall*, 86 Ala. 305; *Wailles v. Neal*, 65 Ala. 59.

*Arkansas*: *City Elect. St. R. Co. v. First Nat. Bank*, 62 Ark. 33, 54 Am. St. Rep. 282; *Carter v. Burnham*, 31 Ark. 212; *Howcott v. Kilbourn*, 44 Ark. 213.

*California*: *Van Dusen v. Star Quartz Min. Co.*, 36 Cal. 571, 95 Am. Dec. 209; *Petterson v. Stockton & T. R. Co.*, 134 Cal. 244; *Sav-*

to allow a person to establish an agency for another, merely by holding himself out as agent, or to allow one who is the agent of another for a certain purpose to extend his authority by his own declarations or acts, irrespective of the acts of the principal.

*ings & Loan Soc. v. Gerichten*, 64 Cal. 521; *Smith v. Liverpool & L. & G. Ins. Co.*, 107 Cal. 432.

*Colorado*: *Omaha & Grant Smelting & Refining Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185; *Union Coal Co. v. Edman*, 16 Colo. 438.

*Connecticut*: *Fitch v. Chapman*, 10 Conn. 8.

*Georgia*: *Americus Oil Co. v. Gurr*, 114 Ga. 624; *Grand Rapids School Furniture Co. v. Morel*, 110 Ga. 321; *Wynne v. Stevens*, 101 Ga. 808; *Mapp v. Phillips*, 32 Ga. 72.

*Illinois*: *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401; *Proctor v. Tows*, 115 Ill. 138; *McClure v. Osborne*, 86 Ill. App. 465; *Osgood v. Pacey*, 23 Ill. App. 116; *Currie v. Syndicate Des Cultivator Des Oignons a Fleur*, 104 Ill. App. 165.

*Indiana*: *Breckenridge v. McAfee*, 54 Ind. 141; *Wabash & Erie Canal v. Bledsoe*, 5 Ind. 133.

*Iowa*: *Butler v. Chicago, B. & Q. R. Co.*, 87 Iowa, 206; *Hensinkveld v. St. Paul Fire & M. Ins. Co.*, 106 Iowa, 229; *Wood Mowing & Reaping Mach. Co. v. Crow*, 70 Iowa, 340; *Joseph Schlitz Brewing Co. v. Barlow*, 107 Iowa, 252.

*Kansas*: *Leu v. Mayer*, 52 Kan. 419; *Kane & Co. v. Barstow*, 42 Kan. 465, 16 Am. St. Rep. 490; *Howe Mach. Co. v. Clark*, 15 Kan. 492; *McCormick v. Roberts*, 36 Kan. 552.

*Louisiana*: *Dawson v. Landreaux*, 29 La. Ann. 363; *Lafourche Transp. Co. v. Pugh*, 52 La. Ann. 1517; *State v. Harris*, 51 La. Ann. 1105.

*Maine*: *Eaton v. Granite State Provident Ass'n*, 89 Me. 58.

*Maryland*: *Harker v. Dement*, 9 Gill, 7, 52 Am. Dec. 670.

*Massachusetts*: *Gould v. Norfolk Lead Co.*, 9 Cush. 338, 57 Am. Dec. 50; *Stollenwerck v. Thacher*, 115 Mass. 224; *Mussey v. Beecher*, 3 Cush. 511; *Richmond Iron Works v. Hayden*, 132 Mass. 190.

*Michigan*: *Hatch v. Squires*, 11 Mich. 185; *Three Rivers Nat. Bank v. Gilchrist*, 83 Mich. 253; *Gore v. Canada Life Assur. Co.*, 119 Mich. 136; *Bond v. Pontiac, O. & P. A. R. Co.*, 62 Mich. 643, 4 Am. St. Rep. 885.

*Minnesota*: *Sencerbox v. McGrade*, 6 Minn. 484; *Woodbury v. Larned*, 5 Minn. 339.

*Mississippi*: *Kinnare v. Gregory*, 55 Miss. 612; *Memphis & Vicksburg R. Co. v. Cocke*, 64 Miss. 713.

*Missouri*: *Mitchum v. Dunlap*, 98 Mo. 418; *Caldwell v. Henry*, 76 Mo. 254; *Craighead v. Wells*, 21 Mo. 404. Nor are declarations,

This principle, of course, excludes evidence of the conduct of an agent or alleged agent, not shown to have been known to and acquiesced in by the principal or alleged principal, for the purpose of establishing an agency, or the nature or extent of authority. In a Kansas case the court instructed the jury that if they believed the conduct of the agent was such as to lead a third person to believe that he had authority to act as agent, and the third person acted upon such belief, the principal would be bound; but this instruction was held erroneous, on appeal, the court saying, "that the agency or authority cannot be proven by the unauthorized or unaccepted conduct of the alleged agent. \* \* \*

tending to disprove the fact of agency, admissible in favor of the person alleged to be his principal. *Peck v. Ritchey*, 66 Mo. 114.

*Montana*: *Nyhart v. Pennington*, 20 Mont. 158; *Spelman v. Gold Coin Min. & Mill. Co.*, 26 Mont. 76, 91 Am. St. Rep. 402.

*Nebraska*: *Anheuser-Busch Brewing Ass'n v. Murray*, 47 Neb. 627.

*New Hampshire*: *Bohanan v. Boston & M. R.*, 70 N. H. 526; *Wendell v. Abbott*, 45 N. H. 349.

*New Jersey*: *Gifford v. Landrine*, 37 N. J. Eq. 127.

*New York*: *Ellis v. Messervie*, 11 Paige, 467; *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. Dec. 315; *Booth v. Newton*, 46 App. Div. 175; *Reid v. Horn*, 25 Misc. 523.

*North Carolina*: *Taylor v. Hunt*, 118 N. C. 168; *Royal v. Sprinkle*, 46 N. C. (1 Jones) 505.

*North Dakota*: *Gordon v. Vermont Loan & Trust Co.*, 6 N. D. 454; *Q. W. Loverin-Browne Co. v. Bank of Buffalo*, 7 N. D. 569.

*Pennsylvania*: *Lawall v. Groman*, 180 Pa. 532, 57 Am. St. Rep. 662; *Pepper v. Cairns*, 133 Pa. 114, 19 Am. St. Rep. 625; *Baltimore & O. Employees' Relief Ass'n v. Post*, 122 Pa. 579, 9 Am. St. Rep. 547; *Central Pa. Tel. & Supply Co. v. Thompson*, 112 Pa. 118.

*Rhode Island*: *Paulton v. Keith*, 23 R. I. 164, 91 Am. St. Rep. 624.

*South Carolina*: *Renneker v. Warren*, 17 S. C. 139; *Ehrhardt v. Breeland*, 57 S. C. 142.

*Texas*: *Coleman v. Colgate*, 69 Tex. 88; *Noel v. Denman*, 76 Tex. 306; *Latham v. Pledger*, 11 Tex. 439.

*Vermont*: *Dickerman v. Quincy Mut. F. Ins. Co.*, 67 Vt. 609.

*Virginia*: *Fisher v. White*, 94 Va. 236; *Hoge v. Turner*, 96 Va. 624.

*Washington*: *Comegys v. American Lumber Co.*, 8 Wash. 661; *Gregory v. Loose*, 19 Wash. 599.

*West Virginia*: *Rosendorf v. Poling*, 48 W. Va. 621.

*Wisconsin*: *Newell v. Clapp*, 97 Wis. 104.



The fact of agency cannot be established by the declarations of the alleged agent, and testimony of his acts or conduct is of no greater value for that purpose.”<sup>86</sup>

**§ 466. Admissibility against principal after proof of agency and authority.**

While the admissions or declarations of an agent or alleged agent are not admissible in evidence for the purpose of establishing the fact of agency, or the nature or extent of his authority, such admissions and declarations are admissible against the principal, under certain circumstances, after proof of the agency, for the purpose of establishing facts as against the principal, just as like admissions or declarations of the principal himself would be admissible. The general rule is that, after proof of the fact of an agency, admissions and declarations of the agent are admissible against the principal to precisely the same extent as if made by himself, if they were made in regard to a matter which was within the scope of the agent's authority, and if they constituted a part of the *res gestae* of a transaction in which the agent was engaged for the principal.<sup>87</sup> Such declara-

<sup>86</sup> *Leu v. Mayer*, 52 Kan. 419.

<sup>87</sup> *United States: Dowdall v. Pa. R. Co.*, 13 Blatchf. 403, Fed. Cas. No. 4,038; *Vicksburg & M. R. v. O'Brien*, 119 U. S. 99; *Jack v. Mut. Reserve Fund L. Ass'n*, 113 Fed. 49.

*Alabama: Henry v. Northern Bank*, 63 Ala. 527; *Cunningham v. Cochran*, 18 Ala. 479, 52 Am. Dec. 230; *Mitcham v. Schuessler*, 98 Ala. 635.

*Arkansas: Campbell v. Hastings*, 29 Ark. 512.

*California: Bullock v. Consumers' Lumber Co. (Cal.)* 31 Pac. 367; *Elledge v. National City & O. R. Co.*, 100 Cal. 282, 38 Am. St. Rep. 290; *Innis v. Steamer Senator*, 1 Cal. 459, 54 Am. Dec. 305.

*Colorado: Edmunds v. Curtis*, 8 Colo. 605.

*Connecticut: Perkins v. Burnet*, 2 Root, 30; *Mather v. Phelps*, 2 Root, 150, 1 Am. Dec. 65; *Willard v. Buckingham*, 36 Conn. 395; *Charter v. Lane*, 62 Conn. 121; *Thill v. Perkins Electric Lamp Co.*, 63 Conn. 478.

*Georgia: Planter's Rice-Mill Co. v. Olmstead*, 78 Ga. 586; *Coweta Falls Mfg. Co. v. Rogers*, 19 Ga. 416, 65 Am. Dec. 602; *Claffin & Co. v. Ballance*, 91 Ga. 411.

*Illinois: Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297, 68 Am. Dec. 594; *Linblom v. Ramsey*, 75 Ill. 246; *Merchants' Despatch*

tions or admissions of an agent, however, are not binding on the principal in such a sense as to preclude him from proving that the facts were otherwise than as stated by the agent,

*Transp. Co. v. Leysor*, 89 Ill. 43; *Matzenbaugh v. People*, 194 Ill. 108.

*Indiana*: *Rowell v. Klein*, 44 Ind. 290; *Lafayette & I. R. Co. v. Ehman*, 30 Ind. 83; *Mutual Ben. L. Ins. Co. v. Cannon*, 48 Ind. 264; *Rahm v. Deig*, 121 Ind. 283; *Ohio & M. R. Co. v. Levy*, 134 Ind. 343.

*Iowa*: *Wilson Sewing Mach. Co. v. Sloan*, 50 Iowa, 367; *Sweetland v. Illinois & M. Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *St. Louis Refrigerator & Wooden Gutter Co. v. Vinton Washing Mach. Co.*, 79 Iowa, 239, 18 Am. St. Rep. 366; *Deere v. Bagley*, 80 Iowa, 197; *Gault v. Sickles*, 85 Iowa, 266.

*Kansas*: *Central Branch U. P. R. Co. v. Butman*, 22 Kan. 639; *Kilpatrick-Koch Dry-Goods Co. v. Kahn*, 53 Kan. 274.

*Maine*: *Haven v. Brown*, 7 Me. 421, 22 Am. Dec. 208; *Hammat v. Emerson*, 27 Me. 308, 46 Am. Dec. 598; *Burnham v. Ellis*, 39 Me. 319, 63 Am. Dec. 625; *Burnham v. Grand Trunk R. Co.*, 63 Me. 298.

*Maryland*: *Franklin Bank v. Pa., D. & M. Steam Nav. Co.*, 11 Gill & J. 28, 33 Am. Dec. 687; *City Bank v. Bateman*, 7 Har. & J. 104; *Marshall v. Haney*, 4 Md. 498, 59 Am. Dec. 92; *Smith v. Cooke*, 31 Md. 174, 100 Am. Dec. 58.

*Massachusetts*: *Tuttle v. Brown*, 4 Gray, 457, 64 Am. Dec. 80; *McGenness v. Adriatic Mills*, 116 Mass. 177; *Baring v. Clark*, 19 Pick. 220; *Stiles v. Western R. Co.*, 8 Metc. 44, 41 Am. Dec. 486; *Rowe v. Canney*, 139 Mass. 41.

*Michigan*: *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Oakland County Sav. Bank v. State Bank*, 113 Mich. 284, 67 Am. St. Rep. 463; *Pittsburgh & L. S. Iron Co. v. Kirkpatrick*, 92 Mich. 252.

*Minnesota*: *Lowry v. Harris*, 12 Minn. 255; *Van Doren v. Bailey*, 48 Minn. 305.

*Mississippi*: *Dickman v. Williams*, 50 Miss. 500.

*Missouri*: *Robinson v. Walton*, 58 Mo. 380; *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234, 33 Am. St. Rep. 439.

*Nebraska*: *McCormick v. Demary*, 10 Neb. 515; *Bowman v. Griffith*, 35 Neb. 361.

*New Hampshire*: *Burnside v. Grand Trunk R. Co.*, 47 N. H. 554, 93 Am. Dec. 474; *Batchelder v. Emery*, 20 N. H. 165; *Webster v. Clark*, 30 N. H. 245.

*New Jersey*: *Ashmore v. Pa. Steam Towing & Transp. Co.*, 38 N. J. Law, 13; *Reed v. Vancleve*, 27 N. J. Law, 352, 72 Am. Dec. 369; *Agricultural Ins. Co. v. Potts*, 55 N. J. Law, 158; *Callaway v. Equitable Trust Co.*, 67 N. J. Law, 44.

*New York*: *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Spelman v. Fisher Iron Co.*, 56 Barb. 151; *Sandford v. Handy*, 23 Wend. 260.

*North Carolina*: *Pinnix v. McAdoo*, 68 N. C. 56; *Williams v. Wil-*

though, to attain this result, he cannot prove declarations of the agent differing from his testimony on the trial.<sup>88</sup>

From the above statement it will be noticed that to render the declarations or admissions of an agent admissible against his principal, there are these three essentials, which will be dealt with in the following sections:

(1) The fact of agency must be established.

(2) The admission or declaration must have been made in regard to a matter which was within the scope of the agent's authority. Ratification may be equivalent to antecedent authority, for this, as for other purposes.

(3) The admission or declaration must have been made at such a time, and must have been of such a character, as to constitute a part of the *res gestae* of a transaction in which the agent was engaged for the principal.

It is also necessary that the admission or declaration should be one of fact, as distinguished from a mere expression of an opinion, as the latter cannot be admitted against the principal as part of the *res gestae*.<sup>89</sup>

#### § 467. Necessity for proof of agency—Scope of authority.

In the first place, to render the admissions and declara-

*Hamson*, 28 N. C. (6 Ired.) 281, 45 Am. Dec. 494; *Albert v. Mut. L. Ins. Co.*, 122 N. C. 92, 65 Am. St. Rep. 693; *Holt v. Johnson*, 129 N. C. 138.

*Ohio*: *Hogg v. Zanesville Mfg. Co.*, *Wright*, 139.

*Pennsylvania*: *Dick v. Cooper*, 24 Pa. 217, 64 Am. Dec. 652; *Kilpatrick v. Home B. & L. Ass'n*, 119 Pa. 30; *Stockton v. Demuth*, 7 Watts, 39, 32 Am. Dec. 735; *Sidney School Furniture Co. v. Warsaw School Dist.*, 122 Pa. 494, 9 Am. St. Rep. 124; *Baker v. Westmoreland & C. Natural Gas Co.*, 157 Pa. 593.

*South Carolina*: *Simmons Hardware Co. v. Bank of Greenwood*, 41 S. C. 177, 44 Am. St. Rep. 700; *Moore v. Dickinson*, 39 S. C. 441.

*Tennessee*: *Moore v. Bettis*, 11 Humph. 67, 53 Am. Dec. 771.

*Texas*: *Belo v. Fuller*, 84 Tex. 450; *Goodbar v. City Nat. Bank*, 78 Tex. 461; *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125.

*Virginia*: *Merchants' Bank of Baltimore v. Goddin*, 76 Va. 503; *Continental Ins. Co. v. Kasey*, 25 Grat. 268, 18 Am. Rep. 681.

<sup>88</sup> *Stockton v. Demuth*, 7 Watts (Pa.) 39, 32 Am. Dec. 735.

<sup>89</sup> *Ft. Smith Oil Co. v. Slover*, 58 Ark. 168; *Wood River Bank v. Kelley*, 29 Neb. 590; *Lane v. Bryant*, 9 Gray (Mass.) 245, 69 Am. Dec. 282.

tions of a person admissible against another on the ground of agency, it is necessary that the agency be established. And as has been seen, an agency cannot be established by the declarations or admissions of the alleged agent.<sup>90</sup> It should be submitted to the jury to find, in the first place, whether the agency is proved. If so, then all he did and said in the execution of his agency is admissible evidence, and binds the principal; otherwise it should be excluded from their consideration in making up their verdict.<sup>91</sup> But proof of agency alone is not enough. It must further appear that the admission or declaration was made in regard to some matter which was within the scope of the agent's authority, otherwise it is no more admissible against the principal than the admission or declaration of a mere stranger would be.<sup>92</sup>

<sup>90</sup> Ante, § 465.

<sup>91</sup> *Coweta Falls Mfg. Co. v. Rogers*, 19 Ga. 416, 65 Am. Dec. 602; *Moore v. Bettis*, 11 Humph. (Tenn.) 67, 53 Am. Dec. 771.

<sup>92</sup> *Ellis v. Thompson*, 3 Mees. & W. 445; *Barnett v. South London Tramways Co.*, 18 Q. B. Div. 815; *American Fur Co. v. United States*, 2 Pet. (U. S.) 358; *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15; *Memphis & C. R. Co. v. Maples*, 63 Ala. 601; *Stanton v. Baird Lumber Co.*, 132 Ala. 635; *Green v. Ophir Copper, S. & G. Min. Co.*, 45 Cal. 522; *Mapp v. Phillips*, 32 Ga. 72; *Chicago, B. & Q. R. Co. v. Lee*, 60 Ill. 501; *Chicago, B. & Q. R. Co. v. Riddle*, 60 Ill. 534; *Reynolds v. Ferree*, 86 Ill. 570; *Rowell v. Klein*, 44 Ind. 290; *Breckenridge v. McAfee*, 54 Ind. 141; *Mundhenk v. Central Iowa R. Co.*, 57 Iowa, 718; *Streeter v. Poor*, 4 Kan. 412; *Barrow v. Brown*, 28 La. Am. 459; *Lamm v. Port Deposit Homestead Ass'n*, 49 Md. 233, 33 Am. Rep. 246; *Fogg v. Pew*, 10 Gray (Mass.) 409, 71 Am. Dec. 662; *Wakefield v. South Boston R. Co.*, 117 Mass. 544; *Stiles v. Western R. Co.*, 8 Metc. (Mass.) 44, 41 Am. Dec. 486; *Corbin v. Adams*, 6 Cush. (Mass.) 93; *Meyer v. Virginia & T. R. Co.*, 16 Nev. 341; *Anderson v. Rome, W. & O. R. Co.*, 54 N. Y. 334; *Leary v. Albany Brew. Co.*, 77 App. Div. (N. Y.) 6; *Williams v. Williamson*, 28 N. C. (6 Ired.) 281, 45 Am. Dec. 494; *Francis v. Edwards*, 77 N. C. 271; *Plymouth County Bank v. Gilman*, 4 S. D. 265, 46 Am. St. Rep. 786; *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.*, 8 Utah, 41; *Jammison v. Chesapeake & O. R. Co.*, 92 Va. 327, 53 Am. St. Rep. 813; *Baltimore & O. R. Co. v. Christie*, 5 W. Va. 325.

Statements made by the secretary of a corporation to the effect that one of its agents was entitled to certain moneys, and that, in any event, he would see that one-half thereof was turned over to

Where the agent's acts will bind the principal, the declarations and admissions accompanying such acts, and respecting the subject-matter, will also bind him, if they constitute part of the *res gestae*. But where he acts without the scope of his authority, or where his declarations and admissions are made in respect to matters beyond his authority, such declarations and admissions are merely hearsay testimony and for that reason cannot be admitted as evidence.<sup>93</sup> And if the agent's declarations are incompetent as evidence against his principal, the fact that they tend to corroborate the evidence of other witnesses does not make them competent.<sup>94</sup>

— **Ratification.** It is not always necessary that the authority shall have existed at the time the admission was made, but it is sufficient if the authority has been conferred by ratification. If a person ratifies a contract made by another as his agent, but without authority, he ratifies it in toto and for all purposes, and declarations or admissions made by the agent in the course of the transaction, if they were part of the *res gestae*, are admissible against him to the same extent as if the contract had been originally authorized.<sup>95</sup>

**§ 468. Necessity that admission or declaration be part of *res gestae*.**

To render the declaration or admission of an agent admissible against the principal, it is not only necessary that it shall have been made in relation to a matter which was within the scope of the agent's authority, but it is also necessary

such agent, are not admissible in evidence, unless shown to have been within the scope of his authority. *Roberts v. Minneapolis Threshing Mach. Co.*, 8 S. D. 579, 59 Am. St. Rep. 777.

<sup>93</sup> *Stiles v. Western R. Co.*, 8 Metc. (Mass.) 46, 41 Am. Dec. 486; *Corbin v. Adams*, 6 Cush. (Mass.) 93; and other cases cited in preceding notes.

<sup>94</sup> *Holt v. Johnson*, 129 N. C. 138.

<sup>95</sup> *Balfour v. Fresno Canal & Irr. Co.*, 123 Cal. 395. The statements of a party's son in respect to notes of the father, without proof of agency, are not admissible in evidence, and will have no binding effect on the father, unless, with a full knowledge of all the facts and circumstances, he has ratified the acts of his son. *Reynolds v. Ferree*, 86 Ill. 571.

that it shall have been made at such a time, and that it shall have been of such a character, as to constitute part of the transaction in which he was acting for the principal.<sup>96</sup> "In cases of agency," said the New York court, "the declarations of the agent are not competent to charge the principal upon proof merely that the relation of principal and agent existed when the declarations were made. It must further appear that the agent, at the time the declarations were made, was engaged in executing the authority conferred upon him, and that the declarations related to, and were connected with the business then depending, so that they constituted a part of the *res gestae*."<sup>97</sup> And in an English case it was said: "What the agent has said may be what constitutes the agreement of the principal, or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation. So, with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But except in one or the other of those ways I do not know, how what is said by an agent can be evidence against his

<sup>96</sup> *Fairlie v. Hastings*, 10 Ves. 123; *Dawson v. Atty*, 7 East, 367; *American Fur Co. v. United States*, 2 Pet. (U. S.) 358; *Lee v. Munroe*, 7 Cranch (U. S.) 366; *Summers v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 372; *Phelps v. James*, 86 Iowa, 398, 41 Am. St. Rep. 497; *Empire Mill Co. v. Lovell*, 77 Iowa, 100, 14 Am. St. Rep. 272; *Roberts v. Burks*, Litt. Sel. Cas. (Ky.) 411, 12 Am. Dec. 325; *Smith v. Cooke*, 31 Md. 174, 100 Am. Dec. 58; *Stiles v. Western R. Co.*, 8 Metc. (Mass.) 44, 41 Am. Dec. 486; *Williamson v. Cambridge R. Co.*, 144 Mass. 148; *Converse v. Blumrich*, 14 Mich. 109, 90 Am. Dec. 230; *Browning v. Hinkle*, 48 Minn. 544, 31 Am. St. Rep. 691; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 42 Am. St. Rep. 738; *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314, 36 Am. St. Rep. 710; *Thalhimer v. Brinckerhoff*, 4 Wend. (N. Y.) 394, 21 Am. Dec. 155; *Plymouth County Bank v. Gilman*, 4 S. D. 265, 46 Am. St. Rep. 786; *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.*, 8 Utah, 41; *Nutter v. Brown*, 51 W. Va. 598.

<sup>97</sup> *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13.

principal. The mere assertion of a fact cannot amount to proof of it; though it may have some relation to the business in which the person making that assertion was employed as agent."<sup>98</sup>

§ 469. Prior and subsequent declarations or admissions.

From the fact that it must appear that the agent, at the time the declarations or admissions were made, was engaged in executing the authority conferred upon him, and that the declarations related to, and were connected with the business then depending, so as to constitute a part of the *res gestae*, it follows that, as a general rule, declarations or admissions made by an agent before entering upon the execution of his authority, or after having executed it, are not admissible. It is well settled therefore, as a general rule, that declarations or admissions as to past events are not admissible.<sup>99</sup> "The statements of an agent," said the New

<sup>98</sup> *Fairlie v. Hastings*, 10 Ves. 127.

<sup>99</sup> *England*: *Fairlie v. Hastings*, 10 Ves. 123; *Dawson v. Atty*, 7 East, 367.

*United States*: *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99; *Goddard v. Creffield Mills*, 21 C. C. A. 530, 75 Fed. 818; *Holmes v. Montauk Steamboat Co.*, 35 C. C. A. 556, 93 Fed. 731.

*Alabama*: *Alabama Great Southern R. Co. v. Hawk*, 72 Ala. 117, 47 Am. Rep. 403; *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 30 Am. St. Rep. 87; *Western Union Tel. Co. v. Way*, 83 Ala. 554.

*Arkansas*: *St. Louis & S. F. R. Co. v. Barger*, 52 Ark. 78; *St. Louis, I. M. & S. R. Co. v. Sweet*, 57 Ark. 287.

*California*: *Innis v. Steamer Senator*, 1 Cal. 459, 54 Am. Dec. 305; *Durkee v. Central Pac. R. Co.*, 69 Cal. 533, 58 Am. Rep. 562; *Borland v. Nevada Bank*, 99 Cal. 89, 37 Am. St. Rep. 32.

*Colorado*: *Anthony v. Estabrook*, 1 Colo. 75, 91 Am. Dec. 702.

*Delaware*: *Randel v. Chesapeake & D. Canal Co.*, 1 Har. 234.

*Georgia*: *Adams v. Humphreys*, 54 Ga. 496; *Newton Mfg. Co. v. White*, 53 Ga. 395; *Central R. & B. Co. v. Kelly*, 58 Ga. 108.

*Idaho*: *Holt v. Spokane & P. R. Co.*, 35 Pac. 39.

*Illinois*: *Pennsylvania Co. v. Kenwood Bridge Co.*, 170 Ill. 645; *Linblom v. Ramsey*, 75 Ill. 246.

*Indiana*: *Cleveland, C., C. & I. R. Co. v. Closser*, 126 Ind. 348, 22 Am. St. Rep. 593.

*Iowa*: *Empire Mill Co. v. Lovell*, 77 Iowa, 100, 14 Am. St. Rep. 272; *Phelps v. James*, 86 Iowa, 398, 41 Am. St. Rep. 497; *Sweetland v. Illinois & M. Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285.

York court, "are inadmissible to affect his principal, unless in respect to a transaction in which he is authorized to ap-

**Kansas:** Swenson v. Aultman, 14 Kan. 273; Greer v. Higgins, 8 Kan. 519; Dodge v. Childs, 38 Kan. 526.

**Kentucky:** Roberts v. Burks, Litt. Sel. Cas. 411, 12 Am. Dec. 325; Davis v. Whitesides, 1 Dana, 177, 25 Am. Dec. 138.

**Louisiana:** Reynolds v. Rowley, 3 Rob. 201, 38 Am. Dec. 233.

**Maine:** Haven v. Brown, 7 Me. 421, 22 Am. Dec. 208; Burnham v. Ellis, 39 Me. 319, 63 Am. Dec. 625; Keeley v. Boston & M. R. Co., 67 Me. 163, 24 Am. Rep. 19; Fairfield v. Oldtown, 73 Me. 573.

**Maryland:** Franklin Bank v. Pennsylvania, D. & M. Steam Nav. Co., 11 Gill & J. 28, 33 Am. Dec. 687; Whiteford v. Burckmyer, 1 Gill, 127, 39 Am. Dec. 640; Smith v. Cooke, 31 Md. 174, 100 Am. Dec. 58.

**Massachusetts:** Stiles v. Western R. Co., 8 Metc. 44, 41 Am. Dec. 486; Williamson v. Cambridge R. Co., 144 Mass. 148; Gilmore v. Mittineague Paper Co., 169 Mass. 471.

**Michigan:** Andrews v. Tamarack Min. Co., 114 Mich. 375; Mott v. Detroit, G. H. & M. R. Co., 120 Mich. 127; Converse v. Blumrich, 14 Mich. 109, 90 Am. Dec. 230.

**Minnesota:** Browning v. Hinkle, 48 Minn. 544, 31 Am. St. Rep. 691; Jackson v. Mutual Ben. L. Ins. Co., 79 Minn. 43.

**Missouri:** McDermott v. Hannibal & St. J. R. Co., 73 Mo. 516, 39 Am. Rep. 526; Adams v. Hannibal & St. J. R. Co., 74 Mo. 553, 41 Am. Rep. 333; Rice v. St. Louis, 165 Mo. 636.

**Montana:** Ryan v. Gilmer, 2 Mont. 517, 25 Am. Rep. 744.

**New Jersey:** Callaway v. Equitable Trust Co., 67 N. J. Law, 44.

**New York:** White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; Merchants' Nat. Bank v. Clark, 139 N. Y. 314, 36 Am. St. Rep. 710; First Nat. Bank of Lyons v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181; Kay v. Metropolitan St. R. Co., 163 N. Y. 447; Hubbard v. Elmer, 7 Wend. 446, 22 Am. Dec. 590.

**North Carolina:** Rumbough v. Southern Imp. Co., 112 N. C. 751, 34 Am. St. Rep. 528; McComb v. North Carolina R. Co., 70 N. C. 178.

**Pennsylvania:** American Steamship Co. v. Landreth, 102 Pa. 131, 48 Am. Rep. 196; Stewartson v. Watts, 8 Watts, 392; Giberson v. Patterson Mills Co., 174 Pa. 369, 52 Am. St. Rep. 823.

**South Carolina:** State Bank v. Johnson, 1 Mill Const. 404, 12 Am. Dec. 645.

**South Dakota:** Plymouth County Bank v. Gilman, 3 S. D. 170, 44 Am. St. Rep. 782.

**Tennessee:** Cobb v. Johnson, 2 Sneed, 73, 62 Am. Dec. 457; Nelson v. State, 2 Swan, 260.

**Vermont:** Hardwick Sav. Bank & T. Co. v. Drenan, 72 Vt. 438; Stiles v. Danville, 42 Vt. 282; Wheelock v. Hardwick, 48 Vt. 19.



pear for the principal, and he has no authority to bind his principal by any statements as to by-gone transactions."<sup>100</sup>

Some of the courts have applied the above rule strictly, holding that admissions and declarations of an agent, to be admissible as part of the *res gestae*, must be made contemporaneously with the act of the agent, and that they are inadmissible if made either before or after the act, however little time may intervene.<sup>101</sup> "It must appear," said the New York court in a leading case, "that the agent, at the time the declarations were made, was engaged in executing the authority conferred upon him."<sup>102</sup> And it was said in a Kentucky case: "The declarations or confessions of an agent, except they be made at the time and compose a part of acts done by him for his principal, within the scope of his authority, cannot be given in evidence to charge the principal."<sup>103</sup>

This view, however, is not taken by all the courts. On the contrary, the tendency of the cases is to the effect that an agent's declaration is admissible against the principal, although made after the act to which it relates, if, under the peculiar circumstances of the case, it appears that it was the result of the act alone and spontaneous, and not the result

*Virginia*: *Virginia & T. R. Co. v. Sayers*, 26 Grat. 328; *Jamison v. Chesapeake & O. R. Co.*, 92 Va. 327, 53 Am. St. Rep. 813.

*West Virginia*: *Hawker v. Baltimore & O. R. Co.*, 15 W. Va. 628, 36 Am. Rep. 825.

*Wisconsin*: *Randall v. Northwestern Tel. Co.*, 54 Wis. 140, 41 Am. Rep. 17.

<sup>100</sup> *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314, 36 Am. St. Rep. 710.

<sup>101</sup> *Fairlie v. Hastings*, 10 Ves. 127; *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99; *Chicago, B. & Q. R. Co. v. Riddle*, 60 Ill. 534; *Summers v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 872; *Sweetland v. Illinois & M. Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *Roberts v. Burks*, Litt. Sel. Cas. (Ky.) 411, 12 Am. Dec. 325 (compare *McLeod v. Glinther's Adm'r*, 80 Ky. 399); *Anderson v. Rome, W. & O. R. Co.*, 54 N. Y. 334; *Luby v. Hudson River R. Co.*, 17 N. Y. 131; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Baldwin v. Doubleday*, 59 Vt. 7.

<sup>102</sup> *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13.

<sup>103</sup> *Roberts v. Burks*, Litt. Sel. Cas. (Ky.) 411, 12 Am. Dec. 325.

also of reflection on the part of the agent.<sup>104</sup> The cases in which this view has been held have generally been cases in which it was sought to hold the principal liable in tort. As has been said: "Perfect coincidence of time between the declaration and the main fact is not of course required. It is enough that the two are substantially contemporaneous; they need not be literally so. The declarations must, however, be so proximate in point of time as to grow out of, elucidate and explain the character and quality of the main fact, and must be so closely connected with it as virtually to constitute but one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained. The evidence offered must not

<sup>104</sup> See the dissenting opinion in *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99. See, also, *Alabama Great Southern R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403; *Henderson v. State*, 70 Ala. 23; *Gandy v. Humphries*, 35 Ala. 617; *Baldwin v. Ashby*, 54 Ala. 82; *Ft. Smith Oil Co. v. Slover*, 58 Ark. 168; *Elledge v. National City & O. R. Co.*, 100 Cal. 282, 38 Am. St. Rep. 290; *Enos v. Tuttle*, 3 Conn. 250; *Rockwell v. Taylor*, 41 Conn. 59; *Mitchum v. State*, 11 Ga. 615; *Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. Rep. 838; *Ohio & M. R. Co. v. Stein*, 133 Ind. 243; *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185; *McLeod v. Ginther's Adm'r*, 80 Ky. 399; *Handy v. Johnson*, 5 Md. 450; *Williamson v. Cambridge R. Co.*, 144 Mass. 148; *Lund v. Tyngsborough*, 9 Cush. (Mass.) 36; *Keyser v. Chicago & G. T. R. Co.*, 66 Mich. 390; *Cleveland v. Newsom*, 45 Mich. 62; *O'Connor v. Chicago, M. & St. P. R. Co.*, 27 Minn. 166, 36 Am. Rep. 829, note, 38 Am. Rep. 288; *Scaggs v. State*, 8 Smedes & M. (Miss.) 722; *Illinois Cent. R. Co. v. Tronstine*, 64 Miss. 834; *Harriman v. Stowe*, 57 Mo. 93; *Hanover R. Co. v. Coyle*, 55 Pa. 402; *Elkins v. McKean*, 79 Pa. 493; *Boothe v. State*, 4 Tex. App. 202; *Hermes v. Chicago & N. W. R. Co.*, 80 Wis. 590, 27 Am. St. Rep. 69.

As was said in *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, in the dissenting opinion: "The modern doctrine has relaxed the ancient rule, that declarations, to be admissible as part of the *res gestae*, must be strictly contemporaneous with the main transaction. It now allows evidence of them, when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it. \* \* \* What time may elapse between the happening of the event in respect to which the declaration is made, and the time of the declaration, and yet the declaration be admissible, must depend upon the character of the transaction itself."

have the ear-marks of a device, or afterthought, nor be merely narrative of a transaction which is really and substantially past."<sup>105</sup>

**§ 470. Necessity that declaration shall unfold character or quality of act.**

In order that an agent's declaration may be admissible as part of the *res gestae*, the time when it was made is not the only consideration. It must not only be made at such a time as to constitute part of the *res gestae*, but it must be of such a nature as to be a part of the transaction. It must naturally accompany the act, or must be of such a nature as to unfold its character or quality.<sup>106</sup> This essential is illustrated by a late New York case, in which it appeared that a passenger was injured by the negligence of a guard in closing a gate of a platform of a car, and to his exclamation of pain the guard made an offensive and insulting reply. The court said in this case: "While proximity in point of time with the act causing the injury is, in every case of this kind, essential to make what was said by a third person competent evidence against another as part of the *res gestae*, that alone is insufficient, unless what was said may be considered part of the principal fact, and so a part of the act itself. But as in this case the act was complete before the remark of the brakeman was made, although closely connected with it in point of time, and was not one naturally accompanying the act, or calculated to unfold its character or quality, it was not admissible as *res gestae*. \* \* \* *Res gestae* in a case like this implies substantial coincidence in time, but if declarations of third persons are not in their nature a part of the fact, they are not admissible in evidence, however closely related in point of time."<sup>107</sup>

<sup>105</sup> *Alabama Great Southern R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 404.

<sup>106</sup> *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 42 Am. St. Rep. 738; *Rockwell v. Taylor*, 41 Conn. 59; *Enos v. Tuttle*, 3 Conn. 250; *Barker v. St. Louis, I. M. & S. R. Co.*, 126 Mo. 143, 47 Am. St. Rep. 646; *Baker v. Gausin*, 76 Ind. 317; *Ohio & M. R. Co. v. Stein*, 133 Ind. 243; *Plymouth County Bank v. Gilman*, 3 S. D. 170, 44 Am. St. Rep. 782; and see cases cited in preceding section.

<sup>107</sup> *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 42 Am. St. Rep. 738.

## § 471. Illustrations.

The difficulty in applying the above rules is in determining whether or not a particular admission or declaration is a part of the *res gestae*, and so admissible as evidence against the principal. It appears from the cases that no steadfast rule can be laid down in this particular, but that each case must depend upon the facts and circumstances surrounding it. The time at which a declaration or admission is made is not conclusive. In one case it may be held to be a part of the *res gestae*, whilst in another case, it may be held otherwise, although made at the same time, in respect to the transaction. The principal requisite seems to be that it should be made spontaneously, without time for reflection; if such is the case, it will generally be held a part of the *res gestae* whether made right at the time of the transaction, or some time afterwards. Thus it is held to be erroneous to admit, as evidence against the principal, declarations made by an agent, six months after an accident on a railroad, that he discovered a flaw in the end of the rail, and so hid the pieces at the time;<sup>108</sup> or declarations of a locomotive engineer in charge of a train, to whose negligence an accident is attributed, five minutes after the accident;<sup>109</sup> or declarations of the driver of a street car, made after an accident had occurred and the car had been stopped, but before he had left it, to the effect that he could not stop the car because the brakes were out of order;<sup>110</sup> or admissions of a teller of a

<sup>108</sup> *Anderson v. Rome, W. & O. R. Co.*, 54 N. Y. 334, and the fact that the agent who made such declarations is afterwards called to the witness stand and testified that he hid the pieces so that no one could find them, and that he did so of his own motion, without being directed to do so by any one, does not cure an error in receiving such declarations. But see *Innis v. Steamer Senator*, 1 Cal. 459, 54 Am. Dec. 305.

<sup>109</sup> *Durkee v. Central Pac. R. Co.*, 69 Cal. 533, 58 Am. Rep. 562; or between ten and thirty minutes afterwards, *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99; or a few days afterwards, *Robinson v. Fitchburg & W. R. Co.*, 7 Gray (Mass.) 92; or an hour afterwards, *Hawker v. Baltimore & O. R. Co.*, 15 W. Va. 628, 36 Am. Rep. 825; or even a few minutes afterwards, *Alabama Great Southern R. Co. v. Hawk*, 72 Ala. 117, 47 Am. Rep. 403.

<sup>110</sup> *Luby v. Hudson River R. Co.*, 17 N. Y. 131.

bank after he had ceased to act as such;<sup>111</sup> or an admission of the general agent of a telegraph company made two months after an accident;<sup>112</sup> or the declarations of a superintendent of a mill to the effect that a hanger therein had been condemned, and should be removed, if made away from the mill some days after a servant in the mill had been injured by the breaking of such hanger;<sup>113</sup> or the declaration of a servant immediately after a collision between teams, one of which was in his charge, and while the plaintiff was being extricated from his carriage, that the plaintiff was not to blame;<sup>114</sup> or the declaration of a conductor, made a moment before an accident, that the road was in such a bad condition that his train had run off the track a number of times on a preceding trip.<sup>115</sup> But on the other hand it has been held proper to admit, as part of the *res gestae*, declarations of an engineer, made within a few moments after a child was killed by being run over by a locomotive in his charge;<sup>116</sup> or statements of a cashier of a bank as to the measures pursued toward the collection of notes left with it;<sup>117</sup> or the declaration of an insurance agent, to the insured, some time after he had agreed to renew a policy and had received the premium, that he had previously delivered the certificate of renewal.<sup>118</sup>

<sup>111</sup> *State Bank v. Johnson*, 1 Mill Const. (S. C.) 404, 12 Am. Dec. 645.

<sup>112</sup> *Randall v. Northwestern Tel. Co.*, 54 Wis. 140, 41 Am. Rep. 17.

<sup>113</sup> *Giberson v. Patterson Mills Co.*, 174 Pa. 369, 52 Am. St. Rep. 823.

<sup>114</sup> *Lane v. Bryant*, 9 Gray (Mass.) 245, 69 Am. Dec. 282, in which case the court said: This declaration "was made after the accident occurred and the injury to the plaintiff's carriage had been done. It did not accompany the principal act, on which the whole case turned, or tend in any way to elucidate it. It was only the expression of an opinion about a past occurrence, and not part of the *res gestae*."

<sup>115</sup> *Mobile & M. R. Co. v. Ashcroft*, 48 Ala. 15.

<sup>116</sup> *Hermes v. Chicago & N. W. R. Co.*, 80 Wis. 590, 27 Am. St. Rep. 69; or declarations made by the engineer after stopping the train and returning to the place of accident, or similar declarations fifty minutes later, *Keyser v. Chicago & G. T. R. Co.*, 66 Mich. 390.

<sup>117</sup> *Plymouth County Bank v. Gilman*, 3 S. D. 170, 44 Am. St. Rep. 782.

<sup>118</sup> *Scott v. Home Ins. Co.*, 53 Wis. 238.

**§ 472. Declarations of agent acting for himself or having an adverse interest.**

Since the declarations of an agent are not admissible against his principal unless made in regard to a transaction in which he was acting for the principal, a principal is not bound by the declarations of his agent made in his own interest and against the interest of the principal, or made in a case in which the other party knew that the agent was acting for himself, or that he had an interest adverse to that of his principal.<sup>119</sup> "It is an old doctrine, from which there has never been any departure," said Judge Maynard in a New York case, "that an agent cannot bind his principal, even in matters touching his agency, where he is known to be acting for himself, or to have an adverse interest."<sup>120</sup>

For example, where an officer or agent of a corporation, in pledging the stock of the corporation for a loan to himself personally, makes declarations or representations as to its genuineness, the declarations or representations are not binding upon or admissible against the corporation, although it would be otherwise if, having authority to do so, he were pledging the stock for a debt of the corporation.<sup>121</sup> The same principle applies to, and renders inadmissible against a corporation, declarations of its manager as to the existence of a debt from it to him,<sup>122</sup> or declarations of the officers as to their authority to use bonds of the company for their own use.<sup>123</sup> In an action by the assignee of a note given by a corporation to its president, declarations of the president as

<sup>119</sup> *Moore v. Citizens' Nat. Bank*, 111 U. S. 156; *Wheeler v. Home Sav. & State Bank*, 188 Ill. 34, 80 Am. St. Rep. 161; *Farrington v. South Boston R. Co.*, 150 Mass. 406, 15 Am. St. Rep. 222; *State Sav. Bank v. Montgomery*, 126 Mich. 327; *Manhattan L. Ins. Co. v. Forty Second St. & G. St. Ferry R. Co.*, 139 N. Y. 146.

<sup>120</sup> *Manhattan L. Ins. Co. v. Forty Second St. & G. St. Ferry R. Co.*, 139 N. Y. 146.

<sup>121</sup> *Manhattan L. Ins. Co. v. Forty Second St. & G. St. Ferry R. Co.*, 139 N. Y. 146.

<sup>122</sup> *Wheeler v. Home Sav. & State Bank*, 188 Ill. 34, 80 Am. St. Rep. 161.

<sup>123</sup> *Germania Safety-Vault & T. Co. v. Boynton*, 19 C. C. A. 118, 37 U. S. App. 602, 71 Fed. 797.

to the amount due at the time of the transfer are not admissible against the corporation.<sup>124</sup>

**§ 473. Admissions and declarations of public agents.**

In respect to the admissions and declarations of a public agent, however, the ordinary rules in reference to private agents do not apply. As has been seen, private agents may, in many cases, bind their principals by their declarations and admissions, although they were made without actual authority, if they were made in the course of their employment. But in the case of public agents, it is the general rule that the government or other public authority is not bound by the admissions and declarations of the agent, unless it clearly appears that he was acting within the scope of his authority, express or implied, or is employed, in his capacity as a public agent, to make such declarations or admissions.<sup>125</sup>

**IV. NOTICE TO AGENT AS NOTICE TO PRINCIPAL.**

**§ 474. General rules.**

Because of the identity of principal and agent in dealings by the agent within the scope of his authority, it is a well settled general rule that notice to an agent in the course of his employment,<sup>126</sup> and in relation to a matter within the scope of his actual or apparent authority, is notice to his principal, whether the agent communicates his knowledge to the principal or not.<sup>127</sup> This rule is based, not only on the

<sup>124</sup> *Love v. Anchor Raisin Vineyard Co.* (Cal.) 45 Pac. 1044.

<sup>125</sup> *Lee v. Munroe*, 7 Cranch (U. S.) 366; *Story, Ag.* (8th Ed.) § 307a.

<sup>126</sup> As to whether the knowledge must be acquired by the agent in the course of his employment, or whether it is sufficient if possessed by him then, although acquired before, see post, §§ 480-482.

<sup>127</sup> *England*: *Gale v. Lewis*, 9 Q. B. 730; *Ex parte Agra Bank*, 3 Ch. App. 555.

*United States*: *Duncan v. Jaudon*, 15 Wall. 165; *New England Car-Spring Co. v. Union India Rubber Co.*, 4 Blatchf. 1, Fed. Cas. No. 10,153; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417; *Zels v. Potter*, 44 C. C. A. 665, 105 Fed. 671; *Waynesville Nat. Bank v. Irons*, 8 Fed. 1.

*Alabama*: *Saint v. Wheeler & W. Mfg. Co.*, 95 Ala. 362, 36 Am.

fiction of identity of principal and agent, but also on the presumption that the agent has discharged his duty by communicating his knowledge to the principal, and generally this

St. Rep. 210; *Harris v. American B. & L. Ass'n*, 122 Ala. 545; *Houston Biscuit Co. v. Dial*, 135 Ala. 168.

*Arkansas*: *Whitehead v. Wells*, 29 Ark. 99.

*California*: *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Sloane v. Southern Cal. R. Co.*, 111 Cal. 668; *Christie v. Sherwood*, 113 Cal. 526; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543.

*Colorado*: *Denver, S. P. & P. R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537; *Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co.*, 11 Colo. 223, 7 Am. St. Rep. 226.

*Connecticut*: *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362; *Toll Bridge Co. v. Betsworth*, 30 Conn. 380; *Smith v. Board of Water Com'rs*, 38 Conn. 208.

*Georgia*: *Strickland v. Vance*, 99 Ga. 531, 59 Am. St. Rep. 241; *Bank of St. Mary's v. Mumford*, 6 Ga. 44; *Merchants' Nat. Bank v. Gullmartin*, 93 Ga. 503, 44 Am. St. Rep. 182; *Guarantee Co. v. East Rome Town Co.*, 96 Ga. 511, 51 Am. St. Rep. 150.

*Illinois*: *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401; *Sterling Bridge Co. v. Baker*, 75 Ill. 139.

*Indiana*: *Pittsburgh, F. W. & C. R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111.

*Iowa*: *McClelland v. Saul*, 113 Iowa, 208, 86 Am. St. Rep. 370; *Anderson v. Kinley*, 90 Iowa, 554; *Jones v. Bamford*, 21 Iowa, 217.

*Kansas*: *Roach v. Karr*, 18 Kan. 529.

*Kentucky*: *Bank of America v. McNeill*, 10 Bush, 54; *Trapp v. Fidelity Nat. Bank*, 101 Ky. 485; *Fowler v. Halbert*, 4 Bibb, 52.

*Louisiana*: *Factors' & Traders' Ins. Co. v. Marine Dry Dock & S. Co.*, 31 La. Ann. 149; *Union Nat. Bank v. Manhattan L. Ins. Co.*, 52 La. Ann. 36; *Cummings v. Harsabrauch*, 14 La. Ann. 711.

*Maine*: *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319.

*Maryland*: *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646.

*Massachusetts*: *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698; *National Security Bank v. Cushman*, 121 Mass. 490; *Suit v. Woodhall*, 113 Mass. 391.

*Michigan*: *Detroit Motor Co. v. Third Nat. Bank*, 111 Mich. 407; *Campau v. Konan*, 39 Mich. 362; *Taylor v. Young*, 56 Mich. 285; *Davis v. Kneale*, 97 Mich. 72.

*Mississippi*: *Ross v. Houston*, 25 Miss. 591, 59 Am. Dec. 231; *Reynolds v. Ingersoll*, 11 Smedes & M. 249, 49 Am. Dec. 57; *Allen v. Poole*, 54 Miss. 323.



presumption is conclusive. "The rule that notice to the agent is constructive notice to the principal," said the California court, "is based on the presumption that the agent has communicated to the principal the facts connected with the subject-matter of his agency which came to his notice.

*Missouri:* City Bank v. Phillips, 22 Mo. 85; Mechanics' Bank v. Schaumburg, 38 Mo. 228; Hickman v. Green, 123 Mo. 165; Hedrick v. Beeler, 110 Mo. 91.

*Nebraska:* Cogswell v. Griffith, 23 Neb. 334; Merriam v. Calhoun, 15 Neb. 569.

*New Hampshire:* Campbell v. Merchants' & F. Mut. F. Ins. Co., 37 N. H. 35; Patten v. Merchants' & F. Mut. F. Ins. Co., 40 N. H. 375; Hovey v. Blanchard, 13 N. H. 145.

*New Jersey:* Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 117; Willard v. Denise, 50 N. J. Eq. 482, 35 Am. St. Rep. 788; Sooy v. State, 41 N. J. Law, 395.

*New York:* Hyatt v. Clark, 118 N. Y. 563; Bank of U. S. v. Davis, 2 Hill, 451; Cragie v. Hadley, 99 N. Y. 131; Weissner v. Denison, 10 N. Y. 68, 61 Am. Dec. 731.

*North Carolina:* Follette v. Mutual Acc. Ass'n, 110 N. C. 377; Cowan v. Withrow, 111 N. C. 306; Farmer v. Willard, 71 N. C. 284; Neal v. Pender-Heyman Hardware Co., 122 N. C. 104, 65 Am. St. Rep. 697.

*Ohio:* Conant v. Reed, 1 Ohio St. 298.

*Oregon:* Farmers' Bank v. Saling, 33 Or. 394.

*Pennsylvania:* Bank of Pittsburgh v. Whitehead, 10 Watts, 397, 36 Am. Dec. 186; Patterson v. Pittsburg & C. R. Co., 76 Pa. 389, 18 Am. Rep. 412; Humphreys v. National Ben. Ass'n, 139 Pa. 264.

*Rhode Island:* In re Sweet, 20 R. I. 557.

*South Carolina:* Union Bank v. Wando Min. & Mfg. Co., 17 S. C. 339.

*Tennessee:* Woodfolk v. Blount, 3 Hayw. 147, 9 Am. Dec. 736; Union Bank v. Campbell, 4 Humph. 394; Merchants & Planters Bank v. Penland, 101 Tenn. 445; Nashville & C. R. Co. v. Elliott, 1 Cold. 611, 78 Am. Dec. 506.

*Texas:* Morrison v. Ins. Co. of North America, 69 Tex. 353, 5 Am. St. Rep. 63; Smith v. Wilson, 1 Tex. Civ. App. 115.

*Vermont:* Porter v. Bank of Rutland, 19 Vt. 410; Smith v. South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179; Backman v. Wright, 27 Vt. 187, 65 Am. Dec. 187; Hill v. North, 34 Vt. 604.

*West Virginia:* Hart v. Sandy, 39 W. Va. 644.

*Wisconsin:* Knott v. Tidyman, 86 Wis. 164; Mihill's Mfg. Co. v. Camp, 49 Wis. 130; Bass v. Chicago & N. W. R. Co., 42 Wis. 654, 24 Am. Rep. 437; Johnson v. First Nat. Bank, 79 Wis. 414, 24 Am. St. Rep. 722; Andrews v. Robertson, 111 Wis. 334, 87 Am. St. Rep. 870.

\* \* \* Where others than the principal and agent are concerned, the presumption that the agent has discharged his duty to his principal in communicating facts of which he has notice, is as conclusive as the presumption that the principal remembers the facts brought home to him personally."<sup>128</sup>

The above rule applies, of course, only where the knowledge of the agent is acquired or possessed in the course of his employment, and when it relates to a matter which is within the scope of his authority, for his duty to communicate his knowledge of facts to his principal is subject to these limitations. Therefore, notice to or knowledge acquired by an agent otherwise than in the course of his employment, or in relation to a matter not within the scope, either of his actual or apparent authority, is not notice to the principal, any more than notice to a perfect stranger would be,<sup>129</sup> unless such notice is actually communicated to the principal.<sup>130</sup>

<sup>128</sup> *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 161. And see *Hyatt v. Clark*, 118 N. Y. 563; *Hummel v. Bank of Monroe*, 75 Iowa, 689; *The Distilled Spirits*, 11 Wall. (U. S.) 356.

<sup>129</sup> *England*: *Powles v. Page*, 3 C. B. 16.

*United States*: *American Surety Co. v. Pauly*, 170 U. S. 133; *Craig v. Continental Ins. Co.*, 141 U. S. 638; *Holm v. Atlas Nat. Bank*, 28 C. C. A. 297, 84 Fed. 119.

*Alabama*: *Reid v. Bank of Mobile*, 70 Ala. 199; *Frenkell v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736.

*Colorado*: *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118.

*Connecticut*: *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362; *Platt v. Birmingham Axle Co.*, 41 Conn. 255.

*Georgia*: *Camp v. Southern Banking & Trust Co.*, 97 Ga. 582.

*Illinois*: *Seaverns v. Presbyterian Hospital*, 173 Ill. 414, 64 Am. St. Rep. 125.

*Iowa*: *McDonald Mfg. Co. v. Thomas*, 53 Iowa, 558; *Thomas v. Deane*, 57 Iowa, 58.

*Kansas*: *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784; *Roach v. Karr*, 18 Kan. 529.

*Kentucky*: *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 564.

*Maine*: *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319.

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<sup>130</sup> *Hicks v. Southern R. Co.*, 63 S. C. 559.

"The principal," said Judge Nelson in a New York case, "is chargeable with this knowledge for the reason that the

*Maryland*: General Ins. Co. v. United States Ins. Co., 10 Md. 517, 69 Am. Dec. 174; Gemmell v. Davis, 75 Md. 546, 32 Am. St. Rep. 412.

*Massachusetts*: National Security Bank v. Cushman, 121 Mass. 490; Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 52 Am. Rep. 710; Allen v. South Boston R. Co., 150 Mass. 200, 15 Am. St. Rep. 185.

*Michigan*: Great Western R. v. Wheeler, 20 Mich. 419.

*Minnesota*: Trentor v. Pothén, 46 Minn. 298, 24 Am. St. Rep. 225; Dorr v. Life Ins. Clearing Co., 71 Minn. 38, 70 Am. St. Rep. 309. Knowledge in an agent, authorized only to sell real estate, that a building is being constructed on it, is not knowledge in the owner, for the purposes of Laws 1889, c. 200, § 5. Sandberg v. Palm, 53 Minn. 252; Jefferson v. Leithauser, 60 Minn. 251.

*Mississippi*: Goodloe v. Godley, 13 Smedes & M. 233, 51 Am. Dec. 159.

*Missouri*: Mechanics' Bank v. Schaumburg, 38 Mo. 228; Merchants' Nat. Bank v. Lovitt, 114 Mo. 519, 35 Am. St. Rep. 770; Kearney Bank v. Froman, 129 Mo. 427, 50 Am. St. Rep. 456; Hickman v. Green, 123 Mo. 165.

*Montana*: Helena Nat. Bank v. Rocky Mountain Tel. Co., 20 Mont. 379, 63 Am. St. Rep. 628.

*Nebraska*: State Bank v. Mathews, 45 Neb. 659, 50 Am. St. Rep. 565; Koehler v. Dodge, 31 Neb. 328, 28 Am. St. Rep. 518.

*New Jersey*: First Nat. Bank v. Christopher, 40 N. J. Law, 435, 29 Am. Rep. 262; Willard v. Denise, 50 N. J. Eq. 482, 35 Am. St. Rep. 788.

*New York*: Bank of U. S. v. Davis, 2 Hill, 451; National Bank v. Norton, 1 Hill, 572; City of New York v. Tenth Nat. Bank, 111 N. Y. 446; Casco Nat. Bank v. Clark, 139 N. Y. 307, 36 Am. St. Rep. 705; Merchants' Nat. Bank v. Clark, 139 N. Y. 314, 36 Am. St. Rep. 710.

*Oregon*: Pennoyer v. Willis, 26 Or. 1, 46 Am. St. Rep. 594.

*Pennsylvania*: Wilson v. McCullough, 23 Pa. 440, 62 Am. Dec. 347; Bard v. Penn. Mut. Fire Ins. Co., 153 Pa. 257, 34 Am. St. Rep. 704.

*South Carolina*: Knobelock v. Germania Sav. Bank, 50 S. C. 259.

*Tennessee*: Memphis Nat. Bank v. Sneed, 97 Tenn. 120, 56 Am. St. Rep. 788.

*Texas*: Texas Banking & Ins. Co. v. Hutchins, 53 Tex. 61, 37 Am. Rep. 750.

*Virginia*: Bank of Virginia v. Craig, 6 Leigh, 399.

*Washington*: Washington Nat. Bank v. Pierce, 6 Wash. 491, 36 Am. St. Rep. 174.

*Wisconsin*: Congar v. Chicago & N. W. R. Co., 24 Wis. 157, 1 Am. Rep. 164.

agent is substituted in his place, and represents him in the particular transaction; and as this relation, strictly speaking, exists only while the agent is acting in the business thus delegated to him, it is proper to limit it to such occasions."<sup>131</sup>

And as was said by Judge Mitchell in a Minnesota case: "The knowledge or notice must come to an agent who has authority to deal in reference to those matters which the knowledge or notice affects. The facts of which the agent had notice must be within the scope of the agency, so that it becomes his duty to act upon them or communicate them to his principal. As it is the rule that whether the principal is bound by contracts entered into by the agent depends upon the nature and extent of the agency, so does the effect upon the principal of notice to the agent depend upon the same conditions."<sup>132</sup>

### § 475. Application of general rules.

These principles apply in any case in which the question whether the principal had notice of a particular fact is material. They apply, for example, where the knowledge of an agent is relied upon as notice to his principal for the purpose of showing that the principal is not a bona fide holder of commercial paper, or of a certificate of stock, etc., when there are facts affecting the consideration or title, or when it was procured by fraud, etc.;<sup>133</sup> or a bona fide purchaser or mortgagee of land, or purchaser, mortgagee, or pledgee of goods, without notice of an unrecorded deed, lease, or mortgage, or of equities in favor of a third person;<sup>134</sup> or where it

<sup>131</sup> *Bank of United States v. Davis*, 2 Hill (N. Y.) 451.

<sup>132</sup> *Trentor v. Pothen*, 46 Minn. 298, 24 Am. St. Rep. 225.

<sup>133</sup> *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362; *Fouche v. Merchants' Nat. Bank*, 110 Ga. 827; *Citizens' Sav. Bank v. Walden*, 21 Ky. L. R. 739, 52 S. W. 953; *Loring v. Brodie*, 134 Mass. 453; *Merchants' Nat. Bank v. Lovitt*, 114 Mo. 519, 35 Am. St. Rep. 770; *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98; *Harrisburg Bank v. Tyler*, 3 Watts & S. (Pa.) 373; *Memphis Nat. Bank v. Sneed*, 97 Tenn. 120, 56 Am. St. Rep. 788; *Porter v. Bank of Rutland*, 19 Vt. 410; *Knott v. Tidyman*, 86 Wis. 164.

<sup>134</sup> *Vercruysse v. Williams*, 112 Fed. 206; *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736; *Farrel Foundry v. Dart*, 26 Conn. 376;

is sought to charge a principal with his agent's knowledge that a particular transaction was in fraud of third persons;<sup>135</sup> or with his agent's knowledge of the insolvency or bankruptcy of a person from whom he has received a payment or a conveyance of property;<sup>136</sup> or with his agent's knowledge of the insanity of a purchaser of the principal's goods;<sup>137</sup> or with his agent's knowledge that a loan was made by the principal in furtherance of an illegal purpose;<sup>138</sup> or to charge a common carrier with knowledge acquired by a receiving agent, as to the character of goods received for transportation;<sup>139</sup> or to charge the principal with knowledge of the dangerous character of an animal left in the agent's care;<sup>140</sup> or where it is sought to charge a wife with knowledge of facts acquired by her husband, while acting as her agent;<sup>141</sup> or

*Flower v. Elwood*, 66 Ill. 438; *Whitney v. Burr*, 115 Ill. 289; *Noyes v. Tootle*, 2 Ind. T. 144; *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784; *Bramblett v. Henderson*, 19 Ky. L. R. 692, 41 S. W. 575; *Schwind v. Boyce*, 94 Md. 510; *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517, 69 Am. Dec. 174; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710; *Taylor v. Young*, 56 Mich. 285; *Russell v. Sweezey*, 22 Mich. 235; *Ross v. Houston*, 25 Miss. 591, 59 Am. Dec. 231; *Johnston v. Shortridge*, 93 Mo. 227; *Coggsell v. Griffith*, 23 Neb. 334; *Pennoyer v. Willis*, 26 Or. 1, 46 Am. St. Rep. 594; *Wilson v. McCullough*, 23 Pa. 440, 62 Am. Dec. 347; *Walker v. Grand Rapids Flouring Mill Co.*, 70 Wis. 92. But notice to an agent, employed to exchange land, of an unrecorded deed, is not notice to his principal, where the agent is not employed to examine the title. *Hickman v. Green*, 123 Mo. 165.

<sup>135</sup> *Brobston v. Penniman*, 97 Ga. 527; *Trapp v. Fidelity Nat. Bank*, 101 Ky. 485; *Noyes v. Tootle*, 2 Ind. T. 144.

<sup>136</sup> *Getman v. Second Nat. Bank*, 23 Hun (N. Y.) 498; *Babbitt v. Kelley*, 96 Mo. App. 529.

<sup>137</sup> *Kelly v. Burke*, 132 Ala. 235.

<sup>138</sup> *Singleton v. Bank of Monticello*, 113 Ga. 527.

<sup>139</sup> *Merrill v. American Exp. Co.*, 62 N. H. 514.

<sup>140</sup> *Brice v. Bauer*, 108 N. Y. 428, 2 Am. St. Rep. 454; *O'Neill v. Blase*, 94 Mo. App. 648. And see *Gladman v. Johnson*, 36 Law J. C. P. 153; *Plimmer v. Sells*, 3 Nev. & M. 422.

<sup>141</sup> *Goodbar v. Daniel*, 88 Ala. 583, 16 Am. St. Rep. 76; *Bray v. Booker*, 8 N. D. 347; *Cox v. Cayan*, 117 Mich. 599, 72 Am. St. Rep. 585. But the wife cannot be charged with her husband's knowledge of matters affecting the title to realty purchased by her, when

where it is sought to charge a principal with his agent's knowledge of defects and dangers in works, machinery, premises, etc., for the purpose of establishing negligence;<sup>142</sup> or, for a like purpose, with his agent's knowledge of the untrustworthiness of a subordinate agent or servant;<sup>143</sup> and in many other cases.

But these rules do not apply where it is sought to impute to the principal knowledge of the agent's malice; as in a case for malicious prosecution, actual malice cannot be conclusively presumed or legally imputed to the principal, from the knowledge of his agent.<sup>144</sup>

#### § 476. Effect of ratification.

If a principal ratifies a contract or other transaction entered into or done for him by another without authority, he is chargeable with the other's knowledge of fraud, illegality, or other facts in the transaction.<sup>145</sup> Thus, where a principal ratifies an illegal sale of intoxicating liquors by an agent, by completing the sale, and claiming the benefit of it, he takes it with all its incidents of illegality and notice of that fact.<sup>146</sup> So where a principal accepts the note and mortgage, given for a loan negotiated by one who declared himself to be his agent,

he took no part in the purchase nor represented her in any way. *Satterfield v. Malone*, 35 Fed. 445.

<sup>142</sup> *Denver v. Sherret*, 31 C. C. A. 499, 88 Fed. 226; *Houston Biscuit Co. v. Dial*, 135 Ala. 168; *Schellay v. Moffitt-West Drug Co.*, 17 Colo. App. 126; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Brookville & C. Turnpike Co. v. Pumphrey*, 59 Ind. 78; *George v. Wabash Western R. Co.*, 40 Mo. App. 433; *Dutzi v. Geisel*, 23 Mo. App. 676; *Eggleston v. Columbia Turnpike Road Co.*, 82 N. Y. 278; *Patterson v. Pittsburgh & C. R. Co.*, 76 Pa. 389, 18 Am. Rep. 412; *Nashville & C. R. Co. v. Elliott*, 1 Cold. (Tenn.) 611, 78 Am. Dec. 506; *Bass v. Chicago & N. W. R. Co.*, 42 Wis. 654, 24 Am. Rep. 437; *Johnson v. First Nat. Bank*, 79 Wis. 414, 24 Am. St. Rep. 722.

<sup>143</sup> *Merchants' Nat. Bank v. Guilmartin*, 93 Ga. 503, 44 Am. St. Rep. 182.

<sup>144</sup> *Reisan v. Mott*, 42 Minn. 49, 18 Am. St. Rep. 489.

<sup>145</sup> *Singleton v. Bank of Monticello*, 113 Ga. 527; *Fouche v. Merchants' Nat. Bank*, 110 Ga. 827; *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 187; *Russell v. Peavy*, 131 Ala. 563; *Mull v. Ingalls*, 30 Misc. (N. Y.) 80.

<sup>146</sup> *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 187.

and subsequently forecloses the same, the agency of the representative is sufficiently shown to charge the principal with knowledge acquired by such agent in negotiating the loan.<sup>147</sup>

**§ 477. Nature of notice required.**

As to the nature of the notice or knowledge that must be acquired by an agent in order to make it binding upon the principal, this rule applies whether it is actual or constructive.<sup>148</sup> Of course if he has actual notice there is no trouble in applying the rule. And the same is true of constructive notice; but the difficulty is in determining when the agent has constructive notice. Of this it may be said that if an agent has knowledge of such facts as would lead an ordinarily prudent man to make further inquiries, he must be taken to have notice of those facts, which, if he had used ordinary diligence, he would readily have obtained.<sup>149</sup> Thus, it is held that if an agent knows or by ordinary care can ascertain the purpose for which certain implements contracted to be furnished are to be used, his knowledge is the knowledge of the principal.<sup>150</sup> This presumption of notice, however, is not a conclusive one, and the agent may show that he did use reasonable prudence and diligence in making inquiries, without ascertaining the facts, with notice of which it is sought to charge his principal.<sup>151</sup>

<sup>147</sup> *Russell v. Peavy*, 131 Ala. 563.

<sup>148</sup> "There is no difference between personal and constructive notice, except in respect to the guilt; for if there were, it would produce great inconvenience, as notice might be avoided in every case by employing an agent." *Bank of United States v. Davis*, 2 Hill (N. Y.) 460, citing *Hiern v. Mill*, 13 Ves. 120; *Warrick v. Warrick*, 3 Atk. 294; *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 309. And see cases cited in preceding sections.

<sup>149</sup> See 4 Kent's Com. 179; *Whitbread v. Boulnois*, 1 Younge & C. 303; *Williamson v. Brown*, 15 N. Y. 354; *Baker v. Bliss*, 39 N. Y. 70; *Jaques v. Weeks*, 7 Watts (Pa.) 276; *Wilson v. McCullough*, 23 Pa. 440, 62 Am. Dec. 347; *Woodfolk v. Blount*, 3 Hayw. (Tenn.) 147, 9 Am. Dec. 736.

<sup>150</sup> *Neal v. Pender-Heyman Hardware Co.*, 122 N. C. 104, 65 Am. St. Rep. 697; citing *Hubbard v. Troy*, 24 N. C. 134; *Anniston Nat. Bank v. School Committee*, 118 N. C. 383.

<sup>151</sup> See *Hanbury v. Litchfield*, 2 Mylne & K. 629; *Rogers v. Jones*, 8 N. H. 264; *Williamson v. Brown*, 15 N. Y. 354.

**§ 478. Character of notice required.**

In order that notice or knowledge of the agent may be binding upon the principal, it is necessary that it should be of some fact material to the transaction in which he is employed. The test whether knowledge acquired by an agent is notice to his principal is whether or not the knowledge was such that it was the agent's duty to disclose it to his principal.<sup>152</sup> The knowledge "must be such as would reasonably charge the agent, on failure to repeat, with breach of faith and duty to his employer."<sup>153</sup>

So the knowledge must have been acquired from a reliable source, and must have been of such a nature that a reasonably prudent man would have acted upon it; and the principal would not be bound if neither the agent, nor himself, takes notice of mere passing rumors or reports.<sup>154</sup>

**§ 479. Notice must be to agent acting in that particular matter.**

The general rule that notice to an agent is notice to his principal applies only to agents acting in the particular matter, in respect to which the notice is acquired. Although an agent is acting for the same principal, the fact that knowledge comes to him in respect to certain matters, not within the scope of his employment, but probably within the scope of authority of another agent acting for the same principal, such knowledge would not be imputed to the principal, for as to such matters there is no duty upon the agent to notify his principal. "The principal is chargeable with the knowledge of his agent, because the agent is substituted in his place, and represents him in the particular transaction; and it would seem to be an obvious perversion of the doctrine, and to lead to most injurious results, if, in the same transaction, the principal were likewise to be charged with the knowledge of other agents, not engaged in it, and to whom

<sup>152</sup> Wood v. Rayburn, 18 Or. 3; Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319; Day v. Wamsley, 33 Ind. 147.

<sup>153</sup> Day v. Wamsley, 33 Ind. 147.

<sup>154</sup> Kerns v. Swope, 2 Watts (Pa.) 75; Mulliken v. Graham, 72 Pa. 484; Wilson v. McCullough, 23 Pa. 440, 62 Am. Dec. 347; Shafer v. Phoenix Ins. Co., 53 Wis. 361.



he had delegated no authority with respect to it, but who were employed by him in other and wholly different departments of business."<sup>155</sup> Thus, notice to agents in Iowa, distant some two or three hundred miles from Chicago, who had distinct duties to perform, and were not at all concerned in the business of forwarding goods from Chicago, was not such notice as will bind the company in relation to that business, the same having been transacted by other agents, who had no such notice.<sup>156</sup> And in an English case it was held that knowledge acquired by an agent in an unsuccessful transaction, but not communicated to the principal, cannot be imputed to the latter in a subsequent transaction of the same kind successfully carried out by another agent.<sup>157</sup> But if the same transaction was being negotiated at the same time, and for the same principal, by different agents, acting independent of one another, knowledge acquired by either in the course of the transaction would be imputed to the principal.

**§ 480. Time of acquiring or possessing knowledge—In general.**

Since notice to an agent, in order that it may constitute notice to his principal, must have been in the course of his employment as well as in relation to a matter within the scope of his authority, it has been contended that notice to an agent before commencement of the agency is never imputable to the principal, on the ground that the notice is not acquired in such a case in the course of his employment; or in other words that the notice must be acquired while the relation exists; and some of the courts have taken this view.<sup>158</sup> This

<sup>155</sup> *Congar v. Chicago & N. W. R. Co.*, 24 Wis. 157, 1 Am. Rep. 164; *Pennoyer v. Willis*, 26 Or. 1, 46 Am. St. Rep. 594.

<sup>156</sup> *Congar v. Chicago & N. W. R. Co.*, 24 Wis. 157, 1 Am. Rep. 164.

<sup>157</sup> *Blackburn v. Vigors*, 12 App. Cas. 531, reversing 17 Q. B. Div. 553.

<sup>158</sup> *Mountford v. Scott*, 3 Madd. 40; *Hiern v. Mill*, 13 Ves. 120; *Satterfield v. Malone*, 35 Fed. 445; *The Admiral*, 18 Law Rep. 91, Fed. Cas. No. 84; *McCormick v. Joseph*, 83 Ala. 401; *Wheeler v. McGuire*, 86 Ala. 398; *Goodbar v. Daniel*, 88 Ala. 583, 16 Am. St. Rep. 76; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160 (compare *Wittenbrock v. Parker*, 102 Cal. 93, 41 Am. St. Rep. 172); *Second Nat. Bank v. Curren*, 36 Iowa, 555; *Willis v. Vallette*, 4 Metc. (Ky.) 186; *Plympton*

rule is based on the legal identity of the principal with the agent, and until the relation of principal and agent exists, all knowledge acquired by the agent is no more binding on the principal than if acquired by a stranger. "The true reason of the limitation," it was said in a Pennsylvania case, "is a technical one, that the agent represents, and stands in the shoes of, his principal. Notice to him, then, is notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased would be."<sup>159</sup> Thus, it is held that a principal is not bound by knowledge acquired by his agent in ordinary social intercourse before the transaction with the principal was contemplated.<sup>160</sup>

**§ 481. Better rule as to time of acquiring or possessing knowledge.**

This view, however, is contrary to the weight of authority. According to the better opinion and the decided weight of authority, knowledge possessed by an agent while he occupies that relation and is executing the authority conferred upon him, as to matters within the scope of his authority, is notice to his principal, although such knowledge may have been acquired before the agency was created.<sup>161</sup> This rule

*v. Preston*, 4 La. Ann. 356; *Ross v. Houston*, 25 Miss. 591, 59 Am. Dec. 231; *Barbour v. Wiehle*, 116 Pa. 308; *Hood v. Fahnestock*, 8 Watts (Pa.) 489, 34 Am. Dec. 489; *Houseman v. Girard Mut. B. & L. Ass'n*, 81 Pa. 256; *Martin v. Jackson*, 27 Pa. 504, 67 Am. Dec. 489; *Pritchett v. Sessions*, 10 Rich. Law (S. C.) 293; *Kauffman v. Robey*, 60 Tex. 308, 48 Am. Rep. 264; *Taylor v. Taylor* (Tex.) 29 S. W. 1057; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 349, (holding that notice to an agent, in order to bind the principal, must be in the same transaction upon which suit is brought).

<sup>159</sup> *Houseman v. Girard Mut. B. & L. Ass'n*, 81 Pa. 256.

"Another reason for the rule is that facts learned in one transaction by a party are not presumed to be present in his mind when engaged in a totally different transaction. The law does not presume that what is once known will always be present in the memory." *Kauffman v. Robey*, 60 Tex. 308, 48 Am. Rep. 266.

<sup>160</sup> *Cooper v. Ford*, 29 Tex. Civ. App. 253.

<sup>161</sup> *Dresser v. Norwood*, 17 C. B. (N. S.) 466; *Rolland v. Hart*, 6 Ch. App. 678; *The Distilled Spirits*, 11 Wall. (U. S.) 356; *Whitten v. Jenkins*, 34 Ga. 305; *Flower v. Elwood*, 66 Ill. 438; *Snyder v. Part-*

is based upon the duty of an agent to communicate to his principal all knowledge he may possess concerning the subject-matter of the agency. The law presumes that the agent has performed this duty, and imputes to the principal whatever knowledge may be then possessed by the agent, and which he is at liberty to disclose, whether it came to his knowledge during the existence of the agency, or so soon before as to be presumed to be in his mind at the time in question, or even if it is acquired some time before if it appears that it is in the agent's mind during the agency. According to this view: "The existence of knowledge in an agent, when acting for his principal, is notice to the principal, however that knowledge may have been acquired."<sup>162</sup>

**§ 482. Qualifications of this rule.**

(a) **Knowledge must be present in agent's mind.**—This rule, however, is subject to the following qualifications: Knowledge acquired by an agent before the commencement of the

ridge, 138 Ill. 173, 32 Am. St. Rep. 130; *Burton v. Perry*, 146 Ill. 71; *Yerger v. Barz*, 56 Iowa, 77; *McClelland v. Saul*, 113 Iowa, 208, 86 Am. St. Rep. 370; *Cummings v. Harsabrauch*, 14 La. Ann. 711; *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *Schwind v. Boyce*, 94 Md. 510; *Suit v. Woodhall*, 113 Mass. 391; *Campau v. Konan*, 39 Mich. 362; *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322; *Wilson v. Minn. Farmers' Mut. F. Ins. Ass'n*, 36 Minn. 112, 1 Am. St. Rep. 659; *George v. Wabash Western R. Co.*, 40 Mo. App. 433; *Richardson v. Palmer*, 24 Mo. App. 480; *Chouteau v. Allen*, 70 Mo. 290; *Patten v. Merchants' & F. Mut. F. Ins. Co.*, 40 N. H. 375; *Hovey v. Blanchard*, 13 N. H. 148; *Willard v. Denise*, 50 N. J. Eq. 482, 35 Am. St. Rep. 788; *Craigie v. Hadley*, 99 N. Y. 131; *Constant v. University of Rochester*, 111 N. Y. 604, 7 Am. St. Rep. 769; *Slatery v. Schwannecke*, 118 N. Y. 543 (compare *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731; *Bank of U. S. v. Davis*, 2 Hill [N. Y.] 451; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478); *Pennoyer v. Willis*, 26 Or. 1, 46 Am. St. Rep. 594; *Fuller v. Atwood*, 14 R. I. 293; *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394; *Tagg v. Tenn. Nat. Bank*, 9 Helsk. (Tenn.) 479; *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252; *Mullin v. Vermont Mut. F. Ins. Co.*, 58 Vt. 113; *Abell v. Howe*, 43 Vt. 403; *Deering v. Holcomb*, 26 Wash. 588; *Shafer v. Phenix Ins. Co.*, 53 Wis. 361; *Brothers v. Bank of Kaukauna*, 84 Wis. 381, 36 Am. St. Rep. 932.

<sup>162</sup> *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394.

agency is not notice to the principal unless it is shown or appears that the knowledge was present in his mind at the time he acted for the principal.<sup>163</sup> But if the agent had acquired the knowledge so recently, and the fact was of such a nature, as to make it incredible that he should have forgotten it, the principal will be bound, at least unless it is affirmatively shown that the agent had forgotten it.<sup>164</sup> Thus, it

<sup>163</sup> *Dresser v. Norwood*, 17 C. B. (N. S.) 466; *Wittenbrock v. Parker*, 102 Cal. 93, 41 Am. St. Rep. 172; *Yerger v. Barz*, 56 Iowa, 77; *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *Schwind v. Boyce*, 94 Md. 510; *Dorr v. Life Ins. Clearing Co.*, 71 Minn. 38, 70 Am. St. Rep. 309; *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322; *Constant v. University of Rochester*, 111 N. Y. 604, 7 Am. St. Rep. 769; *Slattery v. Schwannecke*, 118 N. Y. 543; *Red River Valley Land & Inv. Co. v. Smith*, 7 N. D. 236; *Mullin v. Vermont Mut. F. Ins. Co.*, 58 Vt. 113; *Deering v. Holcomb*, 26 Wash. 588.

In *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 320, Peters, J., says: "We think, all things considered, the safer and better rule to be that the knowledge of an agent, obtained prior to his employment as agent, will be an implied or imputed notice to the principal, under certain limitations and conditions, which are these: The knowledge must be present to the mind of the agent when acting for the principal, so fully in his mind that it could not have been at the time forgotten by him; the knowledge or notice must be of a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal; and the agent must himself have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but must be at liberty to communicate it. Additional modification might be required in some cases. These elements appearing, it seems just to say that a previous notice to an agent is present notice to the principal. The presumption that an agent will do what it is his right and duty to do, having no personal motive or interest to do the contrary, is so strong that the law does not allow it to be denied."

<sup>164</sup> *Brothers v. Bank*, 84 Wis. 381, 36 Am. St. Rep. 932; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361; *Snyder v. Partridge*, 138 Ill. 173, 32 Am. St. Rep. 130; *Richardson v. Palmer*, 24 Mo. App. 480. In *Burton v. Perry*, 146 Ill. 71, 118, the court states the rule as follows: "The knowledge of the agent must be acquired during his agency, and in the course of the same transaction from which the principal's rights and liabilities arise, in order to affect the principal with notice, unless it is clear from the evidence, that the information obtained by the agent in a former transaction, is so precise and definite, that it is or must be present to his mind and memory while engaged in the second transaction."

was held in a Missouri case, that the rule that the knowledge of the agent affects the principal is applicable not only to knowledge acquired during the continuance of the agency, but to such as was acquired so shortly before it began as necessarily to give rise to the inference that it remained fixed in the mind of the agent during the employment.<sup>165</sup> As to the length of time within which knowledge previously acquired by an agent may be attributed to him, it must necessarily depend upon the facts and circumstances of the particular case. It cannot be determined merely by the time that has elapsed since he acquired the knowledge. It may have been of such a nature as to have escaped his memory in a very short time; and on the other hand the circumstances may have been such that he would be supposed to retain it for a longer period. It must in all cases depend upon the circumstances.<sup>166</sup>

**(b) Agent must be at liberty to communicate his knowledge.**—The other qualification with respect to the effect of knowledge acquired by the agent before the commencement of the agency is that the agent must have been at liberty to disclose it to the principal. If, for example, he could not have disclosed it without violating his duty to another principal, the present principal is not chargeable with notice.<sup>167</sup> “When it is not the agent’s duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound

<sup>165</sup> *Chouteau v. Allen*, 70 Mo. 290.

<sup>166</sup> *Mountford v. Scott*, 1 Turn. & R. 274; *The Distilled Spirits*, 11 Wall. (U. S.) 367.

<sup>167</sup> *Constant v. University of Rochester*, 111 N. Y. 604, 7 Am. St. Rep. 769; *Littauer v. Houck*, 92 Mich. 162, 31 Am. St. Rep. 572; *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *The Distilled Spirits*, 11 Wall. (U. S.) 356; *Schwind v. Boyce*, 94 Md. 510; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Wittenbrock v. Parker*, 102 Cal. 93, 41 Am. St. Rep. 172; *Snyder v. Partridge*, 138 Ill. 173, 32 Am. St. Rep. 130.

by his agent's secret and confidential information."<sup>168</sup> This qualification is applied most frequently to attorneys, and others, acting in a capacity that imposes upon them the duty of not disclosing professional secrets, such as physicians, ministers, etc.<sup>169</sup>

**§ 483. Knowledge of agent employed in continuous transactions.**

Where an agent is employed, not for a single transaction, or for separate transactions at different times, but continuously and for a series of transactions, as in the case of a person intrusted continuously with the conduct of a business, a manager of a corporation, cashier of a bank, etc., knowledge acquired by him in the course of one transaction will affect the principal in other transactions of such agent. In a New York case Judge Folger said: "Where the agency is continuous, and concerned with a business made up of a long series of transactions of a like nature, of the same general character, it will be held that knowledge acquired as agent in that business in any one or more of the transactions, making up from time to time the whole business of the principal, is notice to the agent and to the principal, which will affect the latter in any other of those transactions in which that agent is engaged, in which that knowledge is material."<sup>170</sup> In a later case Judge Andrews said: "The general rule is well established that notice to an agent of a bank, or other corporation intrusted with the management of its business, or of a particular branch of its business, is notice to the corporation in transactions conducted by such agent, acting for the corporation, within the scope of his authority, whether the knowledge of such agent was acquired in the course of the particular dealing, or on some prior occasion."<sup>171</sup>

<sup>168</sup> *The Distilled Spirits*, 11 Wall. (U. S.) 356.

<sup>169</sup> As to notice by an attorney when imputable to his client, see post, § 633.

<sup>170</sup> *Holden v. New York & Erie Bank*, 72 N. Y. 286.

<sup>171</sup> *Craigie v. Hadley*, 99 N. Y. 131.

**§ 484. Knowledge acquired after termination of agency.**

Of course, a principal is not chargeable with notice to a former agent, after termination of the agency.<sup>172</sup> But if, at the time of a transaction through an agent the principal has notice by reason of the agent's knowledge, such notice is in no way affected by the termination of the agency by death of the agent or otherwise.<sup>173</sup>

**§ 485. Exception to the general rule where the agent is interested adversely to the principal.**

The doctrine that a principal is chargeable with notice of facts known to his agent is based, not only upon the fiction of identity, but also upon the fact that it is the duty of the agent to communicate his knowledge to his principal, and the presumption that he has performed this duty. No such presumption can arise, however, where the agent is dealing with the principal in his own interest, or where he is acting in collusion to defraud his principal, or where for any other reason his interest is adverse to that of his principal, so that it is to his own interest not to communicate the knowledge to the principal. In such a case the general rule that notice to an agent is notice to his principal does not apply.<sup>174</sup> In accord-

<sup>172</sup> *Great Western Ry. v. Wheeler*, 20 Mich. 419; *Boardman v. Taylor*, 66 Ga. 638; *Houseman v. Girard Mut. Bldg. & Loan Ass'n*, 81 Pa. 256.

<sup>173</sup> See *Birmingham Trust & Sav. Co. v. La. Nat. Bank*, 99 Ala. 379.

<sup>174</sup> *England*: In re *European Bank*, 5 Ch. App. 358; *Cave v. Cave*, 15 Ch. Div. 639; *Kettlewell v. Watson*, 21 Ch. Div. 685; *Kennedy v. Green*, 3 Mylne & K. 699.

*United States*: *Whittle v. Vanderbilt Min. & Mill. Co.*, 83 Fed. 48; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 22 C. C. A. 378, 75 Fed. 433; *Lamson v. Beard*, 36 C. C. A. 56, 94 Fed. 30; *Western Mortg. & Inv. Co. v. Ganzer*, 63 Fed. 647; *Hudson v. Randolph*, 66 Fed. 216; *Bank of Overton v. Thompson*, 118 Fed. 798.

*Alabama*: *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736; *Reid v. Bank of Mobile*, 70 Ala. 199.

*Colorado*: *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118.

*Connecticut*: *Platt v. Birmingham Axle Co.*, 41 Conn. 255; *First Nat. Bank v. Bevin*, 72 Conn. 666.

*Georgia*: *English-American L. & T. Co. v. Hiers*, 112 Ga. 823.

ance with this doctrine, a corporation is liable for the fraudulent issue of stock by one of its officers to whom it has given apparent authority to make such issue, though such officer is

*Illinois:* *Seaverns v. Presbyterian Hospital*, 173 Ill. 414, 64 Am. St. Rep. 125.

*Indiana:* *Peckham v. Hendren*, 76 Ind. 47.

*Iowa:* *First Nat. Bank v. Gifford*, 47 Iowa, 575; *Hummel v. Bank of Monroe*, 75 Iowa, 689.

*Kansas:* *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784.

*Kentucky:* *Lyne v. Bank of Ky.*, 5 J. J. Marsh. 545.

*Louisiana:* *Seixas v. Citizens' Bank*, 38 La. Ann. 424.

*Maine:* *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319.

*Maryland:* *Winchester v. Baltimore & S. R. Co.*, 4 Md. 231; *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412.

*Massachusetts:* *Commercial Bank v. Cunningham*, 24 Pick. 270, 35 Am. Dec. 322; *Washington Bank v. Lewis*, 22 Pick. 24; *Dickinson v. Cent. Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351; *Innerarity v. Merchants Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710; *Corcoran v. Snow Cattle Co.*, 151 Mass. 74.

*Michigan:* *International Wrecking & Transp. Co. v. McMorran*, 73 Mich. 467; *State Sav. Bank v. Montgomery*, 126 Mich. 327.

*Minnesota:* *Bang v. Brett*, 62 Minn. 4; *Dorr v. Life Ins. Clearing Co.*, 71 Minn. 38, 70 Am. St. Rep. 309.

*Missouri:* *Johnston v. Shortridge*, 93 Mo. 227; *Merchants' Nat. Bank v. Lovitt*, 114 Mo. 519, 35 Am. St. Rep. 770; *Hickman v. Green*, 123 Mo. 165.

*Nebraska:* *Koehler v. Dodge*, 31 Neb. 328, 28 Am. St. Rep. 518; *State Bank v. Mathews*, 45 Neb. 659, 50 Am. St. Rep. 565.

*New Jersey:* *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33; *First Nat. Bank v. Christopher*, 40 N. J. Law, 435; *Graham v. Orange County Nat. Bank*, 59 N. J. Law, 225; *De Kay v. Hackensack Water Co.*, 38 N. J. Eq. 158.

*New York:* *Seneca County Bank v. Neass*, 5 Denio, 329; *Atlantic State Bank v. Savery*, 82 N. Y. 291; *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 36 Am. St. Rep. 705; *Henry v. Allen*, 151 N. Y. 1.

*Ohio:* *Loomis v. Eagle Bank*, 1 Disn. 285.

*Pennsylvania:* *Gunster v. Scranton Illuminating, H. & P. Co.*, 181 Pa. 327, 59 Am. St. Rep. 650; *Musser v. Hyde*, 2 Watts & S. 314.

*South Carolina:* *Knobelock v. Germania Sav. Bank*, 50 S. C. 259.

*Texas:* *Harrington v. McFarland*, 1 Tex. Civ. App. 289; *Cooper v. Ford*, 29 Tex. Civ. App. 253.

*Vermont:* *Lyndon Mill Co. v. Lyndon L. & B. Inst.*, 63 Vt. 581,



also the broker of the person to whom the stock is issued, when the latter acts in good faith, and has no personal knowledge of the fraudulent act of the officer.<sup>175</sup>

Especially does this exception to the general rule apply where it is stipulated or understood between the agent and the third party that the agent will not communicate his knowledge to his principal.<sup>176</sup> The rule that the principal is chargeable with what the agent knows is for the benefit of innocent third persons; but it is difficult to perceive how this rule can apply when the understanding between an agent and such person is that the knowledge of the agent is not to be communicated to the principal, or where they otherwise collude to cheat or defraud the principal.<sup>177</sup>

25 Am. St. Rep. 783; *First Nat. Bank v. Briggs' Assignees*, 70 Vt. 594.

*Virginia*: *Martin v. South Salem Land Co.*, 94 Va. 28.

*Wisconsin*: *In re Plankinton Bank*, 87 Wis. 378; *Cole v. Getzinger*, 96 Wis. 559.

In *Allen v. South Boston R. Co.*, 150 Mass. 200, 15 Am. St. Rep. 185, this exception to the general rule is upheld, but the court seems to doubt whether the reasons, given above, for the exception, are the true ones. As said by the court: "It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud, committed by an agent on his own account, is beyond the scope of his employment, and therefore knowledge of it, as a matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it."

<sup>175</sup> *Allen v. South Boston R. Co.*, 150 Mass. 200, 15 Am. St. Rep. 185.

<sup>176</sup> *Pennoyer v. Willis*, 26 Or. 1, 46 Am. St. Rep. 594.

<sup>177</sup> *Pennoyer v. Willis*, 26 Or. 1, 46 Am. St. Rep. 594; *National L. Ins. Co. v. Minch*, 53 N. Y. 144. "The rule that the principal is chargeable with what the agent knows is for the benefit of third persons, and is founded upon the theory that the agent is at liberty and is presumed to have communicated such knowledge to the principal, or, if he has not, still, the principal having entrusted the

C. & S.—67.

**§ 486. Notice to agent acting for both parties.**

Where an agent is acting for both parties to the same transaction, with the knowledge of both, notice or knowledge to him with respect to the subject-matter of the agency is notice or knowledge to each of the parties so far as it affects either.<sup>178</sup>

**§ 487. Notice to joint agent.**

If a principal employs several agents to transact jointly a particular piece of business, he is equally responsible for the conduct of each and all of them while acting within the limit and scope of their power; and notice to either of them, while engaged in the business of the principal, is notice to the principal.<sup>179</sup>

**§ 488. Notice to clerk, servant, or mere ministerial agent.**

It follows from the reasons given for the general rule, that it does not apply to servants, clerks, or others acting in a ministerial capacity. The notice or knowledge must be acquired by a person who is executing some agency, and not acting merely in a ministerial capacity, as servants and clerks, for in such cases they do not act as substitutes for their principal, nor is there a duty imposed upon them to communicate to their principal knowledge acquired by them.<sup>180</sup> Thus, an agent whose duty it is to act merely as custodian of funds and securities offered for loans, but who has no discretion in the matter of making loans, or passing on the sufficiency of titles, is not such an agent as that previous notice to him of

agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal, otherwise the neglect of the agent might operate most injuriously to the rights and interests of such party. But it is difficult to perceive what application the rule can have when the understanding between an agent and such party is that the knowledge of the agent is not to be communicated to the principal but to be withheld from him." *Pennoyer v. Willis*, *supra*.

<sup>178</sup> *Smith v. Farrell*, 66 Mo. App. 8.

<sup>179</sup> *Bank of U. S. v. Davis*, 2 Hill (N. Y.) 451.

<sup>180</sup> *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 321; *Rogers v. Dutton*, 182 Mass. 187.

an incumbrance on land offered as security for a loan of funds in the agent's hands will be notice to his principal.<sup>181</sup>

**§ 489. Notice to subagents.**

If an agent is authorized by his principal to appoint a subagent and make him the agent of the principal, it is clear that notice to the subagent is notice to the principal to the same extent as notice to an agent appointed directly by the principal would be.<sup>182</sup> This is true where the appointment of subagents is authorized by custom, as in the case of insurance agents.<sup>183</sup>

It would seem equally clear that if an agent has no authority to appoint a subagent, notice to a subagent appointed by him is not notice to the principal.<sup>184</sup> In order, therefore, to determine in any case whether a principal is chargeable with notice to a subagent, the only question is whether the agent had authority to appoint the subagent.<sup>185</sup>

It was held by a divided court in the supreme court of the United States that where a person employs an agent to collect a debt or transact other business which may require the employment of an attorney by the agent, and the latter employs an attorney, the attorney is the agent of the agent and not of the principal, and notice to him is not notice to the principal.<sup>186</sup> In some cases in the state courts, however, the decisions are to the contrary.<sup>187</sup>

<sup>181</sup> *Pennoyer v. Willis*, 26 Or. 1, 46 Am. St. Rep. 594.

<sup>182</sup> *Hoover v. Wise*, 91 U. S. 308, 810; *Arff v. Star F. Ins. Co.*, 125 N. Y. 57, 21 Am. St. Rep. 721; *Bates v. American Mortg. Co.*, 37 S. C. 88. And see *Smith v. Wilson & B. Sav. Bank*, 1 Tex. Civ. App. 115, 126.

<sup>183</sup> *Arff v. Star F. Ins. Co.*, 125 N. Y. 57, 21 Am. St. Rep. 721; *Carpenter v. German American Ins. Co.*, 135 N. Y. 298.

<sup>184</sup> *Hoover v. Wise*, 91 U. S. 308. And see *National Security Bank v. Cushman*, 121 Mass. 490.

<sup>185</sup> See ante, §§ 341-345.

<sup>186</sup> *Hoover v. Wise*, 91 U. S. 308.

<sup>187</sup> *Bates v. American Mortg. Co.*, 37 S. C. 88. And see *Ryan v. Tudor*, 31 Kan. 366.

§ 490. Application of these rules to corporations—In general.

These rules apply as well to corporations, as principals, as to private individuals, and notice or knowledge of facts acquired or possessed by an officer or agent of a corporation in the course of his employment, and in respect to matters within the scope of his authority, is notice or knowledge to the corporation, whether communicated to it or not.<sup>188</sup> This rule is

<sup>188</sup> *New England Car-Spring Co. v. Union India Rubber Co.*, 4 Blatchf. 1, Fed. Cas. No. 10,153; *Zels v. Potter*, 105 Fed. 671; *Saint v. Wheeler & W. Mfg. Co.*, 95 Ala. 362, 36 Am. St. Rep. 210; *Branch Bank v. Steele*, 10 Ala. 915; *Sloane v. Southern Cal. R. Co.*, 111 Cal. 668; *Love v. Anchor Raisin Vineyard Co. (Cal.)* 45 Pac. 1044; *Denver S. P. & P. R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537; *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362; *New York & N. E. R. Co. v. New York, N. H. & H. R. Co.*, 52 Conn. 274; *McKenney v. Diamond State Loan Ass'n*, 8 Houst. (Del.) 557; *Hobbs v. Georgia Lumber & T. Co.*, 74 Ga. 371; *Merchants' Nat. Bank v. Gullmartin*, 93 Ga. 503, 44 Am. St. Rep. 182; *Home Sav. & State Bank v. Wheeler*, 74 Ill. App. 261; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Chicago Pneumatic Tool Co. v. H. W. Johns Mfg. Co.*, 101 Ill. App. 349; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401; *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111; *Liebfritz v. Dubuque St. R. Co.*, 48 Iowa, 709; *Trapp v. Fidelity Nat. Bank*, 101 Ky. 485; *Union Nat. Bank v. Manhattan L. Ins. Co.*, 52 La. Ann. 36; *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646; *Atlantic Cotton Mills Co. v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698; *Detroit Motor Co. v. Third Nat. Bank*, 111 Mich. 407; *City Bank v. Phillips*, 22 Mo. 85; *George v. Wabash Western R. Co.*, 40 Mo. App. 433; *Campbell v. Merchants' & F. Mut. F. Ins. Co.*, 37 N. H. 35; *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117; *State v. Felton*, 52 N. J. Law, 161; *Ransom v. Brinkerhoff*, 56 N. J. Eq. 149; *Holden v. New York & E. Bank*, 72 N. Y. 286; *Cragle v. Hadley*, 99 N. Y. 131; *Follette v. Mutual Acc. Ass'n*, 110 N. C. 377; *Conant v. Reed*, 1 Ohio St. 298; *Farmers' Bank v. Saling*, 33 Or. 394; *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. 389, 18 Am. Rep. 412; *Wilson v. McCullough*, 23 Pa. 440, 62 Am. Dec. 347; *In re Sweet*, 20 R. I. 557; *Webb v. Graniteville Mfg. Co.*, 11 S. C. 396, 32 Am. Rep. 479; *American Freehold Land Mortg. Co. v. Felder*, 44 S. C. 478; *Magowan v. Groneweg (S. D.)* 91 N. W. 335; *Huron Printing & B. Co. v. Kittleson*, 4 S. D. 520; *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394; *Merchants' & Planters' Bank v. Penland*, 101 Tenn. 445; *Argentine Min. Co. v. Benedict*, 18 Utah, 183; *Porter*

subject to the same qualifications that we have seen heretofore, and notice or knowledge acquired by an officer or agent of a corporation otherwise than in the course of his employment, or in relation to a matter which is not within the scope of his authority, is not notice to or knowledge of the corporation, unless communicated to it.<sup>189</sup> And if a corporation ratifies an unauthorized contract or act of its officer or agent, it is chargeable with his knowledge of fraud, illegality,

v. Bank of Rutland, 19 Vt. 410; Hart v. Farmers' & Mechanics' Bank, 33 Vt. 252; Bass v. Chicago & N. W. R. Co., 42 Wis. 654, 24 Am. Rep. 437; Johnson v. First Nat. Bank, 79 Wis. 414, 24 Am. St. Rep. 722. And see Clark & M. Corp. § 719 et seq.

<sup>189</sup> Powles v. Page, 3 C. B. 16; Waynesville Nat. Bank v. Irons, 8 Fed. 1; American Surety Co. v. Pauly, 170 U. S. 133; Frankel v. Hudson, 82 Ala. 158, 60 Am. Rep. 736; Franklin Min. Co. v. O'Brien, 22 Colo. 129, 55 Am. St. Rep. 118; Farmers' & Citizens' Bank v. Payne, 25 Conn. 444, 68 Am. Dec. 362; Camp v. Southern Banking & T. Co., 97 Ga. 582; Seaverns v. Presbyterian Hospital, 173 Ill. 414, 64 Am. St. Rep. 125; McDonald Mfg. Co. v. Thomas, 53 Iowa, 558; Wickersham v. Chicago Zinc Co., 18 Kan. 481, 26 Am. Rep. 784; Taylor v. Bank of Ky., 2 J. J. Marsh. (Ky.) 564; Mercier v. Canonge, 8 La. Ann. 37; Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319; Gemmell v. Davis, 72 Md. 546, 32 Am. St. Rep. 412; General Ins. Co. v. United States Ins. Co., 10 Md. 517, 69 Am. Dec. 174; Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 52 Am. Rep. 710; National Security Bank v. Cushman, 121 Mass. 490; Stevenson v. Bay City, 26 Mich. 44; Dorr v. Life Ins. Clearing Co., 71 Minn. 38, 70 Am. St. Rep. 309; Goodloe v. Godley, 13 Smedes & M. (Miss.) 233, 51 Am. Dec. 159; Kearney Bank v. Froman, 129 Mo. 427, 50 Am. St. Rep. 456; State Bank v. Mathews, 45 Neb. 659, 50 Am. St. Rep. 565; First Nat. Bank v. Christopher, 40 N. J. Law, 435, 29 Am. Rep. 262; Willard v. Denise, 50 N. J. Eq. 482, 35 Am. St. Rep. 788; Casco Nat. Bank v. Clark, 139 N. Y. 307, 36 Am. St. Rep. 710; Red River Valley Land & Inv. Co. v. Smith, 7 N. D. 236; Bard v. Pennsylvania Mut. F. Ins. Co., 153 Pa. 257, 34 Am. St. Rep. 704; Knobelock v. Germania Sav. Bank, 50 S. C. 259; National Bank of Commerce v. Feeney, 9 S. D. 550; Memphis Nat. Bank v. Sneed, 97 Tenn. 120, 56 Am. St. Rep. 788; Texas Banking & Ins. Co. v. Hutchins, 53 Tex. 61, 37 Am. Rep. 750; Victor Gold & Silver Min. Co. v. National Bank, 15 Utah, 391; Bank of Virginia v. Craig, 6 Leigh (Va.) 399; Washington Nat. Bank v. Pierce, 6 Wash. 491, 36 Am. St. Rep. 174; Congar v. Chicago & N. W. R. Co., 24 Wis. 157, 1 Am. Rep. 164. And see Clark & M. Corp. §§ 719, 720.

or other facts in the transaction.<sup>190</sup> As to the time at which such notice or knowledge must be acquired or possessed by such officer or agent, the same rules apply, as have been considered in a preceding section.<sup>191</sup> These rules do not apply, however, where the officer or agent is dealing with the corporation in his own interest, or where, for other reasons, his interest is adverse to that of the corporation, so that it is to his own interest not to impart his knowledge to the corporation, and in such cases, notice or knowledge possessed by an officer or agent is not imputable to the corporation,<sup>192</sup> unless he also represents the corporation in the transaction; as where his act constitutes a fraud upon a third person, the corpora-

<sup>190</sup> *Singleton v. Bank of Monticello*, 113 Ga. 527; *Fouche v. Merchants' Nat. Bank*, 110 Ga. 827.

<sup>191</sup> See ante, § 480 et seq.; and cases cited in preceding notes.

<sup>192</sup> *In re European Bank*, 5 Ch. App. 358; *Lamson v. Beard*, 94 Fed. 30; *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736; *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118; *First Nat. Bank v. Bevin*, 72 Conn. 666; *English-American Loan & Trust Co. v. Hiers*, 112 Ga. 823; *Seaverns v. Presbyterian Hospital*, 173 Ill. 414, 64 Am. St. Rep. 125; *Peckham v. Hendren*, 76 Ind. 47; *Hummell v. Bank of Monroe*, 75 Iowa, 689; *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784; *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. (Ky.) 545; *Seixas v. Citizens' Bank*, 38 La. Ann. 424; *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; *Corcoran v. Snow Cattle Co.*, 151 Mass. 74; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710; *International Wrecking & Transp. Co. v. McMorran*, 73 Mich. 467; *Fort Dearborn Nat. Bank v. Seymour*, 71 Minn. 81; *Dorr v. Life Ins. Clearing Co.*, 71 Minn. 38, 70 Am. St. Rep. 309; *Merchants' Nat. Bank v. Lovitt*, 114 Mo. 519, 35 Am. St. Rep. 770; *State Bank v. Mathews*, 45 Neb. 659, 50 Am. St. Rep. 565; *First Nat. Bank v. Christopher*, 40 N. J. Law, 435, 29 Am. Rep. 262; *Graham v. Orange County Nat. Bank*, 59 N. J. Law, 225; *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 36 Am. St. Rep. 705; *Atlantic State Bank v. Savery*, 82 N. Y. 291; *Gunster v. Scranton Illuminating, Heat & Power Co.*, 181 Pa. 327, 59 Am. St. Rep. 650; *Knobelock v. Germania Sav. Bank*, 50 S. C. 259; *National Bank of Commerce v. Feeney*, 9 S. D. 550; *Victor Gold & Silver Min. Co. v. National Bank*, 15 Utah, 391; *Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.*, 63 Vt. 581, 25 Am. St. Rep. 783; *Martin v. South Salem Land Co.*, 94 Va. 28; *In re Plankinton Bank*, 87 Wis. 378. And see *Clark & M. Corp.* § 723a.

tion is chargeable with notice thereof, if the officer or agent is also representing the corporation in the transaction, although the fraud is perpetrated for his own benefit.<sup>193</sup> Thus, where a town treasurer gave his note, as treasurer, to raise money for his own use, and discounted the same as cashier for a bank, it was held that the bank was chargeable with notice of the fraud.<sup>194</sup> Nor do these rules apply where it is expressly stipulated or understood that the facts within the agent's knowledge shall not be communicated to the corporation.<sup>195</sup>

— **Notice to or knowledge of directors.** The directors of a corporation when acting together as a board, represent the corporation as to all matters within their powers, which are very extensive in controlling the management of the corporation. Therefore, notice or knowledge of facts acquired or possessed by the directors of a corporation, while acting together as a board, whether acquired from one of the directors or from a third person, is chargeable to the corporation, the same as if acquired or possessed by any other agent.<sup>196</sup> But since the directors do not individually represent the corporation, but only when acting together as a board, notice or

<sup>193</sup> *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698; *Taft v. Presidio R. Co.*, 84 Cal. 131, 18 Am. St. Rep. 166; *First Nat. Bank v. Town of New Milford*, 36 Conn. 93; *Atlantic Bank v. Merchants' Bank*, 10 Gray (Mass.) 532; *Detroit Motor Co. v. Third Nat. Bank*, 111 Mich. 407; *Steam Stonecutter Co. v. Myers*, 64 Mo. App. 527; *Withers v. Lafayette County Bank*, 67 Mo. App. 115; *Holden v. New York & Erie Bank*, 72 N. Y. 286; *Fishkill Sav. Inst. v. Bostwick*, 19 Hun (N. Y.) 354; *In re Millward-Cliff Cracker Co.'s Estate*, 161 Pa. 157; *Smith v. Wilson & B. Sav. Bank*, 1 Tex. Civ. App. 115; *Barksdale v. Finney*, 14 Grat. (Va.) 338. And see *Clark & M. Corp.* § 723e.

<sup>194</sup> *First Nat. Bank of Milford v. New Milford*, 36 Conn. 93.

<sup>195</sup> *First Nat. Bank of Sturgis v. Reed*, 36 Mich. 263.

<sup>196</sup> *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362; *Toll Bridge Co. v. Betsworth*, 30 Conn. 380; *City Bank of Columbus v. Phillips*, 22 Mo. 85, 64 Am. Dec. 254; *First Nat. Bank of Hightstown v. Christopher*, 40 N. J. Law, 435, 29 Am. Rep. 262; *Fulton Bank v. New York & S. Canal Co.*, 4 Paige (N. Y.) 127; *Bank of Pittsburgh v. Whitehead*, 10 Watts (Pa.) 397, 36 Am. Dec. 186; *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394. See *Clark & M. Corp.* § 721.

knowledge acquired by an individual director, and not communicated to the other directors or officers, is not notice or knowledge to the corporation.<sup>197</sup> It has been held, however, that where notice or knowledge is acquired by a director of a corporation officially, for the purpose of being communicated to the board, it is chargeable to the corporation, whether it is communicated or not.<sup>198</sup> So, by the weight of authority, notice or knowledge possessed by a director, present and acting at a meeting of the board, is imputable to the corporation, whether he communicates it or not, on the ground that it is then possessed by him officially and it is his duty to communicate it to the board.<sup>199</sup> Of course, if an individual di-

<sup>197</sup> *Powles v. Page*, 3 C. B. 16; *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280; *Murphy v. Gumaer*, 12 Colo. App. 472; *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362; *New Haven, M. & W. R. Co. v. Chatham*, 42 Conn. 465; *Mercier v. Canonge*, 8 La. Ann. 37; *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *General Ins. Co. v. U. S. Ins. Co.*, 10 Md. 517, 69 Am. Dec. 174; *Winchester v. Baltimore & S. R. Co.*, 4 Md. 231; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710; *Sawyer v. Pawn-ers' Bank*, 6 Allen (Mass.) 207; *Shaw v. Clark*, 49 Mich. 384, 43 Am. Rep. 474; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123; *Edwards v. Carson Water Co.*, 21 Nev. 469; *Buttrick v. Nashua & L. R. Co.*, 62 N. H. 413, 13 Am. St. Rep. 578; *First Nat. Bank of Hightstown v. Christopher*, 40 N. J. Law, 435, 29 Am. Rep. 262; *Fulton Bank v. New York & S. Canal Co.*, 4 Paige (N. Y.) 127; *Westfield Bank v. Cornen*, 7 N. Y. 320, 93 Am. Dec. 573; *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 36 Am. St. Rep. 705; *Bard v. Penn Mut. F. Ins. Co.*, 153 Pa. 257, 34 Am. St. Rep. 704; *Wilson v. McCullough*, 23 Pa. 440, 62 Am. Dec. 347; *Jones v. Planters' Bank*, 9 Heisk. (Tenn.) 455. And see *Clark & M. Corp.* § 721.

<sup>198</sup> *Pittsburgh, C. & St. L. R. Co. v. Woolley*, 12 Bush (Ky.) 451; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646; *General Ins. Co. v. U. S. Ins. Co.*, 10 Md. 517, 69 Am. Dec. 174; *Bank of U. S. v. Davis*, 2 Hill (N. Y.) 451.

<sup>199</sup> *Toll Bridge Co. v. Betsworth*, 30 Conn. 380; *Pittsburgh, C. & St. L. R. Co. v. Woolley*, 12 Bush (Ky.) 451; *National Security Bank v. Cushman*, 121 Mass. 490; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710; *City Bank of Columbus v. Phillips*, 22 Mo. 85, 64 Am. Dec. 254; *Clerks' Sav. Bank v. Thomas*, 2 Mo. App. 367; *Bank of U. S. v. Davis*, 2 Hill (N. Y.) 451; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Union Bank v. Campbell*,



rector acts as the authorized agent of a corporation, notice to or knowledge possessed by him is imputable to the corporation; but this is because of his agency, rather than because he is a director.<sup>200</sup> But if a director is acting for himself and adversely to the interests of the corporation, in a particular transaction, his knowledge of facts is not chargeable to the corporation; and it is immaterial that he was present at a meeting of the board of directors at which the transaction was considered and authorized.<sup>201</sup>

— **Notice to or knowledge of stockholders, promoters, etc.** The stockholders, promoters, or corporators, as such, of a corporation are not its agents, and hence notice or knowledge possessed by the promoters or individual stockholders or corporators is not chargeable to the corporation, unless there are no other stockholders, or unless the person possessing the notice or knowledge is also an officer or agent of the corporation.<sup>202</sup> If, however, they are also officers or agents of the corporation, and the notice or knowledge relates to matters

4 Humph. (Tenn.) 394. But see *Terrell v. Branch Bank at Mobile*, 12 Ala. 502; *Custer v. Tompkins County Bank*, 9 Pa. 27.

<sup>200</sup> *Dr. Jaeger's Sanitary Woolen System Co. v. Walker*, 77 Law T. (N. S.) 180; *Davis Improved W. I. Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.*, 20 Fed. 699; *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362; *Dunham v. Troy Union R. Co.*, 1 Abb. Dec. (N. Y.) 565; *Smith v. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179.

<sup>201</sup> *Terrell v. Branch Bank at Mobile*, 12 Ala. 502; *English-American L. & T. Co. v. Hiers*, 112 Ga. 823; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710; *Bang v. Brett*, 62 Minn. 4; *Custer v. Tompkins County Bank*, 9 Pa. 27; *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394. But see *Bank of U. S. v. Davis*, 2 Hill (N. Y.) 451; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262. And see *Clark & M. Corp.* 723(b).

<sup>202</sup> *Racine Seeder Co. v. Joliet Wire-Check Rower Co.*, 27 Fed. 367; *Murphy v. Gumaer*, 12 Colo. App. 472; *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118; *Burt v. Batavia Paper Mfg. Co.*, 86 Ill. 66; *Housatonic Bank v. Martin*, 1 Metc. (Mass.) 294; *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 40 Am. St. Rep. 299; *Wilson v. McCullough*, 23 Pa. 440, 62 Am. Dec. 347; *Bank of Pittsburgh v. Whitehead*, 10 Watts (Pa.) 397, 36 Am. Dec. 186; *Union Canal Co. v. Loyd*, 4 Watts & S. (Pa.) 393. And see *Clark & M. Corp.* § 724.

within the scope of their authority, it is imputable to the corporation, the same as in the case of other agents.<sup>203</sup> And this may also be true, where the notice or knowledge is possessed by all the stockholders, or by a stockholder owning all the stock.<sup>204</sup>

#### V. LIABILITY OF PRINCIPAL FOR THE TORTS OF HIS AGENT.

##### § 491. In general.

In the preceding sections we have considered the principal's liability for the contractual obligations entered into on his behalf by his agent, but there are many acts of the agent for which a principal may be held liable which are not contractual obligations though they may arise in the course of such a transaction. For these acts or torts of an agent, the principal may be held liable for several reasons. He may be liable on the ground of representation, because the agent represented him in the doing of such acts or wrongs. This doctrine is in accordance with the maxim *qui facit per alium, facit per se*. As has been seen, the principal is held liable for contractual obligations of his agent on the ground of authority express or implied; but it is not reasonable to suppose that a principal will authorize his agent to commit wrongs, though he may of course do so. But since he has put it in the agent's power to commit such wrongs on the rights of others, he will be held liable to the same extent as if he had authorized them. This rule is obviously based on the great social principal, *sic utere tuo ut alienum non laedas*,—so use your own that you do not injure another; in other words, so conduct your own affairs, whether by yourself or by another, that you do not injure the rights or property of others.

It is obvious that a principal may also be held liable for such wrongs of his agent, although he himself is perfectly innocent of any wrongful intent or of any collusion with

<sup>203</sup> *Hoffman Steam Coal Co. v. Cumberland C. & I. Co.*, 16 Md. 456, 77 Am. Dec. 311; *Cumberland C. & I. Co. v. Sherman*, 30 Barb. (N. Y.) 553.

<sup>204</sup> *Simons Creek Coal Co. v. Doran*, 142 U. S. 417. And see *Clark & M. Corp.* § 724.

the agent in committing them; for it is plain that the principal, although innocent, cannot be relieved, and the third party, who is equally innocent, be made to suffer for wrongs which the principal has put in the agent's power to commit. This is based on the rule that where one of two innocent parties must suffer from the wrongful act of another, that one should bear the loss who has put it in the wrongdoer's power to commit the wrong.<sup>205</sup> This liability of the principal is governed by the same principles as those applicable to the relation of master and servant, in fact the two relations run so closely together that it is often impossible to clearly distinguish between them, and for that reason many of the cases hereafter cited are properly cases of master and servant; but it will be seen that an agent's opportunities for committing wrongs binding upon his principal, are much less than those of a servant.

In determining a principal's liability for his agent's tort, two important elements are to be considered, as will be seen from the following sections: First, it must be committed in the course of the agent's employment; and second, it must be committed for the principal's benefit, although there are cases holding the principal liable for the agent's wrongs committed for his own benefit.

**§ 492. Liability of principal for torts expressly authorized.**

Of course there is no question as to the liability of a principal, to third persons, for torts which he has expressly authorized or directed, or which are the natural and proximate result of acts which he has expressly authorized or directed.<sup>206</sup> And the same is true if the principal knowingly ratifies the agent's acts or torts.<sup>207</sup> But an agency to commit a

<sup>205</sup> *Hern v. Nichols*, 1 Salk. 289; *Lee v. Sandy Hill*, 40 N. Y. 448.

<sup>206</sup> *Sutton v. Clarke*, 6 Taunt. 29; *Thames Steamboat Co. v. Housatonic R. Co.*, 24 Conn. 40, 63 Am. Dec. 154; *State v. Smith*, 78 Me. 260, 57 Am. Rep. 802; *Eaton v. European & N. A. R. Co.*, 59 Me. 520, 8 Am. Rep. 430; *Bachelor v. Pinkham*, 68 Me. 255; *Hewett v. Swift*, 3 Allen (Mass.) 420; *Guille v. Swan*, 19 Johns. (N. Y.) 382, 10 Am. Dec. 234; *Herring v. Hoppock*, 15 N. Y. 413.

<sup>207</sup> *Dempsey v. Chambers*, 154 Mass. 330, 26 Am. St. Rep. 249;

tort will not be presumed from the fact that one has been committed by the agent.<sup>208</sup>

**§ 493. Liability for agent's torts in the course of his employment.**

It is a well established rule that a principal is liable for all torts, negligences, or other malfeasances, committed by his agent in the course of his employment and for the principal's benefit, although such torts or negligences are not authorized or ratified by the principal,<sup>209</sup> or even though he

*Nims v. Mount Hermon Boys' School*, 160 Mass. 177, 39 Am. St. Rep. 467. See post, § 501.

<sup>208</sup> *Callahan v. Hyland*, 59 Ill. App. 347.

<sup>209</sup> *England*: *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *Mackay v. Commercial Bank*, L. R. 5 P. C. 394; *Venables v. Smith*, 2 Q. B. Div. 279.

*United States*: *Philadelphia & R. R. Co. v. Derby*, 14 How. 468; *Harris v. Louisville, N. O. & T. R. Co.*, 35 Fed. 116.

*Alabama*: *Gilliam v. South & N. A. R. Co.*, 70 Ala. 268; *Birmingham Water-Works Co. v. Hubbard*, 85 Ala. 179, 7 Am. St. Rep. 35.

*Arkansas*: *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560.

*California*: *Turner v. North Beach & M. R. Co.*, 34 Cal. 594; *Paige v. Roeding*, 96 Cal. 388; *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417.

*Connecticut*: *Church v. Mansfield*, 20 Conn. 284; *Phelon v. Stiles*, 43 Conn. 426. -

*Florida*: *Wheeler v. Baars*, 33 Fla. 696.

*Georgia*: *Merchants' Nat. Bank v. Guilmartin*, 88 Ga. 797.

*Illinois*: *Johnson v. Barber*, 10 Ill. 426, 50 Am. Dec. 416; *Moir v. Hopkins*, 16 Ill. 313, 63 Am. Dec. 312; *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33; *Chicago, B. & Q. R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114.

*Indiana*: *Pittsburgh, C. & St. L. R. Co. v. Kirk*, 102 Ind. 399, 52 Am. Rep. 675; *Noblesville & E. Gravel Road Co. v. Gause*, 76 Ind. 142, 40 Am. Rep. 224.

*Iowa*: *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa, 314, 24 Am. Rep. 748.

*Kansas*: *Wheeler & W. Mfg. Co. v. Boyce*, 36 Kan. 350, 59 Am. Rep. 571.

*Kentucky*: *Johnson v. Small*, 5 B. Mon. 26.

*Louisiana*: *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 8 Am. St. Rep. 512; *Lutz v. Forbes*, 13 La. Ann. 609; *Ware v. Barataria & L. Canal Co.*, 15 La. 169, 35 Am. Dec. 189.

*Maine*: *Maddox v. Brown*, 71 Me. 432, 36 Am. Rep. 336; *Rhoda*

had forbidden or disapproved of them, and the agent disobeyed or deviated from his instructions or orders in com-

*v. Annis*, 75 Me. 17, 46 Am. Rep. 354; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *State v. Smith*, 78 Me. 260, 57 Am. Rep. 802.

*Maryland*: *Evans v. Davidson*, 53 Md. 245, 36 Am. Rep. 400; *Baltimore & O. R. Co. v. Blocher*, 27 Md. 278.

*Massachusetts*: *Locke v. Stearns*, 1 Metc. 560, 35 Am. Dec. 382; *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Nims v. Mount Hermon Boys' School*, 160 Mass. 177, 39 Am. St. Rep. 467.

*Michigan*: *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516, 45 Am. Rep. 54; *Smith v. Webster*, 23 Mich. 298; *Cleveland v. Newsom*, 45 Mich. 62.

*Minnesota*: *Mulvehill v. Bates*, 31 Minn. 364, 47 Am. Rep. 796; *Larson v. Fidelity Mut. L. Ass'n*, 71 Minn. 101; *Osborne v. McMasters*, 40 Minn. 103, 12 Am. St. Rep. 698.

*Missouri*: *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405.

*New Jersey*: *Aycrigg's Ex'rs v. New York & E. R. Co.*, 30 N. J. Law, 460.

*New York*: *Lee v. Sandy Hill*, 40 N. Y. 442; *Quinn v. Power*, 87 N. Y. 535, 41 Am. Rep. 392; *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 361; *Higgins v. Watervliet Turnpike & R. Co.*, 46 N. Y. 23, 7 Am. Rep. 293.

*North Carolina*: *Hussey v. Norfolk Southern R. Co.*, 98 N. C. 34, 2 Am. St. Rep. 312; *Huntley v. Mathias*, 90 N. C. 105, 47 Am. Rep. 516; *Jones v. Glass*, 35 N. C. (13 Ired.) 305.

*Ohio*: *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373; *Pickens v. Diecker*, 21 Ohio St. 212, 8 Am. Rep. 55; *Passenger R. Co. v. Young*, 21 Ohio St. 518, 8 Am. Rep. 78.

*Oregon*: *Oliver v. North Pac. Transp. Co.*, 3 Or. 84.

*Pennsylvania*: *Erie City Iron Works v. Barber*, 106 Pa. 125, 51 Am. Rep. 508; *Siner v. Stearne*, 155 Pa. 62; *Franklin F. Ins. Co. v. Bradford*, 201 Pa. 32, 88 Am. St. Rep. 770.

*South Carolina*: *Rucker v. Smoke*, 37 S. C. 377, 34 Am. St. Rep. 758.

*Tennessee*: *Luttrell v. Hazen*, 3 Sneed, 20; *Puryear v. Thompson*, 5 Humph. 397.

*Texas*: *International & G. N. R. Co. v. Anderson*, 82 Tex. 516, 27 Am. St. Rep. 902.

*Vermont*: *Andrus v. Howard*, 36 Vt. 248, 84 Am. Dec. 680; *May v. Bliss*, 22 Vt. 477.

*Virginia*: *De Voss v. Richmond*, 18 Grat. 353, 98 Am. Dec. 647.

*West Virginia*: *Bess v. Chesapeake & O. R. Co.*, 35 W. Va. 492, 29 Am. St. Rep. 820.

*Wisconsin*: *Enos v. Hamilton*, 24 Wis. 653.

mitting them.<sup>210</sup> And it is immaterial that the negligence or tort causing the injury was committed under a mistake of facts or a mistake of judgment upon the facts,<sup>211</sup> or under a misapprehension of the principal's instructions.<sup>212</sup> This rule is not based on the ground that the agent had authority, express or implied, to commit the tort, as is the case with contractual obligations binding on the principal; but it is based on the ground that in such cases the agent represents the principal and all acts done by the agent in the course of his employment are the acts of the principal, and also on the ground of public policy that where one of two innocent persons must suffer from the agent's wrongful act, it is just and reasonable that the principal, who has put it in the agent's power to commit such wrong, should bear the loss rather than the innocent third person.<sup>213</sup> If the principal employs "incompetent or untrustworthy agents it is his fault, and whether the injury to the third persons is caused by the negligence or positive misfeasance of the agent, the maxim respondeat

<sup>210</sup> *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468; *Heenrich v. Pullman Palace Car Co.*, 20 Fed. 100; *Pine Bluff Water & L. Co. v. Schneider*, 62 Ark. 109, 116; *Turner v. North Beach & M. R. Co.*, 34 Cal. 594; *Pittsburgh, C. & St. L. R. Co. v. Kirk*, 102 Ind. 399, 52 Am. Rep. 675; *Wilton v. Middlesex R. Co.*, 107 Mass. 108, 9 Am. Rep. 11; *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Smith v. Munch*, 65 Minn. 256; *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405; *Driscoll v. Carlin*, 50 N. J. Law, 28; *Higgins v. Watervliet Turnpike & R. Co.*, 46 N. Y. 23, 7 Am. Rep. 293; *Lee v. Sandy Hill*, 40 N. Y. 442; *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 361; *Ochsenbein v. Shapley*, 85 N. Y. 217; *McClung v. Dearborne*, 134 Pa. 396, 19 Am. St. Rep. 708; *Redding v. South Carolina R. Co.*, 3 S. C. 1, 16 Am. Rep. 681; *Burnett v. Oechsner*, 92 Tex. 588, 71 Am. St. Rep. 880; *Cook v. Houston Direct Nav. Co.*, 76 Tex. 353, 18 Am. St. Rep. 52; *International & G. N. R. Co. v. Anderson*, 82 Tex. 516, 27 Am. St. Rep. 902; *De Voss v. Richmond*, 18 Grat. (Va.) 358, 98 Am. Dec. 647; *Gregory's Adm'r v. Ohio River R. Co.*, 37 W. Va. 614.

<sup>211</sup> *Higgins v. Watervliet Turnpike & R. Co.*, 46 N. Y. 23, 7 Am. Rep. 293.

<sup>212</sup> *Moir v. Hopkins*, 16 Ill. 313, 63 Am. Dec. 312; *Luttrell v. Hazen*, 3 Sneed (Tenn.) 20, May v. Bliss, 22 Vt. 477.

<sup>213</sup> *Hern v. Nichols*, 1 Salk. 289; *Lee v. Sandy Hill*, 40 N. Y. 442; *Locke v. Stearns*, 1 Metc. (Mass.) 560, 35 Am. Dec. 382.

superior applies, provided only, that the agent was acting at the time for the principal, and within the scope of the business intrusted to him."<sup>214</sup> Hence, the test, in such cases, is not whether the agent's wrongful act was or was not authorized, but whether or not it was committed in the course of his employment, for his principal's benefit. And the burden of proof, to show that a tort committed by an agent is within the course of his employment, is upon the party injured by such tort.<sup>215</sup>

— **Torts of husband as agent.** This doctrine applies as well to a husband as his wife's agent as to any other agent, and a wife will be held liable for torts committed by her husband in the course of his agency for her.<sup>216</sup> She is liable for his frauds while acting within the scope of his authority, especially where she has received the fruits thereof and retained them.<sup>217</sup> So she is chargeable with his negligence or misfeasance in the execution of the agency, or that of any other person on whom she has conferred authority.<sup>218</sup>

#### § 494. What is meant by "course of employment."

The question naturally presents itself, what is meant by torts committed by an agent "in the course of his employment"? When is an agent so acting for his principal that his acts will be considered his principal's acts, and his torts

<sup>214</sup> *Higgins v. Watervliet Turnpike & R. Co.*, 46 N. Y. 23, 7 Am. Rep. 293.

<sup>215</sup> *International & G. N. R. Co. v. Anderson*, 82 Tex. 516, 27 Am. St. Rep. 902; *Bess v. Chesapeake & O. R. Co.*, 35 W. Va. 492, 29 Am. St. Rep. 820. And see cases cited above.

<sup>216</sup> *Shane v. Lyons*, 172 Mass. 199, 70 Am. St. Rep. 261, in which a married woman was charged for personal injuries inflicted by her husband, out of her presence, and within the scope of his authority.

<sup>217</sup> *Baum v. Mullen*, 47 N. Y. 577; *Vanneman v. Powers*, 56 N. Y. 39; *Bodine v. Killeen*, 53 N. Y. 93; *Krumm v. Beach*, 96 N. Y. 398; *Graves v. Spier*, 58 Barb. (N. Y.) 349. Where her husband uses the proceeds of negotiable instruments intrusted to him by her for disposal she cannot annul the sale unless for fraud or deceit of her husband with the connivance of the purchaser. *Waller v. Nelson* (Ala.) 18 So. 154.

<sup>218</sup> *Freiberg v. Branigan*, 18 Hun (N. Y.) 344; *Ferguson v. Brooks*, 67 Me. 251; *McNeely v. Ford*, 103 Iowa, 508, 64 Am. St. Rep. 195.

his principal's torts? Of this it may be said that this term, like the term "scope of authority," cannot be set forth or determined by any set rules or definition; but the question in any given case is to be determined from the facts and circumstances of that particular case, aided by instructions from the court. What may be an agent's "course of employment" in one case or for a certain purpose may not be in another case or for a different purpose. It is certain, however, that the agent must be engaged in the principal's business, and the tort must be committed while he is carrying out such business. If from a consideration of all the facts and circumstances of the case it is determined that the agent was acting for his principal, and in pursuance of his real or apparent agency, at the time the tort was committed, then it may be said that he was acting in the course of his employment, and the principal will be liable for such tort, whether authorized or not.<sup>219</sup>

#### § 495. Illustrations.

Thus the agent has been held to be acting in the course of his employment, and the principal held liable for injuries caused by his torts, where an agent, while acting for his principal, carelessly or negligently sets a prairie on fire, or even if he does it purposely, if done with a view to benefiting or protecting his principal's interests;<sup>220</sup> or where an agent, directed to get a team of horses belonging to another, the principal intending that he shall get them with the owner's consent, misapprehending such instruction takes them without leave, and in using them kills one of them;<sup>221</sup> or where a driver, employed by the owner of an express wagon, with authority to secure and transact such business as he could, having delivered a trunk, on his return got a load of poles

<sup>219</sup> See ante, § 208. *International & G. N. R. Co. v. Anderson*, 82 Tex. 516, 27 Am. St. Rep. 902; and see cases cited in preceding and subsequent notes.

<sup>220</sup> *Johnson v. Barber*, 10 Ill. 425, 50 Am. Dec. 416. Compare *Moir v. St. Paul, M. & M. R. Co.*, 31 Minn. 351, 47 Am. Rep. 793; *Thiele v. Newman*, 116 Cal. 571.

<sup>221</sup> *Moir v. Hopkins*, 16 Ill. 313, 63 Am. Dec. 312.



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or where a teamster employed to deliver flour, etc., left several bags of bran by the roadside while he made another delivery, and they frightened the plaintiff's horse, which ran away and caused the injury.<sup>224</sup>

So, where an injury is caused by negligent driving of a principal's team by his driver, the principal is liable therefor although the team and driver are temporarily in the employ of a third person, by special request, and to a certain extent are subject to the directions of such person, if the driver is still generally engaged in the principal's business and subject to his orders.<sup>225</sup> No other person than the principal of such driver can be liable, on the simple ground that the driver is a driver of another, and his act the act of another; consequently a third person entering into a contract with the principal which does not raise the relation of principal and agent or master and servant between himself and the driver is not thereby rendered liable.<sup>226</sup> Of course it may be otherwise if the third person takes the actual management of the horses, or orders the driver to drive in a particular manner, which occasions the damage complained of, or to absent himself at a particular moment, and the like.<sup>227</sup>

It matters not that the agent "exceeded the powers conferred upon him by his principal, and that he did an act which the principal was not authorized to do, so long as he acted in the line of his duty, or being engaged in the service of the defendant" (principal), "attempted to perform a duty pertaining, or which he believed to pertain, to that service."<sup>228</sup> Thus, a master may be civilly liable to a statutory penalty for an illegal sale of intoxicating liquor made by

<sup>224</sup> *Phelon v. Stiles*, 43 Conn. 426.

<sup>225</sup> *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516, 45 Am. Rep. 54; *Quarman v. Burnett*, 6 Mees. & W. 499; *Crockett v. Calvert*, 8 Ind. 127. And see *Fenton v. Dublin Steam Packet Co.*, 8 Adol. & E. 835; *Dalyell v. Tyrer*, El. Bl. & El. 899; *Holmes v. Onion*, 2 C. B. (N. S.) 790; *Huff v. Ford*, 126 Mass. 24, 30 Am. Rep. 645; *Weyant v. New York & H. R. Co.*, 3 Duer (N. Y.) 360; *Norris v. Kohler*, 41 N. Y. 42.

<sup>226</sup> *Quarman v. Burnett*, 6 Mees. & W. 499.

<sup>227</sup> *Quarman v. Burnett*, 6 Mees. & W. 499.

<sup>228</sup> *Lynch v. Metropolitan Elevated R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141.

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<sup>226</sup> *Quarman v. Burnett*, 6 Mees. & W. 499.

<sup>227</sup> *Quarman v. Burnett*, 6 Mees. & W. 499.

<sup>228</sup> *Lynch v. Metropolitan Elevated R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141.

his servant, without his knowledge and consent, and against his instruction.<sup>229</sup> So a principal is liable for the resulting injuries, where an agent, contrary to his principal's instructions, improperly placed and left timbers on a sidewalk in the course of his employment, and a third person was injured by falling over them.<sup>230</sup> So, where a master claiming to own an organ in the possession of another, sends his servants to the latter's house to remove the organ therefrom, and the servants enter and take the organ by force and violence, the master will be liable for their trespass, although in committing it they violated their express instructions.<sup>231</sup>

**§ 496. Breach of duty as ground for principal's liability for agent's tort.**

There are some cases, however, where it is obvious that the strict ground of liability is not because the agent was acting in the course of his employment, as where an engineer willfully lets off steam or blows a whistle, thereby frightening horses.<sup>232</sup> Here the principal intrusts to his agents instrumentalities or powers that are naturally dangerous to the public, hence he assumes a duty to the public to select such agents as will make a proper use of those instrumentalities or powers, and if he does not do so, the principal will be liable for the consequent injury. As has been said, "he assumes thereby a liability in the nature of an insurance as to their proper use."<sup>233</sup> "The corporation in such case can only act through its agents and servants, and having placed under the control of its agents an instrument of so much peril and injury, it is but reasonable that the law should demand of the corporation the utmost caution in the selection of its agents,

<sup>229</sup> See post, § 515.

<sup>230</sup> *Driscoll v. Carlin*, 50 N. J. Law, 28. Or by them falling over on him. *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 361.

<sup>231</sup> *McClung v. Dearborne*, 134 Pa. 396, 19 Am. St. Rep. 708.

<sup>232</sup> *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill. 298; *Chicago, B. & Q. R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114; *Bittle v. Camden & A. R. Co.*, 55 N. J. Law, 615; *Cobb v. Columbia & G. R. Co.*, 37 S. C. 194; *Nashville & C. R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296.

<sup>233</sup> *Huffcut*, Ag. § 150.

and hold it to strict accountability for injuries which befall the citizen for the want of such caution."<sup>234</sup> So where a railway servant assaults a passenger for some purpose of his own,<sup>235</sup> the ground of liability is that the principal has assumed a duty of safe conduct and protection towards the passenger, the performance of which duty he has intrusted to another, and therefore he "warrants that his agent possesses and will exercise the qualities necessary for the discharge of this duty,"<sup>236</sup> and it is immaterial whether the tort was committed by the agent or servant in the course of his employment or not.<sup>237</sup> "The principal is responsible for the duty, and if he delegates it to an agent, and the agent fails to perform it, it is immaterial whether the failure be accidental or willful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty."<sup>238</sup>

§ 497. Liability for agent's torts outside course of employment.

It follows from the rule holding a principal liable for the agent's torts in the course of his employment, that a principal is not liable for torts committed by his agent outside the course of his employment, as where he willfully departs

<sup>234</sup> *Nashville & C. R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296.

<sup>235</sup> *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504. See cases cited in following sections.

<sup>236</sup> *Huffcut*, Ag. 150; and see cases cited hereafter.

<sup>237</sup> *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Dwinelle v. New York Cent. & H. R. R. Co.*, 120 N. Y. 117; *Pittsburg, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512; *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 753; *Bess v. Chesapeake & O. R. Co.*, 35 W. Va. 492, 29 Am. St. Rep. 320.

<sup>238</sup> *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657, 17 Am. Rep. 507.

from his authority, unless such torts are subsequently ratified.<sup>289</sup> It is quite apparent that if an agent does an act or performs a service outside the scope of his actual or ap-

<sup>289</sup> *England*: *Thorne v. Heard* [1895] App. Cas. 495; *Lamb v. Palk*, 9 Car. & P. 629; *Mitchell v. Crassweller*, 13 C. B. 237; *Croft v. Alison*, 4 Barn. & Ald. 590.

*United States*: *Bradford v. Hanover F. Ins. Co.*, 102 Fed. 48, 43 C. C. A. 810.

*Alabama*: *Birmingham Water-Works Co. v. Hubbard*, 85 Ala. 179, 7 Am. St. Rep. 85.

*Arkansas*: *Pine Bluff Water & L. Co. v. Schneider*, 62 Ark. 109.

*California*: *Daley v. Quick*, 99 Cal. 179; *Stephenson v. Southern Pac. R. Co.*, 93 Cal. 558, 27 Am. St. Rep. 223.

*Connecticut*: *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 685; *Ritchie v. Waller*, 63 Conn. 155, 38 Am. St. Rep. 361.

*Georgia*: *Marsh v. South Carolina R. Co.*, 56 Ga. 274; *Wikle v. Louisville & N. R. Co.*, 116 Ga. 309; *Merchants' Nat. Bank v. Guilmartin*, 88 Ga. 797.

*Illinois*: *Hancock v. Singer Mfg. Co.*, 174 Ill. 503; *Sawyer v. Martins*, 25 Ill. App. 521; *Johnson v. Barber*, 10 Ill. 426, 50 Am. Dec. 416; *Moir v. Hopkins*, 16 Ill. 313, 63 Am. Dec. 312; *Fay v. Slaughter*, 194 Ill. 157, 88 Am. St. Rep. 148.

*Iowa*: *Golden v. Newbrand*, 52 Iowa, 59, 35 Am. Rep. 257.

*Louisiana*: *Ware v. Barataria & L. Canal Co.*, 15 La. 169, 35 Am. Dec. 189.

*Maine*: *Stickney v. Munroe*, 44 Me. 195; *Maddox v. Brown*, 71 Me. 432, 36 Am. Rep. 386.

*Maryland*: *Lamm v. Port Deposit Homestead Ass'n*, 49 Md. 233, 33 Am. Rep. 246; *Adams v. Cost*, 62 Md. 264, 50 Am. Rep. 211.

*Massachusetts*: *Driscoll v. Scanlon*, 165 Mass. 348, 52 Am. St. Rep. 523; *Brown v. Jarvis Engineering Co.*, 166 Mass. 75, 55 Am. St. Rep. 382; *Nourse v. Jennings*, 180 Mass. 592.

*Michigan*: *Govaski v. Downey*, 100 Mich. 429; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205.

*Minnesota*: *Mulvehill v. Bates*, 31 Minn. 364, 47 Am. Rep. 796; *Morier v. St. Paul, M. & M. R. Co.*, 31 Minn. 351, 47 Am. Rep. 793; *Larson v. Fidelity Mut. L. Ass'n*, 71 Minn. 101.

*Mississippi*: *McCoy v. McKowen*, 26 Miss. 487, 59 Am. Dec. 264.

*Missouri*: *Garretzen v. Duenkel*, 50 Mo. 104, 11 Am. Rep. 406; *Walker v. Hannibal & St. J. R. Co.*, 121 Mo. 575, 42 Am. St. Rep. 547.

*New Hampshire*: *Andrews v. Green*, 62 N. H. 436; *Wilson v. Peverly*, 2 N. H. 548.

*New Jersey*: *Aycrigg's Ex'rs v. New York & E. R. Co.*, 30 N. J. Law, 460.

*New York*: *Morris v. Brown*, 111 N. Y. 318, 7 Am. St. Rep. 751;

parent employment, the principal cannot be held liable for the act or service itself, nor for any negligence or other wrong on the part of the agent in the doing of such act or service, unless he subsequently ratifies it.

The same difficulty arises here in determining when an agent's acts are beyond the scope of his authority, as has been seen in a preceding section; and each case must be determined from its own facts and circumstances. Of course, in some cases the acts may be so clearly beyond the course of his employment that there would be no difficulty in determining them. In other cases, however, the distinction may not be so clear, and there may be much difficulty in determining whether the particular act is or is not beyond his authority. It may be stated generally, however, that if the act is done, while the agent is acting aside from his principal's business for purposes of his own, and independent of any service for his principal, he will be held to be acting outside the course of his employment, and the principal will not be liable for his negligence or torts, during the doing of such act. In other words, it is necessary, in order to hold the principal liable, that the relation of principal and agent must exist as to such act at the time it is committed, otherwise he would

*Cavanagh v. Dinsmore*, 12 Hun, 465; *Flinn v. World's Dispensary Med. Ass'n*, 64 App. Div. 490.

*North Carolina*: *Hussey v. Norfolk Southern R. Co.*, 98 N. C. 34, 2 Am. St. Rep. 312.

*Ohio*: *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 873.

*Oregon*: *Oliver v. North Pac. Transp. Co.*, 3 Or. 84.

*Pennsylvania*: *Bard v. Yohn*, 26 Pa. 482; *Flower v. Pennsylvania R. Co.*, 69 Pa. 210, 8 Am. Rep. 251; *McClung v. Dearborne*, 134 Pa. 396, 19 Am. St. Rep. 708.

*Rhode Island*: *Campbell v. Providence*, 9 R. I. 262.

*South Dakota*: *J. I. Case Thresh. Mach. Co. v. Eichinger*, 15 S. D. 530.

*Tennessee*: *Cantrell v. Colwell*, 40 Tenn. 471.

*Texas*: *Schulze v. Jalonick*, 18 Tex. Civ. App. 296; *International & G. N. R. Co. v. Anderson*, 82 Tex. 516, 27 Am. St. Rep. 902.

*Washington*: *Hart v. Maney*, 12 Wash. 266.

*West Virginia*: *Bess v. Chesapeake & O. R. Co.*, 35 W. Va. 492, 29 Am. St. Rep. 820.

not be liable for the tort, although the suspension of the relation was merely temporary, and not permanent.<sup>240</sup>

### § 498. Illustrations.

Thus an agent is held not to be acting in the course of his employment, and the principal held not liable for injuries or losses caused by his wrongs, where an agent, having authority to indorse and draw checks during the absence of his principal, forges his principal's name to securities, sells them to brokers who fail to ascertain the genuineness of the indorsements, and embezzles the proceeds;<sup>241</sup> or where an agent forges his principal's signature to a policy and delivers the same without the consent, knowledge, or ratification of his principal;<sup>242</sup> or where a manager of a theater stands against the door of a stage and refuses to allow an officer to enter for the purpose of serving a writ upon an actor;<sup>243</sup> or where an agent, whose business it was to keep mills in repair, lease the same, and receive rents therefor, excavated the bed of the river, thereby causing damage to a neighboring mill owner;<sup>244</sup> or where a bank cashier receives a special deposit for gratuitous safe-keeping and return on demand, and, without the bank's knowledge or consent, steals it or fraudulently appropriates it to his own use, provided the bank had exercised due diligence in selecting and retaining the cashier;<sup>245</sup> or where an agent, without his principal's authority, loans goods in his principal's possession belonging to another and they are damaged by the borrower;<sup>246</sup> or where a teamster ordered to deliver a wagon-load of goods at a certain place, and to return by a certain route and bring a load of wood, consented to the plaintiff's request to carry the goods to a different place and get another load for the plaintiff, in the course of which

<sup>240</sup> *Joel v. Morison*, 6 Car. & P. 501; *Butler v. Basing*, 2 Car. & P. 613; *Bard v. Yohn*, 26 Pa. 482; and see other cases cited in preceding note 289.

<sup>241</sup> *Fay v. Slaughter*, 194 Ill. 157, 88 Am. St. Rep. 148.

<sup>242</sup> *Bradford v. Hanover F. Ins. Co.*, 102 Fed. 48, 43 C. C. A. 310.

<sup>243</sup> *Paulton v. Keith*, 23 R. I. 164, 91 Am. St. Rep. 624.

<sup>244</sup> *Stickney v. Munroe*, 44 Me. 195.

<sup>245</sup> *Merchants' Nat. Bank v. Gullmartin*, 88 Ga. 797.

<sup>246</sup> *Hart v. Maney*, 12 Wash. 266.

deviation from his instructions the plaintiff's property was injured by the team running off;<sup>247</sup> or where a passenger on defendant's road, applied to the baggage-master to have his trunk checked, which not being promptly done, the plaintiff became angry and used threatening and abusive language, whereupon the baggage-master seized a hatchet and struck him;<sup>248</sup> or where the driver of defendants' cart, returning home at a late hour in the evening, drove up to the shop door to get the keys of the stable, for the purpose of putting up the horse and cart, and being requested by the defendants' foreman, who was unwell, to drive him part of the way home, tried to get his employers' permission, but not finding either of them at home, drove the foreman part of the way, and in returning accidentally ran over the plaintiff;<sup>249</sup> or where the plaintiff, who put his mare in the defendant's livery stable for keeping, instructed a servant of the latter to exercise her, but this was not part of the contract of keeping, and the mare died in consequence of immoderate riding by the servant.<sup>250</sup> So, where a minor son, who had been permitted to use his father's horse and wagon without restriction, took them in the absence and without the knowledge of his father, on business of his own, left the horse unfastened in the street, and the horse ran away, the father was not liable for the injury caused thereby.<sup>251</sup> So a railway company is not liable for damage to property adjoining its road by a fire kindled by its section men, for the purpose of cooking their meals, while engaged in repairing the track.<sup>252</sup> So where a clerk went into his master's private office to wash his hands, after his

<sup>247</sup> *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635.

<sup>248</sup> *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373.

<sup>249</sup> *Mitchell v. Crassweller*, 13 C. B. 237.

<sup>250</sup> *Adams v. Cost*, 62 Md. 264, 50 Am. Rep. 211.

<sup>251</sup> *Maddox v. Brown*, 71 Me. 432, 36 Am. Rep. 336.

<sup>252</sup> *Morier v. St. Paul, M. & M. R. Co.*, 31 Minn. 351, 47 Am. Rep. 793. Defendant is not liable for loss by fire, where his agent, who owned land between his and the plaintiff's, employed to set fire to defendant's land, also at the same time, and for his own benefit, set fire to his own land which spread to plaintiff's land and caused the loss. *Thiele v. Newman*, 116 Cal. 571. Compare *Johnson v. Barber*, 10 Ill. 425, 50 Am. Dec. 416.



master had left, contrary to express orders, there being another lavatory for the use of clerks, and negligently left the tap open whereby the plaintiff's property was injured, it was held that the clerk was not acting in the course of his employment, and the master, therefore, was not liable for the injury.<sup>253</sup>

**§ 499. Effect of malice or wantonness of agent—Earlier rule.**

Where an agent commits torts, which result in injuries to third persons, willfully and wantonly, and they are beyond the course of his employment, the principal would of course not be liable therefor, unless he had authorized or subsequently ratified them.<sup>254</sup> As it has been said: "The principal is liable for the tort of the agent, where the particular act, although willful and not directly authorized, was within the line of the agent's duty; but if the act was an independent one, and not within the scope of the agency, the person injured cannot compel the principal to respond in damages."<sup>255</sup> Thus, an agent authorized to bring suits cannot charge his principal with his own malicious acts in setting in motion the criminal procedure of the state, from any legitimate result of which the principal can receive no benefit; and if the agent's intention is to derive for his principal a benefit from the abuse of the process, the principal is not thereby charged.<sup>256</sup>

<sup>253</sup> *Stevens v. Woodward*, 6 Q. B. Div. 318. Compare *Ruddiman v. Smith*, 60 Law T. (N. S.) 708.

<sup>254</sup> *McManus v. Crickett*, 1 East, 106; *Stevens v. Woodward*, 6 Q. B. Div. 318; *Croft v. Alison*, 4 Barn. & Ald. 590; *Gilliam v. South & N. A. R. Co.*, 70 Ala. 268; *Johnson v. Barber*, 10 Ill. 426, 50 Am. Dec. 416; *Oxford v. Peter*, 28 Ill. 434; *Cleveland Co-operative Stove Co. v. Koch*, 37 Ill. App. 595; *Illinois Cent. R. Co. v. Downey*, 18 Ill. 259; *Evansville & C. R. Co. v. Baum*, 26 Ind. 70; *Evansville & T. H. R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102; *Brown v. Purviance*, 2 Har. & G. (Md.) 316; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Hoffman v. New York Cent. & H. R. R. Co.*, 37 N. Y. 32, 41 Am. Rep. 337; *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 126, 7 Am. Rep. 418; *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 134, 21 Am. Rep. 597; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373; *Cantrell v. Colwell*, 3 Head (Tenn.) 471.

<sup>255</sup> *Evansville & T. H. R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102.

<sup>256</sup> *Cleveland Co-operative Stove Co. v. Koch*, 37 Ill. App. 595.

But where such tort is committed in the course of his employment, as to the principal's liability, the authorities are not entirely in harmony. It may be stated generally, however, that, according to the modern authorities, the motive which prompted an agent in doing a tortious act is immaterial if the act is otherwise in the course of his employment. According to the earlier English and American cases, although a principal was liable for an agent's negligence or tortious acts in the course of his employment, he was not liable for such acts if they were committed by the agent willfully or maliciously, unless the principal had ordered or directed them.<sup>257</sup> This view is based on the theory that when an

<sup>257</sup> *McManus v. Crickett*, 1 East, 106; *Peachey v. Rowland*, 13 C. B. 182; *Croft v. Allison*, 4 Barn. & Ald. 590; *Cox v. Keahey*, 36 Ala. 340, 76 Am. Dec. 325; *Selma, R. & D. R. Co. v. Webb*, 49 Ala. 240; *Turner v. North Beach & M. R. Co.*, 34 Cal. 594; *Church v. Mansfield*, 20 Conn. 284; *Thames Steamboat Co. v. Housatonic R. Co.*, 24 Conn. 40, 63 Am. Dec. 154; *Illinois Cent. R. Co. v. Downey*, 18 Ill. 259; *Tuller v. Voght*, 13 Ill. 277; *Johnson v. Barber*, 10 Ill. 426, 50 Am. Dec. 416; *De Camp v. Mississippi & M. R. Co.*, 12 Iowa, 248; *Southwick v. Estes*, 7 Cush. (Mass.) 385; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Cleveland v. Newsom*, 45 Mich. 62; *Wilson v. Peverly*, 2 N. H. 548; *Mall v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448; *Wright v. Wilcox*, 19 Wend. (N. Y.) 345, 32 Am. Dec. 507; *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 126, 7 Am. Rep. 418; *Wesson v. Seaboard & R. R. Co.*, 49 N. C. (4 Jones) 379; *Yerger v. Warren*, 31 Pa. 319; *Puryear v. Thompson*, 5 Humph. (Tenn.) 397.

As was said in *Wright v. Wilcox*, 19 Wend. (N. Y.) 345, 32 Am. Dec. 507: "All the cases agree that a master is not liable for the willful mischief of his servant, though he be at the time, in other respects, engaged in the service of the former. 1 Chitty, Pl. 69 (Ed. of 1828); *McManus v. Crickett*, 1 East, 106; *Hammond, Parties*, 83; *Croft v. Allison*, 4 Barn. & Ald. 590; 1 Chitty, Gen. Pr. 80; *Bowcher v. Noldstrom*, 1 Taunt. 568. Why is the master chargeable for the act of his servant? Because, what a man does by another he does by himself. The act is within the scope of the agency. Reeve, Dom. Rel. 357. 'A master is not answerable,' says Mr. Hammond, 'for every act of his servant's life, but only for those done in his relative capacity. To charge the master, it must always be shown or presumed, that the relation of master and servant subsisted between them in the particular affair. If

agent commits a willful or malicious act, he is not acting within the course of his employment, and that as to such act the relation of principal and agent, or master and servant,

the master is liable under other circumstances, he is so, not *quatenus* master, but as any one would be who instigates an injury.' The dividing line is the willfulness of the act. If the servant make a careless mistake of commission or omission, the law holds it to be the master's business negligently done. It is of the very nature of business that it may be well or ill done. We frequently speak of a cautious or careless driver in another's employment. Either may be in the pursuit of his master's business, and negligence in servants is so common, that the law will hold the master to the consequences as a thing that he is bound to foresee and provide against. But it is different with a willful act of mischief. To subject the master in such a case, it must be proved that he actually assented, for the law will not imply assent. In the particular affair, there is, then, no longer the presumed relation of master and servant. The distinction seems to resolve itself into a question of evidence. A man shall be presumed to intend the ordinary consequences of his own acts; and especially so far as such consequences may be innocent of all evil intention; for these he may be safely held accountable. But for those which are remote or barely possible, he is not accountable; and if they be at the same time criminal, it would be violating one of the plainest principles of presumptive evidence, to say that he intended them. 'The master's liability has never been questioned,' says Judge Reeve, 'when a servant does an act injurious to another, through negligence or want of skill, on the principle that the master should at his peril employ servants who are skillful or careful.' Reeve, *Dom. Rel.* 357, 358. He admits that the English cases deny the master's liability where the servant's act is willful, but questions the soundness of the distinction, if the willful act be done in the immediate performance of his master's business; in which I understand the learned judge at the circuit to have followed him in the case at bar. The answer is that the law holds such willful act a departure from the master's business. Judge Reeve remarks that one of two innocent persons must suffer, and that should be the man who put it in the power of the servant to do the injury; and the reason is as strong that the master should run the risk of his servant's unruly passions, as his want of care. Clearly the argument proves too much. It would make the master accountable for every mischievous act of the servant, which he is enabled to commit in consequence of the general relation; for aught I see, including the credit which the servant may obtain with his merchant."

does not exist. The dividing line is the willfulness of the act.<sup>258</sup> As has been said: "When it is said that the master is not responsible for the willful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders."<sup>259</sup> The fallacy of this reasoning is that it makes a certain mental condition of the agent or servant the test by which to determine whether he was acting about his principal's or master's business.<sup>260</sup>

Thus, where a servant employed to watch a building of trifling value, on a wharf, unnecessarily cuts adrift from the wharf a valuable steamboat, on discovering that she is on fire, and the vessel floats out of reach and is burned, the master is not liable in an action of trespass for her destruction, in the absence of any proof that he was ordered or directed to cut the vessel's cables.<sup>261</sup> The court in this case, after discussing generally the acts which an agent may do in the course of his employment says: "The law never imputes malice or a wanton and willful trespass to the transaction of any lawful business, contrary to the wishes of the party, any more than it will impute crime. These acts may be done through the instrumentality of agents; but it must be shown as a fact that they were ordered, directed, or authorized to be done; the law will never infer this from the mere relation of master and servant. Undoubtedly this relation may be a circumstance proper to be shown, in connection with other facts tending to show that the act complained of was done by the command of the master; but unless the act of trespass is the natural or necessary consequence of something which the master has ordered to be done, it will not alone be sufficient to subject the master."<sup>262</sup>

<sup>258</sup> *Wright v. Wilcox*, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507.

<sup>259</sup> *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597.

<sup>260</sup> *Richberger v. American Exp. Co.*, 73 Miss. 161, 55 Am. St. Rep. 523.

<sup>261</sup> *Thames Steamboat Co. v. Housatonic R. Co.*, 24 Conn. 40, 63 Am. Dec. 154.

<sup>262</sup> *Thames Steamboat Co. v. Housatonic R. Co.*, 24 Conn. 40, 63 Am. Dec. 154.

## § 500. Same—Modern rule.

According to the more modern cases, however, it is held to be the better rule that the motive which prompts an agent to commit a tortious act is immaterial; and if the act is otherwise within the course of the agent's employment, the principal is liable therefor, although it was done by the agent with malice and wantonness. The principal's liability in such cases does not depend on the motive of the agent, but upon the fact whether or not the agent was engaged in the principal's business when he committed the act. If the agent is in the exercise of some function of his employment at the time he commits a tort, it is now generally held that the principal will be liable therefor, notwithstanding the agent may have acted willfully or maliciously, and although such act was not previously authorized nor subsequently ratified by the principal.<sup>263</sup> The test of the principal's liability in such

<sup>263</sup> *England*: *Limpus v. London General Omnibus Co.*, 1 Hurl. & C. 526.

*Alabama*: *Gilliam v. South & N. A. R. Co.*, 70 Ala. 263 (limiting *Selma, R. & D. R. Co. v. Webb*, 49 Ala. 240).

*Arkansas*: *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560.

*Georgia*: *Central of Ga. R. Co. v. Brown*, 113 Ga. 414, 34 Am. St. Rep. 250.

*Illinois*: *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33; *Chicago, B. & Q. R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114; *North Chicago City R. Co. v. Gastka*, 128 Ill. 613.

*Indiana*: *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103; *Evansville & T. H. R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102.

*Iowa*: *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa, 314, 24 Am. Rep. 743.

*Kansas*: *Southern Kan. R. Co. v. Rice*, 38 Kan. 398, 5 Am. St. Rep. 766; *Hynes v. Jungren*, 8 Kan. 391.

*Kentucky*: *Sherley v. Billings*, 8 Bush, 147, 8 Am. Rep. 451.

*Louisiana*: *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 8 Am. St. Rep. 512.

*Maine*: *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39.

*Maryland*: *Baltimore & O. R. Co. v. Blocher*, 27 Md. 277; *Carter v. Howe Mach. Co.*, 51 Md. 290, 34 Am. Rep. 311.

*Massachusetts*: *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376;

cases is not the quality of the act or the motive of the agent in doing it, but whether it was done in the course of the principal's business. And whether or not a certain act was

*Levi v. Brooks*, 121 Mass. 501; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 811.

*Minnesota*: *Smith v. Munch*, 65 Minn. 256.

*Mississippi*: *Richberger v. American Exp. Co.*, 73 Miss. 161, 55 Am. St. Rep. 522; *New Orleans, J. & G. N. R. Co. v. Bailey*, 40 Miss. 395.

*Missouri*: *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405.

*Nevada*: *Quigley v. Central Pac. R. Co.*, 11 Nev. 350.

*New York*: *Dupre v. Childs*, 52 App. Div. 306; *Stewart v. Brooklyn & C. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185; *Hoffman v. New York Cent. & H. R. R. Co.*, 87 N. Y. 32, 41 Am. Rep. 337; *Palmer v. Manhattan R. Co.*, 133 N. Y. 261, 28 Am. St. Rep. 632.

*Ohio*: *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 71 Am. St. Rep. 729; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373; *Passenger R. Co. v. Young*, 21 Ohio St. 518, 8 Am. Rep. 78.

*Pennsylvania*: *Pa. R. Co. v. Vandiver*, 42 Pa. 365, 82 Am. Dec. 520.

*South Carolina*: *Rucker v. Smoke*, 37 S. C. 377, 34 Am. St. Rep. 758; *Redding v. South Carolina R. Co.*, 3 S. C. 1, 16 Am. Rep. 681.

*Tennessee*: *Nashville & C. R. Co. v. Starnes*, 9 Helsk. 52, 24 Am. Rep. 296; *Cantrell v. Colwell*, 3 Head, 471.

*Texas*: *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 753.

*West Virginia*: *Bess v. Chesapeake & O. R. Co.*, 35 W. Va. 492, 29 Am. St. Rep. 820.

*Wisconsin*: *Bryan v. Adler*, 97 Wis. 124, 65 Am. St. Rep. 99; *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504.

In *Central of Georgia R. Co. v. Brown*, 113 Ga. 414, 84 Am. St. Rep. 250, *Simmons, C. J.*, says: "Some of the courts seem at one time to have been inclined to hold that a master could not be held liable for the willful torts of his servant, because, it was said, if the servant through anger or malice committed an assault upon a person, he ceased for the time being to occupy the position of servant, and acted independently; that inasmuch as he was not authorized to commit an assault, he did not represent the master in that act, but acted as an individual, the master therefore being not liable either in case or trespass. This argument has long since been exploded. The theory that one may be a servant one minute, and the very next minute get angry, commit an assault, and in that act be not a servant, was too refined a distinction. I have read a great deal upon the subject, and believe that the law has been definitely settled contrary to this fine-spun theory, and that

done in the course of the principal's business is to be determined from all the facts and circumstances of the case.<sup>244</sup>

the courts have settled down to the common-sense doctrine that a master is liable for the torts of his servant, committed in the course of the servant's employment, even though the tort be a willful one."

<sup>244</sup> In *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657, 17 Am. Rep. 506, Ryan, C. J., discusses this doctrine and says: "We cannot help thinking that there has been some useless subtlety in the books in the application of the rule respondeat superior, and some unnecessary confusion in the liability of principals for willful and malicious acts of agents. This has probably arisen from too broad an application of the dictum of Lord Holt, that 'no master is chargeable with the acts of his servant but when he acts in the execution of the authority given to him, and the act of the servant is the act of the master. *Middleton v. Fowler*, 1 Salk. 282. For this would seem to go to excuse the master for the negligence as well as for the malice of his servant. One employing another in good faith to do his lawful work would be as little likely to authorize negligence as malice; and either would be equally deors the employment. Strictly, the act of the servant would not, in either case, be the act of the master. It is true that so great an authority as Lord Kenyon denies this in the leading case of *McManus v. Crickett*, 1 East, 106, which has been so extensively followed; and again, in *Ellis v. Turner*, 8 Term R. 531, he distinguishes between the negligence and the willfulness of the one act of the agent, holding the principal for the negligence but not for the willfulness. It is a singular comment on these subtleties, that *McManus v. Crickett* appears to rest on *Middleton v. Fowler*, the only adjudged case cited to support it; and that *Middleton v. Fowler* was not a case of malice, but of negligence, Lord Holt holding the master in that case not liable for the negligence of his servant, in such circumstances as no court could now doubt the master's liability. In spite of all the learned subtleties of so many cases, the true distinction ought to rest, it appears to us, on the condition whether or not the act of the servant be in the course of his employment, as is virtually recognized in *Ellis v. Turner*. But we need not pursue the subject. For, however that may be in general, there can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or willful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or

The burden of proof, in such cases, is on the party injured, to show that the act was done by the agent in the course of his employment.<sup>285</sup>

The chief distinction between these two rules, after all, is in determining when an agent's tort is within the course of his employment. The earlier rule holds that the fact that the agent acts maliciously or wantonly is sufficient to take his acts out of the course of his employment, and that for the time being he is held to be acting for his own purposes. The more modern rule, on the other hand, holds that the mere fact that an agent acts maliciously or wantonly, does not make the act any the less the principal's, if it is otherwise within the course of his employment. The mere condition of the agent's mind at the time of committing an act does not change its legal effect as to the principal. If the nature of the injurious act is such as to make the principal liable for its consequences, in the absence of the particular intention, it is not perceived how the presence of such intention can be held to excuse the principal. It is not meant by this that when the nature of the act is such as to render it equivocal, whether the act comes within the scope of the agent's employment or not, the intention with which the act is done is not to be looked to in determining its true character. But what is meant is that when it plainly appears that the act of the agent was done in the course of his employment, the willfulness or wrongful motive of the agent in doing the act will not excuse the principal.<sup>286</sup>

Thus, it is held that damages for injury to one's property

in the malicious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another and appoint an agent to furnish it, and the agent of malice furnish a stone instead, the principal is responsible for the stone and its consequences. In such case, malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it."

<sup>285</sup> *Bess v. Chesapeake & O. R. Co.*, 35 W. Va. 492, 29 Am. St. Rep. 820.

<sup>286</sup> See *Passenger R. Co. v. Young*, 21 Ohio St. 518, 8 Am. Rep. 80.



caused by the collision of two steamboats are recoverable from the owners of the boat causing the sinking of the other, if the officers and agents of the former, then engaged in the service of the owners, willfully or without orders or against orders, produced the collision.<sup>267</sup> So, where the defendant's engineman wantonly and maliciously sounded the locomotive whistle, so as to frighten the horses of the plaintiff, and he was injured thereby, the defendant was held liable.<sup>268</sup> So, where the local agent of an express company, immediately after refunding the excess of an overcharge on an express package, while taking a receipt therefor, and while the sender still remains in the office, willfully, wantonly, oppressively, and wrongfully curses, abuses, insults, and maltreats such sender, the principal is liable therefor, especially where the whole transaction consumes but a few moments and all of its features constitute but one continuous and unbroken occurrence, the provoking cause of the tort being the lawful demand made for the excess.<sup>269</sup>

§ 501. Effect of ratification of agent's torts.

As has been seen in a former chapter, a principal may ratify the unauthorized torts of his agent, as well as his unauthorized contracts; and where a principal, with a full knowledge of all the facts, ratifies an unauthorized tort of his agent, he will be as fully responsible therefor as if previously authorized.<sup>270</sup> But in order that a person may be held liable for a tort committed by another, on the ground of ratification, the act must have been done on his behalf or in his interest,<sup>271</sup> for, as has been seen, this is an essential element of

<sup>267</sup> *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560.

<sup>268</sup> *Chicago, B. & Q. R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114; *Nashville & C. R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296.

<sup>269</sup> *Richberger v. American Exp. Co.*, 73 Miss. 161, 55 Am. St. Rep. 522.

<sup>270</sup> See ante, § 116.

<sup>271</sup> *Eastern Counties R. Co. v. Broom*, 6 Exch. 314; *Wilson v. Barker*, 4 Barn. & Adol. 614; *Wilson v. Tumman*, 6 Man. & G. 241; *Brown v. Webster City*, 115 Iowa, 511; *Grund v. Van Vleck*, 69 Ill. 478; *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 753.

ratification.<sup>272</sup> And though, as a rule, a ratification of a tort, to make a principal liable, must be with knowledge of all the facts or with the purpose on the part of the principal to take the consequences on himself without inquiry,<sup>273</sup> yet where the wrongful act is simply in excess of authority, mere approval of the wrong is generally sufficient.<sup>274</sup> Hence, although an agent's wrongful act for the benefit of his principal is not in the course of his employment, if the principal, after having a complete knowledge of all the facts, either expressly or impliedly ratifies it, he will be liable therefor.<sup>275</sup>

Where an agent, acting in the name and for the benefit of his principal, commits a trespass which is voidable merely and not void, as imposing a civil and not a criminal liability upon the perpetrator, the principal, after being informed of its tortious nature, may adopt it as his own act, and such ratification ordinarily binds the principal to the same extent, and holds him to the same civil responsibilities as if he had originally authorized it. And for many purposes the ratification will relate back to the date of the unauthorized act so as to constitute the principal a trespasser *ab initio*.<sup>276</sup> But this doctrine cannot be applied so as to authorize one to be made a party defendant to a suit, by amendment, when the act creating his liability was done after the suit was instituted. If a defendant is not liable when the suit is commenced, he cannot be made liable at all in that action by a subsequent ratification.<sup>277</sup>

### § 502. Assault and battery by agent—Excessive force.

In accordance with the principles heretofore considered, a principal may be held liable for an assault committed by his

<sup>272</sup> See ante, § 102.

<sup>273</sup> See ante, § 106.

<sup>274</sup> *Brown v. Webster City*, 115 Iowa, 511.

<sup>275</sup> *Burns v. Campbell*, 71 Ala. 271; *Morehouse v. Northrup*, 33 Conn. 380, 89 Am. Dec. 211; *Brown v. Webster City*, 115 Iowa, 511; *Dempsey v. Chambers*, 154 Mass. 330, 26 Am. St. Rep. 249; *Nims v. Mount Hermon Boys' School*, 160 Mass. 177, 39 Am. St. Rep. 467.

<sup>276</sup> *Burns v. Campbell*, 71 Ala. 271; *Blevins v. Pope*, 7 Ala. 371; *Chapman v. Lee's Adm'r*, 47 Ala. 143.

<sup>277</sup> *Burns v. Campbell*, 71 Ala. 271.

agent, in the course of his employment, and for the purpose of advancing the principal's interests. Hence in cases where an agent is authorized to use force against another in order to carry out his principal's orders, the principal commits it to the agent to decide what degree of force he shall use, and if he exercises due discretion and care, but through misjudgment or violence of temper he goes beyond the necessity of the occasion and gives a right of action to a third person, he cannot, as to such person, be said to have been acting beyond the course of his employment, and the principal will be liable for the injury done by the excessive force or assault; and this is true even though the excessive force was used or the assault was made wantonly, if done while engaged in the principal's business with a view to the furtherance of that business.<sup>278</sup> If, however, the agent under guise and cover of

<sup>278</sup> *Eastern Counties R. Co. v. Broom*, 6 Exch. 314; *Greenwood v. Seymour*, 30 Law J. Exch. 327; *Southern Exp. Co. v. Platten*, 36 C. C. A. 46, 93 Fed. 936; *Turner v. North Beach & M. R. Co.*, 34 Cal. 594; *Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213; *Savannah St. R. Co. v. Bryan*, 86 Ga. 312, 22 Am. St. Rep. 464; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353; *North Chicago City R. Co. v. Gastka*, 128 Ill. 613; *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33; *Carter v. Louisville, N. A. & C. R. Co.*, 98 Ind. 552, 49 Am. Rep. 780; *Evanville & T. H. R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102; *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa, 314, 24 Am. Rep. 748; *Sherley v. Billings*, 8 Bush (Ky.) 147, 8 Am. Rep. 451; *Hanson v. European & N. A. R. Co.*, 62 Me. 84, 16 Am. Rep. 404; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Holmes v. Wakefield*, 12 Allen (Mass.) 580, 90 Am. Dec. 171; *Moore v. Fitchburg R. Corp.*, 4 Gray (Mass.) 465, 64 Am. Dec. 83; *Ramaden v. Boston & A. R. Co.*, 104 Mass. 117, 6 Am. Rep. 200; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Brokaw v. New Jersey R. & Transp. Co.*, 32 N. J. Law, 328, 90 Am. Dec. 659; *Haver v. Central R. Co.*, 62 N. J. Law, 282, 72 Am. St. Rep. 647; *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Higgins v. Watervliet Turnpike & R. Co.*, 46 N. Y. 23, 7 Am. Rep. 293; *Hoffman v. New York Cent. & H. R. R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337; *Hussey v. Norfolk Southern R. Co.*, 98 N. C. 34, 2 Am. St. Rep. 312; *Passenger R. Co. v. Young*, 21 Ohio St. 518, 8 Am. Rep. 78; *Atlantic & G. W. R. Co. v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. 365, 82 Am. Dec. 520; *McClung v. Dearborne*, 134 Pa. 396, 19 Am. St. Rep. 708; *Redding v. South Carolina R. Co.*, 3 Rich.

executing his principal's orders, and exercising the authority conferred upon him, or where he is not authorized to use force at all, willfully and designedly, for the purpose of accomplishing his own independent, malicious, and wicked purposes, does an injury to another, as by assaulting him, the principal is not liable therefor.<sup>279</sup>

Many of the cases applying this principle are cases of railroad companies, or other common carriers, being held liable for assault of their agents or servants. In these cases a distinction is made between assaults on passengers and assaults on persons who are on the company's cars or property as strangers. In the case of passengers it is held that the railroad company owes a duty to them to protect them while on its train or property as a passenger; and if it delegates this duty to its servant or agent and the latter commits an assault upon such passenger, the company will be liable therefor notwithstanding it is committed outside the course of his employment, though it has been said that the fact that the agent has violated this duty of his principal makes the assault sufficiently in the course of his employment to hold the principal liable.<sup>280</sup> But where a per-

(S. C.) 1, 16 Am. Rep. 681; *Palmer v. Charlotte, C. & A. R. Co.*, 3 Rich. (S. C.) 580, 16 Am. Rep. 750.

<sup>279</sup> *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Gillham v. South & N. A. R. Co.*, 70 Ala. 268; *Lynch v. Florida Cent. & P. R. Co.*, 113 Ga. 1105; *Callahan v. Hyland*, 59 Ill. App. 347; *Evansville & C. R. Co. v. Baum*, 26 Ind. 70; *Golden v. Newbrand*, 52 Iowa, 59, 35 Am. Rep. 257; *Ware v. Barataria & L. Canal Co.*, 15 La. 169, 35 Am. Dec. 189; *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 8 Am. St. Rep. 512; *Central R. Co. v. Peacock*, 69 Md. 257, 9 Am. St. Rep. 425; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373.

<sup>280</sup> *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 417, 8 Am. St. Rep. 538; *Richmond & D. R. Co. v. Jefferson*, 89 Ga. 554, 32 Am. St. Rep. 87; *Savannah, F. & W. R. Co. v. Quo*, 103 Ga. 125, 68 Am. St. Rep. 85; and see cases cited in preceding notes.

"The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his

son is upon the company's cars or property as a stranger, and not as a passenger or otherwise on business, the company does not owe him this duty, and if the servant or agent uses excessive force or commits an assault upon such person, the company will not be liable therefor unless it is committed in the course of the agent's employment.<sup>281</sup>

Thus, the principal has been held liable for an assault, where a passenger on a railway, having lost his watch, accused the brakeman of having taken it, and the brakeman thereupon struck him;<sup>282</sup> or where a passenger, who had given up his ticket to a brakeman, was afterwards accused of not giving it up and was assaulted and grossly insulted by the brakeman;<sup>283</sup> or where a conductor attempted to seize articles of property in the hands of a passenger for the purpose of enforcing payment of fare;<sup>284</sup> or where a conductor kicked a boy, eight years old, off of a car, on which he had jumped to steal a ride, while the train was going at a rapid rate of speed.<sup>285</sup>

But it is held that an agent is not acting in the course of his employment, and the principal is not responsible for an assault, where a lock-keeper and collector of tolls assaulted a

passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, a fortiori, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or willful misconduct of the carrier's servant, the carrier is necessarily responsible." *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39, 41.

<sup>281</sup> *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 8 Am. St. Rep. 512; and see cases cited in preceding notes.

<sup>282</sup> *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33.

<sup>283</sup> *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39.

<sup>284</sup> *Ramsden v. Boston & A. R. Co.*, 104 Mass. 117, 6 Am. Rep. 200.

<sup>285</sup> *Hoffman v. New York Cent. & H. R. R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337.

party, under pretext that such party had evaded or was endeavoring to evade payment of toll for the passage of his boat;<sup>286</sup> or where a watchman, employed by the owners of a brewery to guard their property and preserve the peace, pursued a person acting on the premises in a drunken and disorderly manner, and, while he was retreating, killed him;<sup>287</sup> or where an agent, employed to make collections of money for books sold, assaulted another who had upheld the purchaser of the books in her claim that she had already paid for them;<sup>288</sup> or where a stranger, upon entering one of the cars of a sleeping car company to ask the privilege of washing his hands, is wantonly and without provocation assaulted by the porter of the car;<sup>289</sup> or where a street car driver left his car and assaulted one who had been a passenger thereon, but who had left the car and was then walking on the street, although it arose out of an altercation in the car, and the passenger had only left the car temporarily, intending to return and claim his place, without advising the person in charge of the car of that fact.<sup>290</sup>

<sup>286</sup> *Ware v. Barataria & L. Canal Co.*, 15 La. 169, 35 Am. Dec. 189.

<sup>287</sup> *Golden v. Newbrand*, 52 Iowa, 59, 35 Am. Rep. 257.

<sup>288</sup> *Callahan v. Hyland*, 59 Ill. App. 347.

<sup>289</sup> *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 8 Am. St. Rep. 512, holding that the porter of a sleeping-car company has no authority to enforce rules and regulations of the company, or to forcibly prevent any person from entering the car, or to expel him therefrom after he has entered, and if he wantonly assaults and beats one who enters the car for a lawful purpose, his act is outside of the functions in which he is employed, and the company will not be liable therefor, unless it had expressly or impliedly authorized the act, or been guilty of knowingly employing a dangerous servant. Compare *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 417, 8 Am. St. Rep. 538, holding that a porter of a Pullman palace car must be regarded as the servant of the railroad company, of whose train such car is a part, in all matters pertaining to the safety of passengers whom it undertakes to carry over its line, and the company is liable for injury received by one of its passengers at the hands of such porter, where the passenger was not a trespasser upon the palace car at the time the injury was inflicted.

<sup>290</sup> *Central R. Co. v. Peacock*, 69 Md. 257, 9 Am. St. Rep. 425.

§ 503. Malicious prosecution, false arrest, and imprisonment by agent.

On the same principle, a principal may be held liable to a third person for the malicious prosecution, or false arrest and imprisonment, of such person, by the principal's agent in the course of his employment, although the agent may have no authority to institute prosecutions or to cause arrests and imprisonment, without probable cause. If the agent has a general authority to institute prosecutions for offenses against his principal or to make arrests, and under the appearance of such authority he institutes or causes a malicious prosecution or false arrest, the principal will be liable therefor, although it was neither authorized nor ratified.<sup>291</sup> Thus, where the principal confers a general authority upon the agent to make arrests for injuries to property, and the agent, in exercising that general authority, forcibly and wrongfully arrests an innocent person, the principal is liable for the injury consequent upon the wrongful act.<sup>292</sup> "The

<sup>291</sup> *Goff v. Great Northern R. Co.*, 30 Law J. Q. B. 148, 3 El. & El. 672; *Edwards v. Midland R. Co.*, 6 Q. B. Div. 287; *Ashton v. Spliers*, 9 Times Law R. 606; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101; *Jordan v. Alabama G. S. R. Co.*, 74 Ala. 85, 49 Am. Rep. 800; *Kinsey v. Wallace*, 36 Cal. 462; *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 58 Am. Dec. 439; *Springfield Engine & T. Co. v. Green*, 25 Ill. App. 106; *American Exp. Co. v. Patterson*, 73 Ind. 430; *Pa. Co. v. Weddle*, 100 Ind. 138; *Wheeler & W. Mfg. Co. v. Boyce*, 36 Kan. 350, 59 Am. Rep. 571; *Atchison, T. & S. F. R. Co. v. Brown*, 57 Kan. 785; *Carter v. Howe Mach. Co.*, 51 Md. 290, 34 Am. Rep. 311; *Central R. Co. v. Brewer*, 78 Md. 394; *Murdock v. Boston & A. R. Co.*, 133 Mass. 15, 41 Am. Rep. 57, note; *Krulovitz v. Eastern R. Co.*, 140 Mass. 573; *Turner v. Phoenix Ins. Co.*, 55 Mich. 236; *Smith v. Munch*, 65 Minn. 256; *Williams v. Planters' Ins. Co.*, 57 Miss. 759, 34 Am. Rep. 494; *Ricord v. Central Pac. R. Co.*, 15 Nev. 167; *Vance v. Erie R. Co.*, 32 N. J. Law, 334, 90 Am. Dec. 665; *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141; *Palmeri v. Manhattan R. Co.*, 133 N. Y. 261, 28 Am. St. Rep. 632; *Hussey v. Norfolk Southern R. Co.*, 98 N. C. 34, 2 Am. St. Rep. 312; *Wheless v. Second Nat. Bank*, 1 Bart. (Tenn.) 469, 25 Am. Rep. 783; *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 15 Am. St. Rep. 743.

<sup>292</sup> *Evansville & T. H. R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102; *Goff v. Great Northern R. Co.*, 30 Law J. Q. B. 148; *Pa. Co.*

fact that the agent arrested a person not guilty does not relieve the principal from liability, for the delegation of authority to arrest persons deemed guilty by the agent committed to him a broad general power, and if the agent, in attempting to exercise that power, did another injury, the principal must answer in damages. It was not necessary \* \* \* to prove that the injury resulted from a rightful attempt to exercise the authority conferred, for whether the attempt was rightful or wrongful the injured person may compel the principal to respond in damages for an illegal injury inflicted in the exercise of the general authority. The question is not whether the act of the agent was a rightful exercise of the duty he owed to his principal, but whether it was within the general line of his employment."<sup>293</sup>

This rule does not apply, however, unless it appears that such an act is within the general scope of the agent's employment. Ordinarily an agent is not authorized to prosecute or arrest a person, even though such person is guilty of an offense against the principal's property. When the agent acts in such cases, he does so in pursuance of his duty as a citizen of the state rather than as an agent of his principal. The principal therefore will not be liable for a malicious prosecution, or for false arrest and imprisonment, made by his agent, where it does not appear, or is not shown, to be in the course of his agent's employment, or that the principal has subsequently ratified it.<sup>294</sup> Thus, a principal is not

*v. Weddle*, 100 Ind. 138; *American Exp. Co. v. Patterson*, 73 Ind. 430. A principal is liable if his agent, while engaged in his principal's service of pursuing a criminal, arrest illegally another man, supposing him to be the fugitive, although acting in disobedience of orders in further pursuit. *Harris v. Louisville, N. & O. R. Co.*, 35 Fed. 116.

<sup>293</sup> *Evansville & T. H. R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 103.

<sup>294</sup> *Bank of New South Wales v. Owston*, 4 App. Cas. 270; *Wilkie v. Louisville & N. R. Co.*, 116 Ga. 309; *Hancock v. Singer Mfg. Co.*, 174 Ill. 503; *Dally v. Young*, 3 Ill. App. 39; *Cleveland Co-operative Stove Co. v. Koch*, 37 Ill. App. 595; *Carter v. Howe Mach. Co.*, 51 Md. 290, 34 Am. Rep. 311; *Baltimore & Y. Turnpike Road v. Brown*, 86 Md. 161; *Govaski v. Downey*, 100 Mich. 429; *Larson v. Fidelity Mut. L. Ass'n*, 71 Minn. 101; *Cameron v. Pacific Exp. Co.*, 48 Mo.



liable in a suit for malicious prosecution, based on the arrest of the plaintiff by the principal's agent for malicious mischief in injuring one of the principal's machines, where the agent's authority is expressly limited to selling and leasing machines and collecting therefor, and his act is promptly disaffirmed by the principal.<sup>295</sup> So a principal is not liable for an arrest and search of a person suspected of having stolen goods and secreted them about his person, by one employed to sell goods in the principal's absence, or to superintend the principal's business at a particular store.<sup>296</sup> So a turnpike company is not liable in an action for malicious prosecution for the arrest and prosecution of the plaintiff which was ordered by a gate keeper for nonpayment of tolls, when such agent was not authorized to institute the proceeding nor acted within the scope of his employment in so doing, and when his act was not ratified by the company.<sup>297</sup>

— **Application to corporations.** By the better opinion this doctrine applies to corporations, as principals, as well as to private individuals; and where a malicious prosecution or false arrest is made by an officer or agent of a corporation it will be responsible therefor.<sup>298</sup> In case of malicious criminal proceedings, however, it has been held that a corporation will not be liable for such by its agents, unless it has previously expressly authorized them or subsequently ratifies them.<sup>299</sup> As has been said: "There is a marked distinction between an act done for the purpose of pro-

App. 99; *Mulligan v. New York & R. B. R. Co.*, 129 N. Y. 506, 26 Am. St. Rep. 539; *Mall v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448; *Forbes v. Hagman*, 75 Va. 168; *Murrey v. Kelso*, 10 Wash. 47.

<sup>295</sup> *Hancock v. Singer Mfg. Co.*, 174 Ill. 503.

<sup>296</sup> *Mall v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448.

<sup>297</sup> *Baltimore & Y. Turnpike Road v. Green*, 86 Md. 161.

<sup>298</sup> See cases cited in note 291, this section.

<sup>299</sup> *Edwards v. London & N. W. R. Co.*, L. R. 5 C. P. 445; *Poulton v. London & S. W. R. Co.*, L. R. 2 Q. B. 534; *Owsley v. Montgomery W. P. R. Co.*, 37 Ala. 560; *Dally v. Young*, 3 Ill. App. 39; *Carter v. Howe Mach. Co.*, 51 Md. 290, 34 Am. Rep. 311; *Larson v. Fidelity Mut. L. Ass'n*, 71 Minn. 101; *Childs v. Bank of Mo.*, 17 Mo. 213; *Gillett v. Mo. Valley R. Co.*, 55 Mo. 315, 17 Am. Rep. 653; *Boogher v. Life Ass'n of America*, 75 Mo. 319, 42 Am. Rep. 413; *Levey v. Fargo*, 1 Nev. 415.

tecting the property by preventing a felony or of recovering it back, and an act done for purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property; it is done merely for the purpose of vindicating justice.<sup>300</sup>

§ 504. Libel by agent.

A principal is also liable for a libel published by his agent in the course of his employment, although the publication of libels may be unauthorized, or even though it is unknown to the principal or contrary to his instructions.<sup>301</sup> Thus where an agent of a telegraph company, acting within the scope of his authority, maliciously transmits a libelous message to another agent of the same company to be delivered to a third person, the telegraph company is liable therefor.<sup>302</sup> But if the publication of the libel is not in the line of the agent's employment, his principal cannot be held liable there-

<sup>300</sup> *Allen v. London & S. W. R. Co.*, L. R. 6 Q. B. 65.

<sup>301</sup> *Times Pub. Co. v. Carlisle*, 36 C. C. A. 475, 94 Fed. 762; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48, 47 Cal. 207, 91 Am. Dec. 672; *Howe Mach. Co. v. Souder*, 58 Ga. 64; *Vinas v. Merchants' Mut. Ins. Co.*, 27 La. Ann. 367; *Fogg v. Boston & L. R. Corp.*, 148 Mass. 513, 12 Am. St. Rep. 583; *Bacon v. Michigan Cent. R. Co.*, 55 Mich. 224, 54 Am. Rep. 372; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178, 23 Am. Rep. 680; *Aldrich v. Press Printing Co.*, 9 Minn. 133, 86 Am. Dec. 84; *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 74 Am. St. Rep. 502; *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539, 27 Am. Rep. 293; *Evening Journal Ass'n v. McDermott*, 44 N. J. Law, 430, 43 Am. Rep. 392; *Hoboken Printing & Pub. Co. v. Kahn*, 59 N. J. Law, 218, 59 Am. St. Rep. 585; *Samuels v. Evening Mail Ass'n*, 9 Hun (N. Y.) 288; *Missouri Pac. R. Co. v. Richmond*, 73 Tex. 568, 15 Am. St. Rep. 794.

<sup>302</sup> *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 74 Am. St. Rep. 502.

for, unless he subsequently ratifies it.<sup>303</sup> Thus, an insurance company, which had furnished a pamphlet to its agent for his instruction and control in making contracts, is not liable for his unauthorized act in exhibiting to the public the alleged libelous statements contained therein.<sup>304</sup>

**§ 505. Measure of damages.**

When it is shown that an agent has committed a tort in the course of his employment for which the principal is responsible, the question then arises as to what is the extent of the principal's liability, i. e., what is the amount for which he is liable. As to this, it may be stated that ordinarily a principal is liable to the injured third person for actual or compensatory damages only, i. e., for such damages as would fully compensate the third person for the injury he has received by reason of the agent's tort.<sup>305</sup>

But it is evident that many cases may arise in which the acts of the agent have been such, or have been committed in such a manner, that the principal should be made to pay, in addition to compensatory damages, an amount by way of punishment for committing the particular tort through his agent, or in other words he should be made to pay punitive or exemplary damages. As to when a principal is liable for such damages the authorities are not in harmony. But there must be present in all cases, in order to recover such damages, an element of malice or wantonness. As has been said: "The cases in which puni-

<sup>303</sup> *Harding v. Greening*, 8 Taunt, 42; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Washington Gas Light Co. v. Lansden*, 172 U. S. 534; *Schulze v. Jalonick*, 18 Tex. Civ. App. 296; *Fogg v. Boston & L. R. Corp.*, 148 Mass. 513, 12 Am. St. Rep. 583.

<sup>304</sup> *Schulze v. Jalonick*, 18 Tex. Civ. App. 296.

<sup>305</sup> *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519; *Turner v. North Beach & M. R. Co.*, 34 Cal. 594; *Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232; *Hill v. New Orleans, O. & G. W. R. Co.*, 11 La. Ann. 292; *Chicago R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375; *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504.

tive damages may be awarded are only those actions of tort 'founded on the malicious or wanton misconduct of the defendant,' or upon 'such culpable neglect of the defendant' as is 'tantamount to malicious or wanton misconduct.'"<sup>306</sup> In some cases it is held that in order to render the principal liable in exemplary or punitive damages for his agent's torts, where such damages are allowed at all, there must be present in the circumstances of the case some misconduct of the principal beyond that which the law implies from the mere relation of principal and agent, as that he has previously authorized the agent's wanton or malicious tort, or has subsequently ratified it, or that he did not exercise due care and diligence in selecting the agent.<sup>307</sup> Retaining the agent in his employ, knowing that he is incompetent or unfit for the position he occupies,<sup>308</sup> or knowing that he has committed a wanton or malicious tort in the course of his employment,<sup>309</sup> will be sufficient misconduct on the part of the principal to render him liable in exemplary damages.

On the other hand there are many cases which hold that the principal will be liable in exemplary or punitive damages,

<sup>306</sup> *Malsenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213. And see *McKeon v. Citizens' R. Co.*, 42 Mo. 79; *Jacob's Adm'r v. Louisville & N. R. Co.*, 10 Bush (Ky.) 263.

<sup>307</sup> *Bank of Palo Alto v. Pacific Postal Tel. Cable Co.*, 103 Fed. 841; *The Amlable Nancy*, 3 Wheat. (U. S.) 546; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101; *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519; *Turner v. North Beach & M. R. Co.*, 34 Cal. 594; *Malsenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213; *Woodward v. Ragland*, 5 App. D. C. 220; *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 47, 15 Am. Rep. 375; *Sullivan v. Oregon R. & Nav. Co.*, 12 Or. 392, 53 Am. Rep. 364; *Allegheny Val. R. Co. v. McLain*, 91 Pa. 442; *Hagan v. Providence & W. R. Co.*, 3 R. I. 88, 62 Am. Dec. 377; *Hays v. Houston G. N. R. Co.*, 46 Tex. 272; *Galveston, H. & S. A. R. Co. v. Donahue*, 56 Tex. 162; *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388; *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Bass v. Chicago & N. W. R. Co.*, 42 Wis. 654, 24 Am. Rep. 437.

<sup>308</sup> *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375.

<sup>309</sup> *Bass v. Chicago & N. W. R. Co.*, 42 Wis. 654, 24 Am. Rep. 437. And see *Gasway v. Atlanta & W. P. R. Co.*, 58 Ga. 216.

or for enhanced damages in those jurisdictions where exemplary damages are not allowed, for the wanton or malicious torts of his agent in the course of his employment, although such torts are not previously authorized nor subsequently ratified.<sup>810</sup>

**§ 506. Form of action against principal for tort.**

In many, probably in a large majority, of the instances in which principals have been held liable for the torts of their agents, the liability has been made to rest upon the negligence of the agent and the negligence of the principal in employing a careless agent, or upon the principal's negligent failure of duty. In such cases the principal is held to be liable in an action of trespass on the case.<sup>811</sup> There may

<sup>810</sup> *Gasway v. Atlanta & W. P. R. Co.*, 58 Ga. 216; *Wabash, St. L. & P. R. Co. v. Rector*, 104 Ill. 296; *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455, 29 Am. Rep. 43 (compare *Grund v. Van Vleck*, 69 Ill. 478); *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103; *Bowler v. Lane*, 3 Metc. (Ky.) 311; *Jacob's Adm'r v. Louisville & N. R. Co.*, 10 Bush (Ky.) 263; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Hanson v. European & N. A. R. Co.*, 62 Me. 84, 16 Am. Rep. 404; *Baltimore & Y. Turnpike Road v. Boone*, 45 Md. 344; *Baltimore & O. R. Co. v. Blocher*, 27 Md. 277; *Philadelphia, W. & B. R. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442; *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383; *Forsee v. Alabama G. S. R. Co.*, 63 Miss. 66, 56 Am. Rep. 801; *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552; *Travers v. Kansas Pac. R.*, 63 Mo. 421; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 364; *Hopkins v. Atlantic & St. L. R. Co.*, 36 N. H. 9, 72 Am. Dec. 287; *Belknap v. Boston & M. R. Co.*, 49 N. H. 358; *Atlantic & G. W. Co. v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382; *Rucker v. Smoke*, 37 S. C. 377, 34 Am. St. Rep. 758; *Palmer v. Railroad*, 3 S. C. 580, 16 Am. Rep. 750; *Louisville & N. R. Co. v. Garrett*, 8 Lea (Tenn.) 438, 41 Am. Rep. 640 (compare *Nashville & C. R. Co. v. Starnes*, 9 Helsk. [Tenn.] 52, 24 Am. Rep. 296).

<sup>811</sup> *McManus v. Crickett*, 1 East, 108; *Moreton v. Hardern*, 4 Barn. & C. 223; *Havens v. Hartford & N. H. R. Co.*, 28 Conn. 69; *Central of Ga. R. Co. v. Brown*, 113 Ga. 414, 84 Am. St. Rep. 253; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353; *Johnson v. Castleman*, 2 Dana (Ky.) 377; *Barnes v. Hurd*, 11 Mass. 57; *Wright v. Wilcox*, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507; *Broughton v. Whallon*, 8 Wend. (N. Y.) 474; and see cases cited in preceding notes.

be cases, however, in which the principal may be held liable in an action of trespass *vi et armis*, as where the tort is expressly or impliedly ordered by him, or it is the natural and probable consequence of some act of the agent ordered by him, and the act was forcible and the injury immediate.<sup>312</sup>

The courts have not all been clear as to whether the principal and agent can be sued jointly in trespass for the tort of the agent. The doubt has been as to whether under the common-law pleading, the principal was not liable in trespass on the case and the agent liable in trespass, so that the two could not be joined in the same action. In those states, however, where the system of code pleading has abolished the distinction between trespass and trespass on the case, there is no reason why the two should not be joined in one action.<sup>313</sup> And it would seem that this would be true also in those cases in which the principal may be held liable in trespass, independent of statute.

**§ 507. Liability of principal for agent's fraud—False representations—In general.**

Although there formerly seemed to be some doubt as to the liability of a principal for his agent's frauds, it is now generally well settled that for the same reasons that a principal is liable for other torts of his agent, he is also civilly responsible for frauds committed by such agent in the course of his employment, and for the principal's benefit, although they were committed without the principal's knowledge or consent, or even though they were expressly forbidden.<sup>314</sup>

<sup>312</sup> *Gregory v. Piper*, 9 Barn. & C. 591; *Central of Ga. R. Co. v. Brown*, 113 Ga. 414, 84 Am. St. Rep. 250; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353; *Howe v. Newmarch*, 12 Allen (Mass.) 49; *Holmes v. Wakefield*, 12 Allen (Mass.) 580, 90 Am. Dec. 171; *McCoy v. McKowen*, 26 Miss. 487, 59 Am. Dec. 264; *Yerger v. Warren*, 31 Pa. 319; and see cases cited in preceding notes.

<sup>313</sup> *Central of Ga. R. Co. v. Brown*, 113 Ga. 414, 84 Am. St. Rep. 253. And see *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 48 Am. St. Rep. 911.

<sup>314</sup> *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *Hern v. Nichols*, 1 Salk. 289; *Doe v. Martin*, 4 Term R. 39; *City Nat. Bank v. Dun*, 51 Fed. 160; *Edinburgh American Land Mortg. Co.*

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unless it be shown that the loss sustained, as the result of such frauds, would not have occurred but for the neglect and want of ordinary care on the part of the person seeking to hold the principal liable.<sup>315</sup> As has been said in a leading case: "Whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong."<sup>316</sup> There is no distinction in this responsibility of the principal for fraud, between an agent authorized to do business generally and an agent employed to conduct a single transaction, if, in each case, he is acting in the course of the business for which he was employed by the principal, and had full authority to complete the transaction.<sup>317</sup> But, of course, if an

*v. Peoples*, 102 Ala. 241; *Lunday v. Thomas*, 26 Ga. 537; *Johnson v. Barber*, 10 Ill. 425, 50 Am. Dec. 416; *Wolfe v. Pugh*, 101 Ind. 293; *Mankin v. Mankin*, 91 Iowa, 406; *Noble v. Steamboat Northern Ill.*, 23 Iowa, 109; *Lutz v. Forbes*, 13 La. Ann. 609; *Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 354; *Andrews v. Clark*, 72 Md. 396; *Haskell v. Starbird*, 152 Mass. 117, 23 Am. St. Rep. 809; *Locke v. Stearns*, 1 Metc. (Mass.) 560, 35 Am. Dec. 382; *Busch v. Wilcox*, 82 Mich. 336, 21 Am. St. Rep. 563; *Aultman v. Olson*, 34 Minn. 450; *Nichols v. Wadsworth*, 40 Minn. 547; *Bank of Commerce v. Hoerber*, 88 Mo. 37, 57 Am. Rep. 359; *Goetz v. Flanders*, 118 Mo. 342; *McKeighan v. Hopkins*, 19 Neb. 33; *Dougherty v. Wells, Fargo & Co.*, 7 Nev. 368; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Fairchild v. McMahon*, 139 N. Y. 290, 36 Am. St. Rep. 701; *Durst v. Burton*, 47 N. Y. 167, 7 Am. Rep. 428; *Peebles v. Patapsco Guano Co.*, 77 N. C. 233, 24 Am. Rep. 447; *Griswold v. Gebble*, 126 Pa. 353, 12 Am. St. Rep. 878; *Smalley v. Morris*, 157 Pa. 349; *Reynolds v. Witte*, 13 S. C. 5, 36 Am. Rep. 678; *Wright v. Calhoun*, 19 Tex. 412; *Henderson v. San Antonio & M. G. R. Co.*, 17 Tex. 560, 67 Am. Dec. 675; *McKinnon v. Vollmar*, 75 Wis. 82, 17 Am. St. Rep. 178.

<sup>315</sup> *Andrews v. Clark*, 72 Md. 399.

<sup>316</sup> *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259.

<sup>317</sup> *Haskell v. Starbird*, 152 Mass. 117, 23 Am. St. Rep. 809; *Beem v. Lockhart*, 1 Ind. App. 202; *Morton v. Scull*, 23 Ark. 289. But in *Davies v. Lyon*, 36 Minn. 427, where a special agent was appointed to sell lot 5, and for the purpose of inducing the plaintiff to buy, he fraudulently pointed out lot 7, it was held that, although in general an action in tort for damages may be maintained against a principal for the fraud of his agent, yet since in

agent commits a fraud beyond the course of the business in which he is engaged for his principal, the latter cannot be held responsible therefor.<sup>318</sup> In accordance with this doctrine, a principal is responsible for the false or fraudulent representations made by his agent in the course of his real or apparent employment, and in reference to the subject-matter of the agency, whether they were expressly authorized or not, or even though they are made in disobedience of the principal's instructions or without the principal's knowledge and consent.<sup>319</sup>

When it is said that a principal is liable for fraud committed by his agent in the course of his employment, it must not be understood that the principal should in any manner intend that such fraud should be committed. The principal's

this case the agent was a special one for the sole purpose of selling lot 5, the plaintiff was bound to know that his agency extended only to the sale of that lot; and that his fraudulent representation that lot 7 was lot 5 was not within the scope of his agency, and therefore an action for damages could not be maintained against the principal, and the defendant's only remedy was to rescind the sale, and reclaim the purchase money.

<sup>318</sup> *Stimpson v. Achorn*, 158 Mass. 342; *Kennedy v. Parke*, 17 N. J. Eq. 415; *Daley v. Quick*, 99 Cal. 179.

<sup>319</sup> *National Exch. Co. v. Drew*, 2 Macq. H. L. Cas. 103; *Lynch v. Mercantile Trust Co.*, 18 Fed. 486; *Morton v. Scull*, 23 Ark. 289; *Geraghty v. Randall* (Colo. App.) 70 Pac. 767; *Wheeler v. Baars*, 33 Fla. 696; *Wachsmuth v. Martini*, 45 Ill. App. 244; *Wolfe v. Pugh*, 101 Ind. 293; *Beem v. Lockhart*, 1 Ind. App. 202; *Du Souchet v. Dutcher*, 113 Ind. 249; *Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 354; *Lamm v. Port Deposit Homestead Ass'n*, 49 Md. 233, 33 Am. Rep. 246; *Haskell v. Starbird*, 152 Mass. 117, 23 Am. St. Rep. 809; *Jewett v. Carter*, 132 Mass. 335; *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; *Busch v. Wilcox*, 82 Mich. 336, 21 Am. St. Rep. 563; *Decker v. Fredericks*, 47 N. J. Law, 469; *Ferguson v. Hamilton*, 35 Barb. (N. Y.) 427; *Sanford v. Handy*, 23 Wend. (N. Y.) 260; *Taylor v. Guest*, 45 How. Pr. (N. Y.) 276; *Fairchild v. McMahon*, 139 N. Y. 290, 36 Am. St. Rep. 701; *Ellenberger v. Protective Mut. F. Ins. Co.*, 89 Pa. 464; *McNelle v. Cridland*, 168 Pa. 16; *Erie City Iron Works v. Barber*, 106 Pa. 125, 51 Am. Rep. 508; *Griswold v. Gebbie*, 126 Pa. 353, 12 Am. St. Rep. 878; *Tagg v. Tennessee Nat. Bank*, 9 Heisk. (Tenn.) 479; *Henderson v. San Antonio & M. G. R. Co.*, 17 Tex. 560, 67 Am. Dec. 675; *Law v. Grant*, 37 Wis. 548.



liability "cannot properly be restricted to what the parties intended in the creation of the agency, for that would also exclude negligence, as no agent is appointed for the purpose of being negligent, any more than for the purpose of acting fraudulently. The question cannot be determined by the authority intended to be conferred by the principal. We must distinguish between the authority to commit a fraudulent act and the authority to transact the business in the course of which the fraudulent act was committed. Tested by reference to the intention of the principal, neither negligence nor fraud is within 'the scope of the agency'; but tested by the connection of the act with the property and business of the agency, fraud" may be "as much 'within the scope of the agency' as negligence" or any other act. "The proper inquiry is, whether the act was done in the course of the agency and by virtue of the authority as agent. If it was, then the principal is responsible, whether the act was merely negligent or fraudulent."<sup>320</sup>

— **Effect of ratification.** This general rule also applies to cases where the agent is not acting in the course of his employment, when he commits the fraud, if the principal afterwards, with a full knowledge of all the facts, ratifies the transaction.<sup>321</sup> Thus, if a self-constituted agent assumes to act for a principal without authority, and the latter adopts or ratifies the contract made by such agent, he is liable for the fraud or misrepresentations of the agent committed or made while acting in the course of his assumed authority.<sup>322</sup>

### § 508. Illustrations.

Thus, where an agent, authorized to sell sheep, fails to disclose to the purchaser the fact that they are diseased, where that fact is known to the agent, his principal is liable

<sup>320</sup> See *Reynolds v. Witte*, 13 S. C. 5, 36 Am. Rep. 678, 684.

<sup>321</sup> *Udell v. Atherton*, 7 Hurl. & N. 172; *Du Souchet v. Dutcher*, 113 Ind. 249; *Busch v. Wilcox*, 82 Mich. 336, 21 Am. St. Rep. 563; *Henderson v. San Antonio & M. G. R. Co.*, 17 Tex. 560, 67 Am. Dec. 675; *Stephens v. Ozbourne*, 107 Tenn. 572.

<sup>322</sup> *Busch v. Wilcox*, 82 Mich. 336, 21 Am. St. Rep. 563.

for all damages occasioned thereby;<sup>323</sup> and the measure of damages in such case is not merely the difference in value between diseased and sound animals, but includes also the damages occasioned by communicating the disease to the purchaser's flock.<sup>324</sup> So where an agent fraudulently misappropriates negotiable collaterals deposited with him on a loan of the principal's moneys, the principal is liable for their value; and if the borrower offers to pay the loan at maturity, the measure of damages is the value of the securities at that time.<sup>325</sup> So a principal is liable for the resulting loss where an agent, employed by him for making a loan, receives the money and embezzles it.<sup>326</sup> And where an agent paid an employe of his principal a part of the wages due him, and obtained from him, by fraud, a receipt in full for his services, the employe was entitled to recover from the principal the balance of the wages due, although the principal had allowed the agent, in a settlement with him, for the payment of the full amount of the employe's wages, as stated in the receipt.<sup>327</sup>

A mere misstatement, by an agent employed to sell land, of the amount of land is not sufficient to prove fraud, but if the deficiency is very great in proportion to the whole, it is evidence of fraud; and where the misstatement is made by advertisement, and by descriptive circular, and is repeated several times, and is altogether unexplained by the agent, though his principal and those connected with him in the transaction

<sup>323</sup> *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476. Or where he sells a horse which he knew to be affected with a contagious and incurable disease that would be likely to be communicated to other stock belonging to the purchaser, and he does not disclose that fact. *Lutz v. Forbes*, 13 La. Ann. 609.

<sup>324</sup> *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476.

<sup>325</sup> *Reynolds v. Witte*, 13 S. C. 5, 36 Am. Rep. 678. So a lender of money is bound by the fraud of his agents affecting a loan upon a mortgage, in misrepresenting to the borrower the contents of an instrument, though they were authorized to loan only upon security to be approved by another agent of the lender who passed on the security without knowledge of any fraud affecting its validity. *Conn v. Hagan*, 93 Tex. 334.

<sup>326</sup> *Edinburgh American Land Mortg. Co. v. Peoples*, 102 Ala. 241.

<sup>327</sup> *Noble v. Steamboat Northern Ill.*, 23 Iowa, 109.

are shown to have been absolutely ignorant on the subject, there is a *prima facie* case to go to the jury.<sup>328</sup>

But where a mercantile agency contracts with its subscribers to furnish them information, on request, as to the financial responsibility of merchants and manufacturers, expressly stipulating that it will not be responsible for the negligence of its agents in obtaining such information and not guaranteeing its correctness, it will not be liable for a loss occasioned to a subscriber by reason of false information willfully and fraudulently furnished by its agent.<sup>329</sup>

**§ 509. When principal liable in an action for deceit for agent's fraud.**

(a) **In general.**—Fraud, for which a principal may be held liable in an action for deceit, consists of a false representation of a material fact made without belief, or sufficient grounds for belief, in its truth, or with a reckless disregard of whether it is true or false, with intent that it should be acted upon by another, who, reasonably relying upon the representation, does act on it to his injury.<sup>330</sup> It will thus be seen that there are certain elements that must be present in order to constitute such fraud for which this action may be maintained. The representation must be made (1) with a knowledge of its falsity or without reasonable grounds for believing it to be true, or with a reckless disregard of whether it is true or false, (2) with an intent to deceive another and (3) it must actually deceive such other to his prejudice. If the representation is in fact true, or the agent has reasonable grounds for believing it to be true, or if the third party has knowledge of its falsity before he acts upon it, there is no ground for this action. In such cases the third party cannot be said to be deceived, either because the representation was in fact true, or believed to be true, or because he knew it was false when he acted on it. And without proof

<sup>328</sup> *Griswold v. Gebble*, 126 Pa. 353, 12 Am. St. Rep. 878.

<sup>329</sup> *Dun v. City Nat. Bank*, 58 Fed. 174, reversing 51 Fed. 160.

<sup>330</sup> *Wheeler v. Baars*, 33 Fla. 696; *Morton v. Scull*, 23 Ark. 289. See *Huffcut*, Ag. § 151; *Pollock, Torts* (4th Ed.) 260; *Derry v. Peek*, 14 App. Cas. 337.

of bad faith or absence of reasonable grounds of belief, there can be no recovery in an action for deceit against principal.<sup>331</sup>

(b) **Representations of fact.**—It is also necessary that the representation should be one of fact, as distinguished from

<sup>331</sup> *Griswold v. Gebbie*, 126 Pa. 353, 12 Am. St. Rep. 878; *Lamm v. Port Deposit Homestead Ass'n*, 49 Md. 233, 33 Am. Rep. 246; *Erie City Iron Works v. Barber*, 106 Pa. 125, 51 Am. Rep. 508. As was said in this case: "In order to make a person liable for a fraudulent representation, he must have been guilty of some moral wrong; legal fraud, unaccompanied by moral fraud, will fail to support the action. But though it is necessary that the defendant in making the false statement should have committed some moral turpitude, it is not necessary to show that he knew as a fact what he stated was false. If he made the representation not knowing it to be true, or without reasonable and probable grounds on which to suppose it to be true, he acted fraudulently. When a man having no knowledge whatever upon a subject takes it upon himself to represent a certain state of facts to exist, he does so at his peril, and if it be done either to secure some benefit to himself or to deceive another, he is guilty of fraud. By assuming to have knowledge of a material fact when he is conscious that he has not, and representing it as of his own knowledge, in such manner as to import knowledge in him thereof, he commits a moral wrong similar in character as if he knew the representation to be untrue. The fraudulent purpose is essential. *Moak's Underhill, Torts*, 547-8. *Bigelow on Fraud* sets forth the same principles, and it is there said, p. 63: 'Deceit cannot be maintained for a false representation, believed to be true, which is based on adequate information; nor will the plea of fraud, or a bill asking for relief for fraud, be supported by such evidence.' True, it is also said that the action can be maintained 'for a false representation, believed to be true, but the truth of which the defendant was bound to know.' The illustrations given under this rule apply to the case of express or implied representation of agency, to one professing to be a partner in a mercantile firm, and to a person professing to be an expert and thus competent to give advice in matters pertaining to his art. These and like cases rest on the ground that the representation, though made by mistake or ignorance, operates as an imposition upon the other party, and the person making it, as against an innocent man who has suffered by reason thereof, will not be allowed to say he made it honestly, believing it to be true. There is reason for his liability without holding him guilty of moral turpitude."

a mere representation of a matter of law or an expression of an opinion. If the agent makes a mere representation as to a matter of law, or merely expresses his opinion as to certain matters, the third person has no right to rely upon them; and if he does so, or if, though it is a representation of fact, and he has equal knowledge with the agent on the matters, he has no right of action against the principal for any damages he may suffer thereby.<sup>332</sup> Thus, where an insurance agent by falsely representing to one who had a claim against the insurance company for loss by fire that his policy had been forfeited by nonoccupancy, thereby induced him to settle for less than the amount of his claim, it was held that such person had no cause of action for damages against the company by reason of such representation, because the representation was merely an expression of opinion by the agent, where interests were known to be hostile to the plaintiff, and as a prudent man he ought not to have relied upon them.<sup>333</sup>

If the false representations are expressly authorized by the principal, there would, of course, be no question as to his liability for them.<sup>334</sup> He would also be liable, where, although he does not expressly authorize them, he knows that they are false, and his agent with knowledge of their falsity, or recklessly, makes them in the course of his employment;<sup>335</sup> and although the agent does not know of the falsity of the representations made in the course of his employment, but the principal has knowledge that they are untrue and he intentionally withholds such information from his agent, he will be liable therefor.<sup>336</sup> But as to whether or not a principal is

<sup>332</sup> *Thompson v. Phoenix Ins. Co.*, 75 Me. 55, 46 Am. Rep. 357; *Andrews v. Clark*, 72 Md. 399; *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105; *Aetna Ins. Co. v. Reed*, 33 Ohio St. 283.

<sup>333</sup> *Thompson v. Phoenix Ins. Co.*, 75 Me. 55, 46 Am. Rep. 357. And see *Aetna Ins. Co. v. Reed*, 33 Ohio St. 283; *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105.

<sup>334</sup> *Cornfoot v. Fowke*, 6 Mees. & W. 358; *Lamm v. Port Deposit Homestead Ass'n*, 49 Md. 233, 33 Am. Rep. 246.

<sup>335</sup> *Erie City Iron Works v. Barber*, 106 Pa. 125, 51 Am. Rep. 508.

<sup>336</sup> *Cornfoot v. Fowke*, 6 Mees. & W. 358; *Ludgater v. Love*, 44 Law T. (N. S.) 694; *Erie City Iron Works v. Barber*, 106 Pa. 125, 51 Am. Rep. 108.

liable under such circumstances, if he intentionally withheld such information but did not know of the agent's false representation, the authorities are not in harmony,<sup>337</sup> though it would seem to be the better rule, on principle, to hold the principal responsible in such cases, because in employing an agent, he should communicate to him all facts necessary for the proper negotiation of the transaction, and if by not doing so he enables the agent to commit a fraud upon another in the course of his employment, it would be more consonant with reason to hold him responsible rather than that the third person should suffer.<sup>338</sup> Thus, where the owner of a house employs an agent to sell it, and the latter described it free from rates and taxes and did not know it to be otherwise, but it was in fact liable to certain rates and taxes, as the owner knew, and on the faith of the agent's description the plaintiff bought the house, it was held he might maintain an action for deceit against the owner though it did not appear that he had intrusted the agent to make any representations as to rates.<sup>339</sup> But the principal would not be liable, in the absence of ratification, if the false representations were not in the course of the agent's employment, even though he knew of their falsity,<sup>340</sup> nor would he be liable where both he and his agent were ignorant of the falsity of the representation made by the agent in the course of his employment, because in such case there would be no fraud.<sup>341</sup>

<sup>337</sup> See *Fuller v. Wilson*, 3 Q. B. 58, holding the principal liable in an action for deceit in such a case. But see *Cornfoot v. Fowke*, 6 Mees. & W. 358, in which Alderson, B., holds that the principal could not be charged with fraud in such a case, "because, though he knew the fact, he was not cognizant of the misrepresentation being made, nor ever directed the agent to make it." But see dissenting opinion of Lord Abinger in the same case.

<sup>338</sup> See *Fitzsimmons v. Joslin*, 21 Vt. 129, 52 Am. Dec. 46. And see *Fuller v. Wilson*, 3 Q. B. 58, where Lord Denman says: "We think the principal and his agent are, for this purpose, completely identified; and that the question is, not what was passing in the mind of either, but whether the purchaser was in fact deceived by them, or either of them."

<sup>339</sup> *Fuller v. Wilson*, 3 Q. B. 58.

<sup>340</sup> See cases cited in preceding note 314.

<sup>341</sup> *Lamm v. Port Deposit Homestead Ass'n*, 49 Md. 233, 33 Am. Rep. 246.

(c) **Ignorance of agent's intent.**—It has been held that where the principal was not a party to the agent's fraudulent representations, and did not know of them, the agent's knowledge or intent could not be imputed to the principal so as to render him liable in an action for deceit, but in such case he could be held liable only to the extent of the benefit he had received from the transaction.<sup>342</sup> Thus, in an action

<sup>342</sup> *Udell v. Atherton*, 7 Hurl. & N. 172; *Western Bank of Scotland v. Addie*, L. R. 1 H. L. Sc. 146; *Kennedy v. McKay*, 43 N. J. Law, 288, 39 Am. Rep. 581; *Decker v. Fredericks*, 47 N. J. Law, 469; *Mayo v. Wahlgreen*, 9 Colo. App. 506.

In *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4, which was an action for damages for breach of warranty of a safe sold by Stewart as defendant's agent, and by him warranted burglar proof, and the plaintiff sought to recover damages for articles stolen from the safe by burglars, and it appeared that such warranty and other representations made by the agent were unauthorized, the court said: "The fraud which would justify a recovery in this case commensurate with the value of the goods lost from the same would not be the mere assertion that the safe was burglar proof, or would resist the assault of burglars for any specified time. That may have been the expression of an opinion honestly entertained. Integrity of purpose and fraud do not co-exist. Bad faith is necessary to maintain the claim to larger damages. To make good this feature of the claim, there must have been an assertion as fact of that which the seller knew to be false, or a reckless, false affirmation that the safe was burglar proof, when the seller did not know whether the assertion was true or not, or a knowledge on the part of the seller that the safe was not burglar proof, and a failure to communicate that knowledge, when he knew the purchaser was contracting for the safe as burglar proof; and the purchaser must have trusted these representations, and been misled by them. \* \* \* Even if it should be shown that the agent was authorized to warrant the safe as burglar proof, this would not conclude the principal, unless one of the forms of fraud above described can be carried home to the principal, thus making him a guilty participant in Stewart's fraud, or unless it be shown that the principal, with a knowledge of the fraud perpetrated by the agent, received and retained the fruits of such fraudulent sale."

In *Wachsmuth v. Martini*, 45 Ill. App. 244, affirmed in 154 Ill. 515, it is held that an action for fraud and deceit will not lie against a purchaser of goods on the ground that, to obtain credit, he made a false statement of his financial condition to a mercantile agency, where the statement of such agency to the seller, on which the

for damages, against a principal for a fraud, consisting of unfounded representations made by his agent in a sale of stocks, the court said: "It is clear that an innocent vendor cannot be sued in tort for the fraud of his agent in effecting a sale. In such a juncture, the aggrieved vendee has at law two, and only two, remedies; the first being a rescission of the contract of sale and a reclamation of the money paid by him from the vendors, or a suit against the agent founded on the deceit. But in such a posture of affairs, a suit based on the fraud will not lie against the innocent vendor, on account of the deceit practiced, without his authority or knowledge, by his agent. If the situation is such that the vendee can make complete restitution, so as to put the vendor in the condition with respect to the property sold that he was in at the time of the sale, he has the right to rescind such contract of sale, and if the vendor, on a tender to that effect, refuses to return the money received in the transaction, a suit will lie for such money, but such refusal on the part of the vendor will not make him a party to the original wrong, so that he can be sued for the deceit."<sup>343</sup> The distinction to be drawn from these cases is that where a person is induced into a contract by fraudulent misrepresentations of an agent, and suit is brought in the name of the principal to enforce that contract, or the person deceived institutes a suit against the principal to rescind the contract on the ground of fraud, the misrepresentations are imputable to the principal, and the third party cannot be held to his contract, because the principal cannot retain any benefit which he has obtained through the fraud of his agents. But if the person who has been induced to enter into the contract, instead of seeking to set it aside, prefers to bring an action

seller relied, is substantially different from that made by the purchaser. But this case is clearly distinguishable from the cases cited above, in that the mercantile agency was not the agent of such purchaser in making its representation.

<sup>343</sup> Kennedy v. McKay, 43 N. J. Law, 288, 39 Am. Rep. 581, 582. And see Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc. 146; Houldsworth v. City of Glasgow Bank, 5 App. Cas. 317.



for damages for the deceit, such an action cannot be sustained against the principal, but only against the agent.<sup>344</sup>

But, though this rule may be true as to a criminal prosecution for such deceit, the better opinion and weight of authority hold that the principal may be held liable in a civil action for damages for such deceit of the agent, although it was practiced without the principal's knowledge or contrary to his orders.<sup>345</sup> "This rule of liability is not based upon any presumed authority in the agent to do the acts, but on the ground of public policy, and that it is more reasonable, when one of two innocent persons must suffer from the wrongful act of a third person, that the principal who has placed the agent in the position of trust and confidence should suffer, than a stranger."<sup>346</sup> It is apparent that this rule is a just one, and that no distinction should be made in the extent of the principal's liability in case of his agent's fraud and that of any other tort. He has placed the agent in a position that enabled him to commit the fraud, and consequently should be responsible for all damages suffered by an innocent third party by reason thereof, and not only to the extent of the benefit he has received. The agent is acting in matters, as to which his agency shows he has knowledge and of which he has power to make representations. If he goes beyond his powers and makes representations that he knows are not true, or of the truth of which he is regardless, and the third person has no knowledge thereof, it is but just and proper that the principal should be the sufferer rather than the innocent third party. For example,

<sup>344</sup> See *Western Bank of Scotland v. Addie*, L. R. 1 H. L. Sc. 146.

<sup>345</sup> *Hern v. Nichols*, 1 Salk. 289; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *Morton v. Scull*, 23 Ark. 289; *Wheeler v. Baars*, 33 Fla. 697; *Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 354; *Locke v. Stearns*, 1 Metc. (Mass.) 560, 35 Am. Dec. 382; *Haskell v. Starbird*, 152 Mass. 117, 23 Am. St. Rep. 809; *Griswold v. Gebble*, 126 Pa. 353, 12 Am. St. Rep. 878.

<sup>346</sup> *Erie City Iron Works v. Barber*, 106 Pa. 125, 51 Am. Rep. 511; *Lee v. Sandy Hill*, 40 N. Y. 442. As was said by Holt, C. J., in *Hern v. Nichols*, 1 Salk. 289: "Seeing that somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger."

an action for deceit has been held to lie against a principal for false representations made by his agent on the sale of goods manufactured and sold by him for a particular purpose;<sup>347</sup> or for false representations made by his agent in effecting a sale of land;<sup>348</sup> and the principal cannot escape this liability by proving that he told the purchaser, before the sale was completed, that he had never seen the land, and knew nothing about it except what he had been informed.<sup>349</sup>

**§ 510. Other remedies of third persons injured by agent's fraud.**

Besides an action for damages for deceit, and as we have seen above in some cases of fraud this action will not lie,

<sup>347</sup> *Erie City Iron Works v. Barber*, 106 Pa. 125, 51 Am. Rep. 508.

<sup>348</sup> *Haskell v. Starbird*, 152 Mass. 117, 23 Am. St. Rep. 809; *Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 354. In this case Danforth, J., says: "It is said that being personally innocent of the fraud, she [the principal] cannot be convicted of that which was committed by another with no authority from her, except that which results from his agency. This may be true in a criminal prosecution, but not in a civil action. If she is liable, that liability must be ascertained in the proper form of action. Here is no contract of any kind, express or implied, between the parties which can afford any remedy for the injury of which the plaintiff complains. He claims that a wrong, for which the defendant is responsible, has been done him. For that wrong he seeks a remedy. What remedy can he have except an action of tort? The counsel says two. He may rescind the contract, and recover back the consideration paid, or in an action for money had and received, recover the profits accruing from the fraud. But neither of these may be adequate to his injury. If he rescinds the contracts he may perhaps lose all the consideration paid, and it would be difficult, if not impossible, to ascertain the amount received on account of the fraud, if that should be held to differ from the amount of damages recoverable in this form of action. \* \* \* The counsel relies largely, if not entirely, upon the English cases to support his views and some of them do so. But an examination of them will show that they are conflicting, many of them decidedly sustaining the instruction given to the jury in this case. It will, however, be noticed that in the most, if not all of them, the form of the action is not considered material. The object is to limit the extent of the liability to the advantages received from the fraud, applying a somewhat different test to the amount of damages to be recovered."

<sup>349</sup> *Haskell v. Starbird*, 152 Mass. 117, 23 Am. St. Rep. 809.

the third person may have other remedies against a principal for his agent's fraud. He may rescind the contract and, upon restoring what he has received under it, recover the money or other property that he has paid or parted with under the contract;<sup>350</sup> or he may retain what he has received under the contract and bring an action on the case and recover the damages he has suffered by the breach of contract.<sup>351</sup> Or he may, as shall be seen in a subsequent chapter, instead of actively enforcing his rights prefer to remain on the defensive, and set up the agent's fraud as a defense to an action against him by the principal on the transaction.<sup>352</sup>

Thus, if an intending purchaser is induced to buy property, by reason of the vendor's agent pointing out a wrong tract when he goes to examine it, or by making other fraudulent representations, he may rescind the sale and recover the purchase money, though the vendor was not aware of the fraud of his agent.<sup>353</sup> So where a deed is procured from another through the fraudulent acts of the grantee's agent, the gran-

<sup>350</sup> *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317; *Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 354; *Mankin v. Mankin*, 91 Iowa, 406; *Wolfe v. Pugh*, 101 Ind. 293; *McKinnon v. Vollmar*, 75 Wis. 82, 17 Am. St. Rep. 178; *Davies v. Lyon*, 36 Minn. 427; *Meyerhoff v. Daniels*, 173 Pa. 555, 51 Am. St. Rep. 782; *Goetz v. Flanders*, 118 Mo. 342; *Law v. Grant*, 37 Wis. 548.

<sup>351</sup> *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317; *Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 354; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Lynch v. Mercantile Trust Co.*, 18 Fed. 486.

<sup>352</sup> See post, § 539.

<sup>353</sup> *McKinnon v. Vollmar*, 75 Wis. 82, 17 Am. St. Rep. 178; *Davies v. Lyon*, 36 Minn. 427, holding that an action against the principal to recover the difference in value between the two lots as damages for the fraud of the agent could not be maintained. *Wolfe v. Pugh*, 101 Ind. 293; *Law v. Grant*, 37 Wis. 548, holding that the fact that a third person, by false representations, induced the purchaser to buy the land, would perhaps justify the court in presuming that he acted as agent for the vendor, in the absence of any other adequate explanation of his conduct. But there is always a presumption of innocence, and if the court can perceive any reasonable hypothesis, consistent with the facts in evidence, explaining the conduct of such third person, without implicating the vendor in the fraud, it is bound to adopt such hypothesis.

tor may rescind the transaction upon discovering the fraud,<sup>354</sup> and the fact that he has brought suit for the purchase price, without discovering the fraud, does estop him from subsequently maintaining a suit to rescind.<sup>355</sup>

**§ 511. Unsatisfied judgment against agent no bar to an action against principal.**

The fact that the injured party has obtained a judgment against an agent for a fraud committed by him within the scope of his agency is no bar to an action against the principal for the same fraud, where such judgment is wholly unsatisfied.<sup>356</sup>

**§ 512. Liability of principal for agent's fraud for the latter's own benefit.**

In the preceding sections has been considered a principal's liability for his agent's fraud in the course of his employment and for the principal's benefit. Many cases arise, however, where though the agent is acting in the course of his employment, and ostensibly for the principal, yet he is committing the fraud and acting for his own personal benefit. As to whether or not the principal is liable for the agent's fraud in such cases, the authorities are greatly in conflict. In England it is held that a principal is not liable for his agent's fraud under such circumstances,<sup>357</sup> and this rule is followed in the federal courts in this country.<sup>358</sup> These cases hold, in effect, that it is an essential element of the principal's liability that the fraud should be committed for the principal's benefit, and if it is committed for the benefit of the agent himself or another, this element is lacking, and consequently the principal cannot be held responsible.

<sup>354</sup> *Mankin v. Mankin*, 91 Iowa, 406; *Goetz v. Flanders*, 118 Mo. 342.

<sup>355</sup> *Mankin v. Mankin*, 91 Iowa, 406.

<sup>356</sup> *Maple v. Cincinnati, H. & D. R. Co.*, 40 Ohio St. 313, 48 Am. Rep. 685.

<sup>357</sup> *British Mut. Banking Co. v. Charnwood Forest R. Co.*, 18 Q. B. Div. 714.

<sup>358</sup> *Friedlander v. Texas & P. R. Co.*, 130 U. S. 416.

*Lloyd v. Grace Smith* 1912 Ap. Cas. overrules *Brit Mut. v. Charnwood*

As has been said: "To bind the principal the agent must be acting 'for the benefit' of the principal."<sup>359</sup>

In other cases, in this country, however, the principal is held liable under such circumstances, on the ground of estoppel, that where a principal has clothed his agent with power to do a certain act upon the existence of some extrinsic fact necessary and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the agency is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice.<sup>360</sup> "If there be any exception to the rule within our jurisdiction," it was said in a leading New York case,<sup>361</sup> "it arises in the case of municipal corporations, whose structure and functions are sometimes claimed to justify a more restricted liability." According to the rule in these cases, if the agent is acting within the scope of his employment, and the third party acts in good faith in relying on the agent's representation, the fact that the fraud was not for the principal's benefit is immaterial. Thus, it is held that if a cashier draws checks in favor of customers of the bank, but without their knowledge, and without intending them to have any interest therein, and then forges their indorsements and delivers the checks to third persons to be collected for his benefit, the bank is answer-

<sup>359</sup> By Lord Esher, in *British Mut. Banking Co. v. Charnwood Forest R. Co.*, 18 Q. B. Div. 714, and it was further said by Bowen, L. J., in this case: "There is, so far as I am aware, no precedent in English law, unless it be *Swift v. Winterbotham*, L. R. 8 Q. B. 244, a case that was overruled upon appeal (*Swift v. Jewsbury*, L. R. 9 Q. B. 301), for holding that a principal is liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's own private ends."

<sup>360</sup> *Bank of Batavia v. New York*, L. E. & W. R. Co., 106 N. Y. 195, 60 Am. Rep. 440; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Armour v. Mich. Cent. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603.

<sup>361</sup> *Bank of Batavia v. New York*, L. E. & W. R. Co., 106 N. Y. 195. And see *Parker v. Saratoga County Sup'rs*, 106 N. Y. 392.

able for the act of its cashier, and liable for the checks thus drawn by it.<sup>362</sup>

So, where the local agent of a telegraph company, who was also the agent of an express company at the same place, sent a forged dispatch over his principal's line to a merchant in another place, requesting the latter to send money to his correspondent at the former place to be used in buying grain, and the merchant received such message in due course of business and in good faith forwarded the money by express, and it was intercepted and abstracted by the agent and converted to his own use, the telegraph company was held liable therefor, although an action might also have been maintained against the express company.<sup>363</sup> "Persons receiving dispatches in the usual course of business, when there is nothing to excite suspicion, are entitled to rely upon the presumption that the agents intrusted with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons, and that they would not knowingly send a false or forged message; and it would ordinarily be an unreasonable and

<sup>362</sup> *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 37 Am. St. Rep. 596. As was said in this case: "The cashier, through his office and the powers confided to him for exercise, was enabled to perpetrate a fraud upon his bank, which a greater vigilance of its officers might have earlier discovered, if it might not have prevented. If his position and the confidence reposed in him were such as to enable him to escape detection for the while, then the consequences of his fraudulent acts should fall upon the bank, whose directors, by their misplaced confidence and gift of powers, made them possible, and not upon others who, themselves acting innocently and in good faith, were warranted in believing the transaction to have been one coming within the cashier's powers." As to liability of a bank for other fraud or misrepresentations of cashier, see *Pahquique Bank v. Bethel Bank*, 36 Conn. 325, 4 Am. Rep. 80; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 67; *Steckel v. First Nat. Bank*, 93 Pa. 376, 39 Am. Rep. 758, note.

<sup>363</sup> *McCord v. Western Union Tel. Co.*, 39 Minn. 181, 12 Am. St. Rep. 636; *Bank of Palo Alto v. Pacific Postal Tel. Cable Co.*, 103 Fed. 841. And see *New York & W. Printing Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338; *Birney v. New York & W. Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607, note; *Bank of Cal. v. Western Union Tel. Co.*, 52 Cal. 280.

impracticable rule to require the receiver of a dispatch to investigate the question of the integrity and fidelity of the defendant's agents acting in the performance of their duties before acting. Whether the agent is unfaithful to his trust, or violates his duty to or disobeys the instructions of the company, its patrons may have no means of knowing."<sup>364</sup>

But of course if the agent acts beyond the course of his employment in the transaction in which he commits the fraud, for his own benefit, the principal cannot be held liable therefor.<sup>365</sup>

**§ 513. Fraudulent issues of bills of lading by agent for his own benefit.**

This question often arises in cases of fraudulent issues of bills of lading by an agent, as where he has authority to issue such bills but he issues them fraudulently in the name of another, colluding with him, without receiving the property for which they are apparently issued, and then sells them through his confederate to an innocent third person, for his own benefit. In England, and in some cases in this country, it is held that the principal is not liable in such cases, on the ground that it is not usual for an agent to issue bills of lading until the goods, for which they are issued, have been received, and when he issues a fictitious bill of lading without receiving the goods, he is not acting in the scope of his employment.<sup>366</sup> Thus it is held that a bill of lading issued by a station or shipping agent of a railroad company or other

<sup>364</sup> *McCord v. Western Union Tel. Co.*, 39 Minn. 181, 12 Am. St. Rep. 639.

<sup>365</sup> See *Larbig v. Peck*, 69 App. Div. (N. Y.) 170.

<sup>366</sup> *Cox v. Bruce*, 18 Q. B. Div. 147; *Grant v. Norway*, 10 C. B. 665; *The Freeman v. Buckingham*, 18 How. (U. S.) 182; *Friedlander v. Texas & P. R. Co.*, 130 U. S. 416; *Pollard v. Vinton*, 105 U. S. 7; *St. Louis, I. M. & S. R. Co. v. Knight*, 122 U. S. 79; *Fellows v. Steamer Powell*, 16 La. Ann. 316, 79 Am. Dec. 581; *Hunt v. Mississippi Cent. R. Co.*, 29 La. Ann. 446; *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11, 22 Am. Rep. 26; *Sears v. Wingate*, 3 Allen (Mass.) 103; *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 20 Am. St. Rep. 566; *Louisiana Nat. Bank v. Laveille*, 52 Mo. 380; *Williams v. Wilmington & W. R. Co.*, 93 N. C. 42, 53 Am. Rep. 450; *Dean v. King*, 22 Ohio St. 118.

common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value, and the carrier is not estopped by the statements in such bill from showing that no goods were in fact received for transportation.<sup>367</sup> "The reasoning by which this doctrine is usually supported," says Judge Mitchell in a Minnesota case,<sup>368</sup> "is that a bill of lad-

<sup>367</sup> *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 20 Am. St. Rep. 566.

<sup>368</sup> *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 20 Am. St. Rep. 566, 574. Mitchell, J., in this case, in referring to the reasoning for the opposite rule, that the principal is liable for the agent's fraudulent issue of fictitious bills of lading, further says: "It is urged that force is added to this reasoning in view of the fact that bills of lading are viewed and dealt with by the commercial world as quasi negotiable, and consequently it is desirable that they should be viewed with confidence, and not distrust; and that for these considerations it is better to cast the risk of the goods not having been shipped upon the carrier who has placed it in the power of agents of his own choosing to make these representations, rather than upon the innocent consignee or indorsee, who, as a rule, has no means of ascertaining the fact. If the question was *res integra*, we confess that it seems to us that this argument would be very cogent. But on the other hand, it may be said that carriers are not in the business of issuing and dealing in bills of lading in the same sense in which bankers issue and deal in bills of exchange; that their business is transporting property; and that if the statements in the receipt part of bills of lading issued by any of their numerous station or local agents are to be held conclusive upon them, although false, it would open so wide a door for fraud and collusion that the disastrous consequences to the carrier would far outweigh the inconvenience resulting to the commercial world from the opposite rule. It is also to be admitted that it requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading. But on questions of commercial law it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted. Moreover, on questions of general commercial law the federal courts refuse to follow the decisions of the state courts, and determine the law according to their own



ing is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods, it is susceptible of explanation or contradiction, the same as any other receipt; \* \* \* that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; \* \* \* and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that if the authority of an agent is known to be open for exercise only in a certain event or the performance of a certain contingency, the occurrence of the event or the happening of the contingency, or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority," and the same principle applies "whether the bill of lading was issued fraudulently and collusively, or merely by mistake."

In other cases, however, this doctrine is disapproved and the principal is held liable in such cases on the ground of estoppel.<sup>369</sup> "The reasoning of these cases is, in substance,

views of what it is. It is therefore very desirable that on such questions the state courts should conform to the doctrine of the federal courts. The inconvenience and confusion that would follow from having two conflicting rules on the same question in the same state, one in the federal courts and another in the state courts, is of itself almost a sufficient reason why we should adopt the doctrine of the federal courts on this question. To do otherwise, so long as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against our own citizens."

<sup>369</sup> *Planters' Rice-Mill Co. v. Olmstead*, 78 Ga. 586; *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293; *Wichita Sav. Bank v. Atchison, T. & S. F. R. Co.*, 20 Kan. 519; *Sioux City & P. R. Co. v. First Nat. Bank*, 10 Neb. 556, 35 Am. Rep. 488; *Armour v. Mich. Cent. R. Co.*,

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that the question does not at all depend upon the negotiability of bills of lading, but upon the principle of estoppel in pais; that where a principal has clothed an agent with power to do an act in case of the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact, to the prejudice of a third person who has dealt with the agent or acted on his representation in good faith, in the ordinary course of business."<sup>370</sup> But this principle does not apply to a case where the agent, assuming to act for his principal, is himself the other party, as where he issues the fictitious bill of lading to himself.<sup>371</sup>

**§ 514. Fraudulent issue of stock certificates by agent for his own benefit.**

This question also often arises in cases of the fraudulent issue of stock certificates, as where an agent of a corporation fraudulently issues certificates of stock beyond the amount which the corporation is authorized by law to issue, and then colludes with the transferee of such stock to sell them to innocent purchasers for value for his own benefit. In England it is held that the principal is not liable to the innocent purchasers in an action for deceit, in such cases, for the reasons given in a preceding section;<sup>372</sup> and it seems to be the tendency of the federal courts, in this country, to follow this doctrine.<sup>373</sup>

But in other cases, in this country, it is held that the prin-

65 N. Y. 111, 22 Am. Rep. 603; *Bank of Batavia v. New York*, L. E. & W. R. Co., 106 N. Y. 195, 60 Am. Rep. 440; *Brooke v. New York*, L. E. & W. R. Co., 108 Pa. 529, 56 Am. Rep. 235, 53 Am. Rep. 453, note.

<sup>370</sup> *National Bank of Commerce v. Chicago*, B. & N. R. Co., 44 Minn. 224, 20 Am. St. Rep. 566, 575.

<sup>371</sup> *Bank of New York N. B. Ass'n v. American D. & T. Co.*, 143 N. Y. 559.

<sup>372</sup> *British Mut. Banking Co. v. Charnwood Forest R. Co.*, 18 Q. B. Div. 714; *Shaw v. Port Phillip Min. Co.*, 13 Q. B. Div. 103; *Thorne v. Heard* [1895] App. Cas. 495.

<sup>373</sup> *Moore v. Citizens' Nat. Bank*, 111 U. S. 156.

principal will be liable in such cases on the ground, as has been seen in a preceding section, that since the principal authorizes the agent to do an act which necessarily involves a representation as to some extrinsic fact, which is peculiarly within the agent's knowledge, and the third party, in good faith and in the exercise of due prudence, relies upon such representation, the principal is estopped to deny its truth or falsity.<sup>374</sup> In a leading case, on this point, it was said: "In truth, the power conferred in these cases is of such a nature that the agent cannot do an act appearing to be within its scope and authority, without, as a part of the act itself, representing expressly or by necessary implication, that the condition exists upon which he has the right to act. Of necessity the principal knows this fact when he confers the power. He knows that the person he authorizes to act for him, on condition of an extrinsic fact, which in its nature must be peculiarly within the knowledge of that person, cannot execute the power without, as *res gestae*, making the representation that the fact exists. With his knowledge he trusts him to do the act, and consequently to make the representation which, if true, is of course binding on the principal. But the doctrine claimed is that he reserves the right to repudiate the act if the representation be false. So he does as between himself and the agent, but not as to an innocent third party who is deceived by it. The latter may answer, you intrusted your agent with means effectually to deceive me by doing an act which in all respects compared with the authority you gave, and which act represented that an extrinsic fact known to your agent or yourself, but unknown to me, existed, and you have thus enabled your agent, by falsehood, to deceive me, and must bear the consequences. The very power you

<sup>374</sup> *Fifth Ave. Bank v. Forty-Second St. & G. St. Ferry R. Co.*, 137 N. Y. 231, 38 Am. St. Rep. 712; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30 (see the opinion of the court in this case for a good discussion of the principles and cases on this point); *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652, 51 Am. St. Rep. 727; *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 17 Am. Rep. 540; *American Wire-Nail Co. v. Bayless*, 91 Ky. 94; *Boston & A. R. Co. v. Richardson*, 135 Mass. 473; *Allen v. South Boston R. Co.*, 150 Mass. 200, 15 Am. St. Rep. 185; *Appeal of Kisterbock*, 127 Pa. 601, 14 Am. St. Rep. 868.

gave, since it could not be executed without a representation, has led me into this position, and therefore you are estopped in justice to deny his authority in this case. By this I do not mean to argue that the principal authorizes the false representation. He only in fact authorizes the act which involves a representation, which, from his confidence in the agent, he assumes will be true; but it may be false, and the risk that it may be taken because he gives the confidence and credit which enables its falsity to prove injurious to an innocent party."<sup>375</sup> Thus, where the transfer agent of a corporation makes out in due and regular form a certificate of stock purporting to be signed by the president and treasurer, and countersigned by the secretary, and to which the corporate seal is affixed, and the names of other officers are forged, and the issuing of the certificate is unauthorized, the corporation is liable to one acquiring such certificate in good faith and for value, believing it to be genuine, and who has made all the inquiries regarding it which can be expected of a prudent purchaser.<sup>376</sup> The bona fide purchaser of the stock, in such cases, does not thereby become a stockholder, or acquire the rights of such, because the fraudulent issue is in excess of the powers conferred by charter and therefore void; but it gives such purchaser a right to recover damages for the fraud in an action of tort against the corporation.<sup>377</sup>

But in order that this doctrine may apply it is necessary that the purchaser should act in good faith and prudently. He cannot have this remedy against the principal, if he does not act in good faith himself, as where he does not rely upon the representation of the agent, or where he knows that the agent is acting for himself in selling the stock.<sup>378</sup> If stock of a corporation is fraudulently issued by one of its

<sup>375</sup> *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 70.

<sup>376</sup> *Fifth Ave. Bank v. Forty-Second St. & G. St. Ferry R. Co.*, 187 N. Y. 231, 33 Am. St. Rep. 712.

<sup>377</sup> *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; and see cases cited in note 374.

<sup>378</sup> *Allen v. South Boston R. Co.*, 150 Mass. 200, 15 Am. St. Rep. 185; *Farrington v. South Boston R. Co.*, 150 Mass. 406, 15 Am. St. Rep. 222.

agents as security for his private debt, and the creditor of such agent knew that the surrender and transfer of the former certificate were prerequisites to the lawful issue of a new one, and he took no steps to assure himself that there was a former certificate to be surrendered and transferred, the corporation, as against such creditor, is not estopped to deny the validity of the stock;<sup>379</sup> nor would this doctrine apply if the agent is not acting in the course of his real or apparent authority.<sup>380</sup>

**§ 515. Liability of principal for agent's statutory torts—  
Usury.**

On the same principle that a principal is liable for the common-law torts of his agent, he is also civilly liable for a statutory tort committed by his agent in the course of his employment, whether such tort is authorized or not, or even though it was committed contrary to instructions. If an agent has committed a wrong by violating some statute, whereby a third person is injured, there would seem to be no distinction between holding the principal liable for the statutory penalty and in holding him liable in damages if the tort had been a common-law one. This question probably most frequently arises in cases involving the selling of intoxicating liquors in violation of a statute, as where an agent, in the course of his employment, sells intoxicating liquor to a person who is in the habit of using it to excess, after notice of his habit and a request from his wife not to sell such liquor to him, which sale is prohibited by statute and a penalty prescribed therefor; in such cases the principal will be held civilly liable for the penalty prescribed by statute for such sale, although it is made without his knowledge and consent, and against his instructions.<sup>381</sup> In these cases, "the action is

<sup>379</sup> *Farrington v. South Boston R. Co.*, 150 Mass. 406, 15 Am. St. Rep. 222.

<sup>380</sup> *Manhattan L. Ins. Co. v. Forty-Second St. & G. St. Ferry R. Co.*, 139 N. Y. 146.

<sup>381</sup> *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376; *Keedy v. Howe*, 72 Ill. 133; *Worley v. Spurgeon*, 38 Iowa, 465; *Kehrig v. Peters*, 41 Mich. 475; *Kreiter v. Nichols*, 28 Mich. 496; *Smith v. Reynolds*, 8 Hun (N. Y.) 130; *Peterson v. Knolle*, 35 Wis. 85.

brought under a statute which makes that a tort which was not so before, and provides for the recovery of damages against the tortfeasor. The tort consists in selling intoxicating liquor to one who has the habit of using it to excess, after notice of his habit and a request from his wife not to sell such liquor to him. The defendant engages in the business of selling liquor voluntarily. He chooses to intrust the details of the business to a servant. If he forbids the making of sales to the intemperate person, and his servant negligently, through forgetfulness of the instruction given him, or through a failure to recognize the person, continues to make sales to that person, there is no reason why the defendant should not be responsible for the wrongful act. The sale is his sale, made in the performance of his business, and is an act within the general scope of the servant's employment."<sup>382</sup> But if the principal has in good faith forbidden his agent to let the husband have liquor, and the agent willfully disobeys him, in a civil action such fact may be shown in mitigation of exemplary damages, but not of actual damages.<sup>383</sup>

So as usury is a creature of statute, a principal may be held responsible for the statutory penalty in such case, if his agent is guilty of charging usury in the course of his employment. Thus a principal is responsible for the usury, where an agent, employed by him to loan money on the principal's account, with the latter's knowledge and consent, lends it at a usurious rate of interest, or takes a certain sum or bonus from the borrower, in addition to lawful interest;<sup>384</sup>

In Iowa, under a statute prohibiting the sale of intoxicating liquors to any person in the habit of becoming intoxicated, and prescribing a penalty of \$100 to be paid the school fund, a principal was held liable for a sale by his agent in violation of such statute, although he had instructed his agent not to sell to such persons, and without his knowledge. *Dudley v. Sautbline*, 49 Iowa, 650, 31 Am. Rep. 165.

<sup>382</sup> *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376.

<sup>383</sup> *Keedy v. Howe*, 72 Ill. 133; *Kehrig v. Peters*, 41 Mich. 475; *Kreiter v. Nichols*, 28 Mich. 496.

<sup>384</sup> *Sherwood v. Roundtree*, 32 Fed. 113; *Rogers v. Buckingham*, 33 Conn. 81; *Payne v. Newcomb*, 100 Ill. 611, 39 Am. Rep. 69; *Borch-*

or where, although such unlawful interest or bonus is taken without the principal's knowledge or consent, he subsequently, with a full knowledge of all the facts, ratifies the agent's act in making the loan.<sup>385</sup>

It has been held in Nebraska that a principal is chargeable with the agent's act in taking usurious interest, although taken without his authority or consent and for the agent's own benefit. As was said by the Supreme Court of that state, it is a well settled rule of law, "that in all cases where a person employs another as his agent to loan money for him and places the funds in the hands of the agent for such purpose, the principal is bound by the act of his agent; and if the agent charges the borrower of such money unlawful interest, or even demands and receives from the borrower a bonus for such loan, and appropriates it to his own individual use, either with or without the knowledge of the principal, the principal is affected by the act of the agent."<sup>386</sup>

By the weight of authority, however, where an agent has authority to lend money at a lawful rate of interest only, and without his principal's knowledge, authority, or consent, he goes beyond the course of his employment and exacts from the borrower a bonus or sum in excess of the lawful interest for his own benefit, in the absence of a subsequent ratifica-

erling's *Ex'r v. Trefz*, 40 N. J. Eq. 502; *Scottish Mortg. & Land Inv. Co. v. McBroom*, 6 N. M. 573; *Wyeth v. Braniff*, 84 N. Y. 627; *Land Mortg. Inv. & Agency Co. v. Gillam*, 49 S. C. 345.

<sup>385</sup> *Payne v. Newcomb*, 100 Ill. 611, 39 Am. Rep. 69; *Rogers v. Buckingham*, 33 Conn. 81; and see cases cited in preceding note.

<sup>386</sup> "In contemplation of law the acts of the agent \* \* \* are the acts of the principal, because the nature of the business which he has placed in charge of his agent furnishes the means of violating the law. In such business transaction by agency there cannot be an agreement between the lender, through his agent, and the borrower, and a separate distinct contract between the agent and the borrower, because it is in consideration of the loan that the unlawful interest or bonus is paid, and hence the whole transaction must be a single indivisible proposition,—it is but one contract only." *Philo v. Butterfield*, 3 Neb. 256; *Cheney v. White*, 5 Neb. 261, 25 Am. Rep. 487; *Cheney v. Woodruff*, 6 Neb. 151; *Olmsted v. New England Mortg. Security Co.*, 11 Neb. 487.

tion, the principal will not be liable for usury.<sup>387</sup> And in such cases, the principal does not, by receiving the security and seeking to enforce it, ratify the unauthorized act of the agent,<sup>388</sup> because the agent is acting for himself and not for the principal, in taking the unlawful interest or bonus. But if an agent for loaning money takes a security in his own name as principal, upon usurious interest, the borrower supposing him to be the principal, and the real principal seeks to take advantage of such security, he will be bound by the usury.<sup>389</sup> This is on the principle that where a person deals with an agent in regard to personal property intrusted to him by the principal, without knowledge that the property is not owned by the agent, but supposing him to be the owner thereof and the principal in the transaction, he will possess all the rights that he would have acquired had the transaction been with the real principal, and if the real principal seeks to reap the benefits of such transaction, he must do so subject to the rights of such third person.

So under a statute declaring all persons to be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, restaurants, saloons, eating houses, and all other places of public accommo-

<sup>387</sup> *Solarte v. Melville*, 7 Barn. & C. 430; *Dagnall v. Wigley*, 11 East, 43; *Fisher v. Porter*, 23 Fed. 162; *Eddy v. Badger*, 8 Biss. 238, Fed. Cas. No. 4,276; *Call v. Palmer*, 116 U. S. 98; *Short v. Pullen*, 63 Ark. 385; *Rogers v. Buckingham*, 33 Conn. 81; *Boardman v. Taylor*, 66 Ga. 638; *McLean v. Camak*, 97 Ga. 804; *Cox v. Massachusetts Mut. L. Ins. Co.*, 113 Ill. 382; *Ballinger v. Bourland*, 87 Ill. 513, 29 Am. Rep. 69; *Phillips v. Roberts*, 90 Ill. 492; *Boylston v. Bain*, 90 Ill. 283; *Brigham v. Myers*, 51 Iowa, 397, 33 Am. Rep. 140; *Gokey v. Knapp*, 44 Iowa, 32; *Wyllis v. Ault*, 46 Iowa, 46; *Babcock v. Murray*, 69 Minn. 199; *Acheson v. Chase*, 28 Minn. 211; *Conover v. Van Mater*, 18 N. J. Eq. 481; *Manning v. Young*, 28 N. J. Eq. 568; *Gray v. Van Blarcom*, 29 N. J. Eq. 454; *Muir v. Newark Sav. Inst.*, 16 N. J. Eq. 537; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Bell v. Day*, 32 N. Y. 165; *Fellows v. Longyor*, 91 N. Y. 324, 330; *Van Wyck v. Watters*, 81 N. Y. 352; *Barger v. Taylor*, 30 Or. 228; *Baxter v. Buck*, 10 Vt. 548.

<sup>388</sup> *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137.

<sup>389</sup> *Erickson v. Bell*, 53 Iowa, 627, 36 Am. Rep. 246, distinguishing *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137.



dation or amusement, and that any person who shall violate such statute shall be liable to the person aggrieved in a certain sum, as damages, the keeper of a restaurant wherein the waiters refused to serve a colored man is liable to him, though the action of the waiters is not sanctioned nor ratified by their principal.<sup>390</sup>

A railroad company may be held civilly liable in an action by a municipal corporation, to enforce a penalty for the violation of an ordinance regulating the rate of speed at which railroad trains shall be run through the corporate limits, where an engineer of the company violated such ordinance.<sup>391</sup>

A principal's criminal responsibility for acts of his agent in violation of a statute will be considered in a subsequent section.<sup>392</sup>

#### § 516. Liability of principal for torts of subagent.

Whether or not a principal is liable for the torts of a subagent depends upon whether the subagent, in the course of the employment in which the tort is committed, is the agent of the principal or not. As to when a subagent's appointment is such that he is directly the agent of the principal, and not of the primary agent, has been considered heretofore,<sup>393</sup> so that it will be the object of this section to consider only the principal's liability for the subagent's torts, when the relation between the parties is once determined. If the appointment of the subagent is such that he becomes the agent of the principal, or if the latter ratifies an unauthorized appointment, the principal is liable for his torts, committed in the course of his employment, to the same extent as if the principal himself had appointed him.<sup>394</sup> For example, if an

<sup>390</sup> *Bryan v. Adler*, 97 Wis. 124, 65 Am. St. Rep. 99.

<sup>391</sup> *City of Hammond v. New York, C. & St. L. R. Co.*, 5 Ind. App. 526; *Buffalo v. New York, L. E. & W. R. Co.*, 54 N. Y. State Rep. 150.

<sup>392</sup> See post, § 522.

<sup>393</sup> See ante, §§ 341-345.

<sup>394</sup> *Bank of California v. Western Union Tel. Co.*, 52 Cal. 280; *Halutzok v. Great Northern R. Co.*, 55 Minn. 446; *McKinnon v. Vollmar*, 75 Wis. 82, 17 Am. St. Rep. 178; *Louisville & N. R. Co. v. Blair*, 4 Baxt. (Tenn.) 407.

agent of a telegraph company, with power to delegate his authority, employs another person to transmit and receive messages, and such other person sends a false message purporting to come from the cashier of a bank, directing another bank to pay a fictitious sum of money, and the sender then impersonates the fictitious person and obtains the money, without any neglect on the part of the bank, the telegraph company is responsible to the bank for the same.<sup>395</sup>

If on the other hand the primary agent appoints the subagent on his own account, or the appointment is otherwise such that the subagent is the agent of the primary agent alone, subject to his control, and not of the principal, the latter is not liable for the torts of such subagent.<sup>396</sup>

**§ 517. Liability of principal for torts of independent contractor.**

Besides the relations of principal and agent, and master and servant, there are other relations of employer and employee in which the question of liability for the torts of the latter may arise. One of these is that of principal and independent contractor. The distinction between an independent contractor and an agent has been pointed out in a former chapter.<sup>397</sup> As there shown, as a general rule, an independent contractor is accountable to his employer for results only, and not for the manner or means by which those results are accomplished. But, as has been seen in the preceding sections, the reasons for holding a principal liable for the torts of his agent were because the principal selected his own agent and had the right to direct and control such agent's actions during the course of his employment. In the case of an independent contractor, however, a principal usually has no right to direct and control the contractor's actions, but must allow the contractor to pursue his own methods in accomplishing the result desired.

It is a general rule, therefore, subject to such limitations and exceptions as shall be seen hereafter, that if a principal

<sup>395</sup> *Bank of California v. Western Union Tel. Co.*, 52 Cal. 280.

<sup>396</sup> *Lindsay's Ex'rs v. Singer Mfg. Co.*, 4 Mo. App. 571.

<sup>397</sup> See ante, § 7.

has used reasonable care and diligence in selecting one whom he wishes to accomplish a certain result for him, such person being at liberty to use his own means or methods of accomplishing the given result and not being subject to the principal's control or orders, the latter will not be liable for the negligence or wrongs of such independent contractor or his agents or servants during the course of the employment.<sup>398</sup>

Although it is a general rule that the principal is not liable for the acts of the independent contractor, there are certain limitations or exceptions to this rule. If he has been negligent in the selection of his independent contractor, he may be held liable for the negligence or wrongs of the latter in the performance of his work.<sup>399</sup> And the same is true where the thing contracted to be done is in itself unlawful or tortious;<sup>400</sup> or where the nature of the act contracted to be done is liable to cause an injury to third parties and the principal fails to use due precaution in guarding against

<sup>398</sup> *Butler v. Hunter*, 7 Hurl. & N. 826; *Milligan v. Wedge*, 12 Adol. & E. 737; *Myer v. Hobbs*, 57 Ala. 175, 29 Am. Rep. 719; *Bennett v. Truebody*, 66 Cal. 509, 56 Am. Rep. 117; *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Hale v. Johnson*, 80 Ill. 185; *Prairie State L. & T. Co. v. Doig*, 70 Ill. 52; *Ryan v. Curran*, 64 Ind. 345, 31 Am. Rep. 123; *Kellogg v. Payne*, 21 Iowa, 575; *Eaton v. European & N. R. Co.*, 59 Me. 520, 8 Am. Rep. 430; *McCarthy v. Second Parish*, 71 Me. 318, 36 Am. Rep. 320; *Linton v. Smith*, 8 Gray (Mass.) 147; *Hilliard v. Richardson*, 3 Gray (Mass.) 349, 63 Am. Dec. 743; *DeForrest v. Wright*, 2 Mich. 370; *St. Paul v. Seitz*, 3 Minn. 297, 74 Am. Dec. 753; *King v. New York Cent. & H. R. R. Co.*, 66 N. Y. 186, 23 Am. Rep. 37; *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. Law, 17, 10 Am. Rep. 205; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Painter v. Pittsburgh*, 46 Pa. 213; *Harrison v. Collins*, 86 Pa. 156, 27 Am. Rep. 699; *Haas v. Phila. & S. M. Steamship Co.*, 88 Pa. 269, 32 Am. Rep. 462; *Bailey v. Troy & B. R. Co.*, 57 Vt. 252, 52 Am. Rep. 129.

<sup>399</sup> *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495; *Berg v. Parsons*, 84 Hun (N. Y.) 60; *Colgrove v. Smith*, 102 Cal. 220.

<sup>400</sup> *Ellis v. Sheffield Gas Const. Co.*, 23 Law J. Q. B. 42; *Caswell v. Cross*, 120 Mass. 545; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Darmstaetter v. Moynahan*, 27 Mich. 188; *Congreve v. Smith*, 18 N. Y. 79; *Creed v. Hartmann*, 29 N. Y. 591; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590.

such an injury;<sup>401</sup> or where the work is such that the principal is bound to take charge of it himself;<sup>402</sup> or where the principal exercises control or retains a right to exercise control over the work.<sup>403</sup> And if the other facts in the case are such as to make the principal liable, the mere fact that he has contracted with the contractor that the latter only shall be liable for injuries caused by the work does not relieve him from responsibility.<sup>404</sup>

Thus, the owner of property is not liable for an injury caused to a third person by the negligence of a plumber whom he had employed to repair water pipes in his own way;<sup>405</sup> or by the negligence of a contractor in making and leaving open an excavation in the sidewalk in front of premises, on which he was employed to erect a building;<sup>406</sup> or by the carelessness of the employes of one whose business it is to slate roofs and who was engaged in repairing the defendant's roof.<sup>407</sup> But he is liable for injuries caused to third persons by the negligence or carelessness of a contractor or his employes, where the work itself is of such a nature that it necessarily results in a nuisance;<sup>408</sup> or where a contractor is engaged to build a cer-

<sup>401</sup> *Hole v. Sittingbourne & S. R. Co.*, 6 Hurl. & N. 488; *Tarry v. Ashton*, 1 Q. B. Div. 314; *Williams v. Fresno Canal & Irr. Co.*, 96 Cal. 14; *Colgrove v. Smith*, 102 Cal. 220; *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269; *Eaton v. European & N. R. Co.*, 59 Me. 520, 8 Am. Rep. 430; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Sturges v. Theological Society*, 130 Mass. 414, 39 Am. Rep. 463; *St. Paul v. Seitz*, 3 Minn. 297, 74 Am. Dec. 753; *Tiffin v. McCormack*, 34 Ohio St. 638.

<sup>402</sup> *Bower v. Peate*, 1 Q. B. Div. 321; *Gray v. Pullen*, 5 Best & S. 970; *Water Co. v. Ware*, 16 Wall. (U. S.) 566.

<sup>403</sup> *Sadler v. Hemlock*, 4 El. & Bl. 570; *Sproul v. Hemmingway*, 14 Pick. (Mass.) 1; *St. Paul v. Seitz*, 3 Minn. 297, 74 Am. Dec. 753; *Cincinnati v. Stone*, 5 Ohio St. 38; *Ardesco Oil Co. v. Gilson*, 63 Pa. 146.

<sup>404</sup> *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437.

<sup>405</sup> *Bennett v. Truebody*, 66 Cal. 509, 56 Am. Rep. 117. Compare *Bush v. Steinman*, 1 Bos. & P. 404.

<sup>406</sup> *Ryan v. Curran*, 64 Ind. 345, 31 Am. Rep. 123.

<sup>407</sup> *McCarthy v. Second Parish*, 71 Me. 318, 36 Am. Rep. 320.

<sup>408</sup> *Ware v. St. Paul Water Co.*, 2 Abb. 261, Fed. Cas. No. 17,172; *Vanderpool v. Husson*, 28 Barb. (N. Y.) 196.

tain machine and the principal interferes and gives directions as to the manner of its construction, or it is built according to the principal's plan;<sup>409</sup> or where the injury was caused by the blasting of rock by contractors on a railroad.<sup>410</sup>

**§ 518. Liability of public principals for torts of agents.**

Although it is well settled that the doctrine of respondeat superior applies to private principals for the acts of their agents, this doctrine is inapplicable when it comes to treat of public principals, such as municipal corporations, public officers, etc., and their agents or servants. The reason for this exception to the general doctrine is based on the ground of public policy, and on the ground that since a public agent's authority is conferred upon him by statute, ordinance, or other public law, a third party cannot plead ignorance of his powers, if he exceeds them and negligently or wrongfully does an act not within the scope of his actual authority, although it may be within what seemed to be his powers. It seems to be the doctrine of the cases on this point, that it is better that a private individual should suffer for the wrongs of a public agent, whom he has trusted, than that the government should be the loser. Of course this assumes that the wrong has been committed by such agent beyond the scope of his actual authority, and that the principal has used due discretion and care in selecting the agent; if the public principal actually authorizes the commission of the tort, or if it has been negligent in the selection of an agent for carrying out its functions, it may be liable for his torts the same as any other principal.

The liability of municipal corporations for the negligence or other wrongs of their officers or agents depends upon the nature of the power that the corporation is exercising when the damage complained of is sustained. If a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed

<sup>409</sup> *Ardesco Oil Co. v. Gilson*, 63 Pa. 146.

<sup>410</sup> *Carman v. Steubenville & I. R. Co.*, 4 Ohio St. 399. Compare *McCafferty v. Spuyten Duyvil & P. M. R. Co.*, 61 N. Y. 178, 19 Am. Rep. 267; *Pack v. City of New York*, 8 N. Y. 222.

solely for the benefit of the public, it incurs no liability for the negligence or wrongs of its officers or agents, though acting under color of office, unless some statute subjects the corporation to liability therefor.<sup>411</sup> If, on the other hand, such municipal corporations are acting in their ministerial or corporate character in the management of property for their own benefit, or in the exercise of powers assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence or wrong of officers or agents subject to their control, although they may be engaged in some work that will inure to the general benefit of the public.<sup>412</sup> Thus it is held that a municipal corporation is not liable, in the absence of statute, for an assault and battery committed by its police officers, though done in an attempt to enforce an

<sup>411</sup> *Culver v. Streator*, 130 Ill. 238; *City of Anderson v. East*, 117 Ind. 126, 10 Am. St. Rep. 35; *Wheeler v. Plymouth*, 116 Ind. 158, 9 Am. St. Rep. 837; *Dooley v. Sullivan*, 112 Ind. 451, 2 Am. St. Rep. 209; *Stewart v. New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218; *Curran v. Boston*, 151 Mass. 505, 21 Am. St. Rep. 465; *Howard v. Worcester*, 153 Mass. 426, 25 Am. St. Rep. 651; *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687; *Hines v. Charlotte*, 72 Mich. 278; *O'Leary v. Marquette Fire & Water Com'rs*, 79 Mich. 281, 19 Am. St. Rep. 169; *Kiley v. Kansas*, 87 Mo. 103, 56 Am. Rep. 443; *Gillespie v. Lincoln*, 35 Neb. 34; *Hill v. Charlotte*, 72 N. C. 55; *Moffitt v. Asheville*, 103 N. C. 237, 14 Am. St. Rep. 810; *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857; *McDade v. Chester City*, 117 Pa. 414, 2 Am. St. Rep. 681; *Dodge v. Granger*, 17 R. I. 664, 33 Am. St. Rep. 901; *Whitfield v. Paris*, 84 Tex. 431, 31 Am. St. Rep. 69; *Richmond v. Long*, 17 Grat. (Va.) 375, 94 Am. Dec. 461; *Hubbell v. Viroqua*, 67 Wis. 343, 58 Am. Rep. 866; *Robinson v. Rohr*, 73 Wis. 436, 9 Am. St. Rep. 810. And the same rule applies where a state is principal. *Billings v. State*, 27 Wash. 288. And see *Dillon, Mun. Corp.* §§ 965, 975.

<sup>412</sup> *City of Anderson v. East*, 117 Ind. 126, 10 Am. St. Rep. 35; *Seymour v. Cummings*, 119 Ind. 148; *Bates v. Westborough*, 151 Mass. 174; *Barron v. Detroit*, 94 Mich. 601, 34 Am. St. Rep. 366; *O'Leary v. Marquette Fire & Water Com'rs*, 79 Mich. 281, 19 Am. St. Rep. 169; *Conrad v. Ithaca*, 16 N. Y. 158; *Moffitt v. Asheville*, 103 N. C. 237, 14 Am. St. Rep. 810; *Richmond v. Long*, 17 Grat. (Va.) 375, 94 Am. Dec. 461; *Robinson v. Rohr*, 73 Wis. 436, 9 Am. St. Rep. 810. And see *Dillon, Mun. Corp.* §§ 966, 968.

ordinance of the city;<sup>413</sup> nor for illegal and oppressive acts of officers committed in the administration of an ordinance;<sup>414</sup> nor for the negligence and carelessness of officers in enforcing an ordinance prohibiting the running at large of unlicensed and unmuzzled dogs;<sup>415</sup> nor for an arrest made by them which is illegal for want of a warrant;<sup>416</sup> nor for their unlawful acts of violence in the exercise of their duty whereby an injury is done to the property of an individual;<sup>417</sup> nor for the negligence of firemen, appointed and paid by it, while engaged in the line of their duty.<sup>418</sup> But it will be liable for the negligence of its agents in planning and constructing its public buildings;<sup>419</sup> or in constructing a bridge;<sup>420</sup> or in grading streets, cleansing sewers, and keeping in safe condition wharfs, from which the corporation derives a profit.<sup>421</sup>

— **Public officers** Another exception to the general doctrine of respondeat superior exists in behalf of all public officers of the government in the performance of their public functions, including all grades of officers, whose trust proceeds from and whose responsibility is due to the government. Such officers, as a general rule, are not liable for

<sup>413</sup> *Buttrick v. Lowell*, 1 Allen (Mass.) 172, 79 Am. Dec. 721; *Moffitt v. Asheville*, 103 N. C. 237, 14 Am. St. Rep. 810.

<sup>414</sup> *Odell v. Schroeder*, 58 Ill. 353.

<sup>415</sup> *Culver v. Streator*, 130 Ill. 238; *Whitfield v. Paris*, 84 Tex. 431, 31 Am. St. Rep. 69.

<sup>416</sup> *Cook v. Macon*, 54 Ga. 468; *Harris v. Atlanta*, 62 Ga. 290; nor for carelessness of the officer in making an arrest, *Pollock's Adm'r v. Louisville*, 13 Bush (Ky.) 221, 26 Am. Rep. 260.

<sup>417</sup> *Dargan v. Mobile*, 31 Ala. 469, 70 Am. Dec. 505.

<sup>418</sup> *Wilcox v. Chicago*, 107 Ill. 334; *Hafford v. New Bedford*, 16 Gray (Mass.) 297; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Gillespie v. Lincoln*, 35 Neb. 34; *Kies v. Erie*, 135 Pa. 144, 20 Am. St. Rep. 867; *Dodge v. Granger*, 17 R. I. 664, 33 Am. St. Rep. 901; and many other cases.

<sup>419</sup> *Barron v. Detroit*, 94 Mich. 601, 34 Am. St. Rep. 366; *Seymour v. Cummins*, 119 Ind. 148.

<sup>420</sup> *Conrad v. Ithaca*, 16 N. Y. 158; *City of New York v. Furze*, 3 Hill (N. Y.) 612.

<sup>421</sup> *Barnes v. District of Columbia*, 91 U. S. 540; *Weightman v. Washington*, 1 Black (U. S.) 39.

the negligence or wrongs of their official subordinates, provided they have used reasonable and proper care in selecting such subordinates, and in superintending them in the discharge of their duties.<sup>422</sup> But they would be liable for the negligence or wrongs of their private agents.<sup>423</sup> Thus the law is well settled that postmasters-general, deputy postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence or wrong only, and not for that of their subordinates in office, although selected by them and subject to their orders.<sup>424</sup>

— **Public charities.** Although there has been some conflict in the cases, the weight of authority is to the effect that if corporations are appointed for the purpose of maintaining a public charity, the funds of which are derived from public or private donations for such purpose, and are held exclusively for such purpose, such corporations are not liable for the negligence or wrongful acts of their agents or servants, unless they have failed to use due care in employing or retaining them. "It would be against all law and all equity to take those trust funds, so contributed for a special charitable purpose, to compensate injuries inflicted or occasioned by the negligence of the agents or servants of" such charity.

<sup>422</sup> *Sutton v. Clarke*, 6 Taunt. 29; *Robertson v. Sichel*, 127 U. S. 507; *Central R. & B. Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334; *Maxwell v. McIlvoy*, 2 Bibb (Ky.) 211; *Keenan v. Southworth*, 110 Mass. 474, 14 Am. Rep. 613; *Hutchins v. Brackett*, 22 N. H. 252, 53 Am. Dec. 248; *Wiggins v. Hathaway*, 6 Barb. (N. Y.) 632; *Conwell v. Voorhees*, 13 Ohio, 523, 42 Am. Dec. 206; *Bolan v. Williamson*, 1 Brev. (S. C.) 181; *Erwin v. Davenport*, 9 Helsk. (Tenn.) 44; *Richmond v. Long*, 17 Grat. (Va.) 375, 94 Am. Dec. 461; *Sawyer v. Corse*, 17 Grat. (Va.) 230.

<sup>423</sup> *Bolan v. Williamson*, 1 Brev. (S. C.) 181; *Sawyer v. Corse*, 17 Grat. (Va.) 230.

<sup>424</sup> *Lane v. Cotton*, 1 Ld. Raym. 646, 12 Mod. 472; *Whitfield v. Le Despencer*, 2 Cowp. 754; *Dunlop v. Munroe*, 7 Cranch (U. S.) 242; *Bishop v. Williamson*, 11 Me. 495; *Keenan v. Southworth*, 110 Mass. 474, 14 Am. Rep. 613; *Hutchins v. Brackett*, 22 N. H. 252, 53 Am. Dec. 248; *Wiggins v. Hathaway*, 6 Barb. (N. Y.) 632; *Conwell v. Voorhees*, 13 Ohio, 523, 42 Am. Dec. 206; *Schroyer v. Lynch*, 8 Watts (Pa.) 453.



"It would be carrying the doctrine of respondeat superior to an unreasonable and dangerous length."<sup>425</sup> Thus this doctrine has been applied to corporations for the purpose of maintaining hospitals and similar institutions, in actions against them by the patients or other persons receiving treatment and care, for injuries resulting from the negligence or wrongful act of the physician, nurse or other attendant;<sup>426</sup> and the fact that the corporation receives pay from some of the patients who are able to pay does not vary this doctrine.<sup>427</sup> The doctrine has been applied also to railroad companies and other large corporations maintaining a hospital for their employes, although the hospital is sustained in part by contributions from the employes.<sup>428</sup> It has also been applied to other charitable corporations, as a corporation for the purpose of maintaining a house of refuge,<sup>429</sup> or an industrial school.<sup>430</sup> So in a Pennsylvania case it was applied to a fire insurance patrol corporation, organized for the purpose of protecting and saving property from fire.<sup>431</sup>

In order that this doctrine may apply, however, the purpose for which the corporation is appointed must be a purely charitable one. Thus it has been held that the rule does not apply

<sup>425</sup> *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 6 Am. St. Rep. 745; *Fcoffees v. Heriot's Hospital v. Ross*, 12 Clark & F. 506.

<sup>426</sup> *Hearns v. Waterbury Hospital*, 66 Conn. 98; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *McDonald v. Mass. General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Downes v. Harper Hospital*, 101 Mich. 555, 45 Am. St. Rep. 427; *Van Tassell v. Manhattan Eye & Ear Hospital*, 60 Hun (N. Y.) 585; *Joel v. Women's Hospital*, 89 Hun (N. Y.) 73. And see *Clark & M. Corp.* § 244.

<sup>427</sup> *McDonald v. Mass. General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Downes v. Harper Hospital*, 101 Mich. 555, 45 Am. St. Rep. 427. But see *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675.

<sup>428</sup> *Union Pac. R. Co. v. Artist*, 19 U. S. App. 612, 60 Fed. 365; *Elghmy v. Union Pac. R. Co.*, 93 Iowa, 538; *Richardson v. Carbon Hill Coal Co.*, 6 Wash. 52, 10 Wash. 648.

<sup>429</sup> *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495.

<sup>430</sup> *Williamson v. Louisville Industrial School*, 95 Ky. 251, 44 Am. St. Rep. 243.

<sup>431</sup> *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 6 Am. St. Rep. 745.

to a Young Men's Christian Association,<sup>422</sup> or to a cemetery corporation.<sup>423</sup> So in a Massachusetts case where a corporation composed of officers and agents of fire insurance companies was organized for the purpose of preventing fires and saving life and property, the expenses of which were paid by compulsory assessments on fire insurance agents and organizations, it was held that the corporation was organized, not for the purpose of public charity but in the interest of insurance companies and agencies, and hence the above doctrine would not apply.<sup>424</sup>

Of course, if such a corporation has not used due care and diligence in selecting its agents, it will be liable for the negligence or wrongful acts of such agents to the same extent as any other private corporation.<sup>425</sup>

#### § 519. Application of these rules to corporations.

The rules considered in the preceding sections apply as well to private corporations as principals as to private individuals, in fact many of the cases cited in support of these rules are cases in which corporations were principals; but it is beyond the scope of this work to go into a full discussion of rules and principles applying to corporations as principals.<sup>426</sup>

### VI. CRIMINAL LIABILITY OF PRINCIPAL FOR AGENT'S ACTS.

#### § 520. In general.

As the commission of a crime or offense is also a tort, the civil liability of a principal for such acts of his agent are governed by the rules considered in the preceding sections.<sup>427</sup> It is the object, therefore, of this subdivision, to treat only of a principal's criminal responsibility for his agent's acts.

<sup>422</sup> Chapin v. Holyoke Young Men's Christian Ass'n, 165 Mass. 280.

<sup>423</sup> Donnelly v. Boston Catholic Cemetery Ass'n, 146 Mass. 163.

<sup>424</sup> Newcomb v. Boston Protective Department, 151 Mass. 215.

<sup>425</sup> Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675. And see Clark & M. Corp. § 244.

<sup>426</sup> For a good treatment of the liability of private corporations for the torts of their officers and agents, see Clark & M. Corp. § 236 et seq., and § 734 et seq.

<sup>427</sup> See ante, §§ 491-501.

As a general rule the principal is liable to a criminal prosecution for the acts of his agent only where he has expressly or impliedly ordered or authorized their commission, or has in some manner participated in or assented thereto.<sup>438</sup> As has been said: "A principal is not liable criminally for the unlawful act of his agent or clerk, unless he participated in the act, or consented to it; and this participation or consent cannot be presumed by the court or jury merely from the fact that the guilty party was the clerk of the accused,"<sup>439</sup> In order to charge the principal criminally, "there must be such a direct participation in the act, or such assent and concurrence therein, as would involve him morally in the guilt of the action."<sup>440</sup> For this reason the cases are comparatively rare, and may be considered as exceptions to the general rule, where by legal rules a party is charged criminally for acts of his agent done without his knowledge and assent.<sup>441</sup> If a principal knows that his agent intends to commit an offense, or is committing an offense, in the course of his employment, and acquiesces, or fails to make any effort to prevent it, he is criminally responsible for the offense to the same extent as if he had expressly ordered or authorized it.<sup>442</sup> In accordance with this rule, it is held that a warden

<sup>438</sup> *Somerset v. Hart*, 12 Q. B. Div. 360; *Rex v. Huggins*, 2 Ld. Raym. 1574; *Reg. v. Holbrook*, 3 Q. B. Div. 60; *Hardcastle v. Bielby* [1892] 1 Q. B. 709; *United States v. Birch*, 1 Cranch, C. C. 571, Fed. Cas. No. 14,595; *United States v. Beaty*, Hempst. 487, Fed. Cas. No. 14,555; *Patterson v. State*, 21 Ala. 571; *Selbert v. State*, 40 Ala. 60; *Nall v. State*, 34 Ala. 262; *Kinnebrew v. State*, 80 Ga. 232; *Hipp v. State*, 5 Blackf. (Ind.) 149, 33 Am. Dec. 463; *Com. v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; *People v. Parks*, 49 Mich. 333; *Anderson v. State*, 22 Ohio St. 305; *Com. v. Johnston*, 2 Pa. Super. Ct. 317; *Mitchell v. Mims*, 8 Tex. 6; *State v. Bacon*, 40 Vt. 456; *Com. v. Lewis*, 4 Leigh (Va.) 664. And see *Clark & M. Crimes*, 395.

<sup>439</sup> *Selbert v. State*, 40 Ala. 60, 63.

<sup>440</sup> *Com. v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432. And see *Com. v. Morgan*, 107 Mass. 199.

<sup>441</sup> *Com. v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432. And see post, § 521.

<sup>442</sup> *Rex v. Almon*, 5 Burrow, 2686; *Com. v. Stevens*, 155 Mass.

of a prison is not criminally responsible for the act of his deputy in killing a prisoner by keeping him in an unhealthy place, without the warden's command or knowledge.<sup>443</sup>

The true ground of the principal's liability, in those cases where he is held criminally responsible for the acts of his agent, is not because of the relation of principal and agent, for as has been seen in an earlier part of this work, an agency cannot be created for the purpose of committing illegal or criminal acts,<sup>444</sup> but is on the ground that the principal in the particular case is a principal or accessory to the crime by in some way being privy to or participating in it. As has been said: "Strictly speaking, the legal relation of principal and agent does not exist in regard to the commission of criminal offenses. All who participate in the commission of such offenses are either principals or accessories."<sup>445</sup>

#### § 521. Agent's unauthorized criminal acts.

But where the agent's criminal act is unauthorized and is not sanctioned or acquiesced in by the principal, especially where it is contrary to the principal's direct instructions, the latter cannot be held criminally responsible therefor.<sup>446</sup> Such instructions or dissent of the principal in order to constitute a defense, however, must be given in good faith and not merely colorably; and the question of authority or consent is to be determined by the real understanding between the principal and agent, and is a question of fact for the jury.<sup>447</sup>

291; *Com. v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432. And see *Clark & M. Crimes*, 397.

<sup>443</sup> *Rex v. Huggins*, 2 Ld. Raym. 1574.

<sup>444</sup> See ante, § 38.

<sup>445</sup> *Anderson v. State*, 22 Ohio St. 305, 308.

<sup>446</sup> *Somerset v. Hart*, 12 Q. B. Div. 360; *Barnes v. State*, 19 Conn. 398; *Hipp v. State*, 5 Blackf. (Ind.) 149, 33 Am. Dec. 463; *Com. v. Stevens*, 153 Mass. 421, 25 Am. St. Rep. 647; *Com. v. Wachen-dorf*, 141 Mass. 270; *People v. Parks*, 49 Mich. 333; *Com. v. Jun-kin*, 170 Pa. 195; *State v. Smith*, 10 R. I. 258. And see *Clark & M. Crimes*, 398.

<sup>447</sup> *Com. v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; *State v. Wentworth*, 65 Me. 234; *Anderson v. State*, 22 Ohio St. 305; *Com. v. Johnston*, 2 Pa. Super. Ct. 317.

Thus, where a druggist, whose license prohibits him from selling intoxicating liquors to minors, instructs his agents not to sell to minors, nor to persons under twenty-five years of age, but leaves his agents to determine the question of minority from the appearance of customers applying for liquors, it is a question for the jury to determine whether such instruction is given in good faith; and if so determined he will not be criminally responsible for such a sale by one of his clerks, where the latter made an innocent mistake in judging of a customer's appearance.<sup>448</sup> So if such a sale is made with his knowledge and approval, the fact that the principal previously instructed his agents not to furnish liquors to those not entitled thereto is immaterial, and the principal is criminally responsible.<sup>449</sup> It is also necessary that the principal should have used due and proper care in looking after his business. He will not be exempted from criminal responsibility for the agent's criminal acts, if the latter has been enabled to commit them through want of proper care and oversight or other negligence, on the part of the principal, in reference to the business in which the agent is employed.<sup>450</sup>

Thus it is held that a principal is not criminally responsible for a libelous publication by his agent unless he authorized or knew of it, or unless it was due to negligence or want of due care, on his part, in reference to the business in which the agent is engaged.<sup>451</sup> But where such a publication issues

<sup>448</sup> *Com. v. Stevens*, 153 Mass. 421, 25 Am. St. Rep. 647. And see *Com. v. Johnston*, 2 Pa. Super. Ct. 317.

<sup>449</sup> *State v. Mueller*, 38 Minn. 497.

<sup>450</sup> *Com. v. Morgan*, 107 Mass. 199; *Reg. v. Holbrook*, 3 Q. B. Div. 60; *Rex v. Dixon*, 3 Maule & S. 11. And see *Clark & M. Crimes*, 401.

<sup>451</sup> *Com. v. Morgan*, 107 Mass. 199.

In England the doctrine is somewhat unsettled as to the extent of a bookseller's or publisher's criminal responsibility for his agent's libelous publication. In *Rex v. Almon*, 5 Burrow, 2686, it was held that the principal was *prima facie* responsible in such cases, but that the presumption may be rebutted by the principal showing that he was ignorant of or was not privy to the agent's act. In later cases, the booksellers or publishers were held criminally responsible for all publications issuing from their houses, although the particular act of sale or publication was done with-

from the principal's office or shop, the presumption is that he is guilty, and unless it was made under such circumstances as to negative any presumption of privity, or connivance, or want of ordinary precaution on his part to prevent it, he will be criminally responsible.<sup>452</sup>

In case of a public nuisance, however, it is held that a principal is criminally liable for his agent's acts in committing it, although committed without the principal's knowledge, consent, or authority, or contrary to his general orders.<sup>453</sup>

— **Effect of ratification.** A principal's ratification does not have the same effect on criminal acts as on other unauthorized acts of an agent, and the principal will not be held criminally responsible for the act of his agent, committed without his knowledge or authority, by subsequently ratifying it.<sup>454</sup>

#### § 522. Statutory crimes or offenses.

There is a class of cases, however, in which the principal is held criminally liable for the agent's acts committed in the course of his employment, under certain statutes or police regulations, such as those in regard to selling liquor on Sunday, the sale of adulterated food, the speed of trains, running trains on Sunday, etc., although the principal has not authorized or consented thereto and has in no manner entered into

out their knowledge. *Rex v. Walter*, 3 Esp. 21; *Rex v. Gutch*, 1 Moody & M. 437. But in a still later case, *Reg. v. Holbrook*, 3 Q. B. Div. 60, it is held under statutory provision that the principal, in such cases, may show that the publication was without his authority, knowledge or consent, and was not due to any negligence or want of care on his part.

<sup>452</sup> *Com. v. Morgan*, 107 Mass. 193.

<sup>453</sup> *Reg. v. Stephens*, L. R. 1 Q. B. 702; *Barnes v. Akroyd*, L. R. 7 Q. B. 474; *Rex v. Medley*, 6 Car. & P. 292.

<sup>454</sup> *Morse v. State*, 6 Conn. 9. As said by Hosmer, C. J., in this case: "In the law of contracts a posterior recognition, in many cases, is equivalent to a precedent command, but it is not so in respect of crimes. The defendant is responsible for his own acts, and for the acts of others done by his express or implied command; but to crimes the maxim *omnis ratihabito retrotrahitur et mandato equiparatur*, is inapplicable."

the commission of such act, either mentally or physically or even though the principal has expressly forbidden its commission.<sup>455</sup> The rule, in these cases, is based on the ground that the statutes dispense with the necessity for any actual criminal intent, and hold the principal responsible for the agent's acts in violation of such statutes without regard to the mental attitude of the principal. It is his duty to see that any acts performed under these statutes, whether by himself or by an agent, are not in violation thereof, and if he does not do so he cannot excuse himself by showing that he gave his agent instructions to act in compliance with the statute. As has been said: "Many statutes which are in the nature of police regulations impose criminal penalties, irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible."<sup>456</sup>

In accordance with this rule, the principal has been held liable to criminal prosecution for his agent's acts, although contrary to instructions, in violation of statutes requiring saloon keepers to keep their saloons closed on Sundays,<sup>457</sup> as where a clerk of the owner opened a saloon on Sunday morning, without the latter's knowledge or consent, to clean it, and sold a drink to a customer;<sup>458</sup> or in violation of statutes prohibiting and punishing the sale of intoxicating liquors without a license, or their sale to minors or drunkards;<sup>459</sup> or in violation of a statute prohibiting the placing

<sup>455</sup> *Redgate v. Haynes*, 1 Q. B. Div. 89; *Rex v. Dixon*, 4 Camp. 12; *Brown v. Foot*, 66 Law T. (N. S.) 649; *Attorney General v. Siddon*, 1 Crompt. & J. 220; *State v. Baltimore & S. Steam Co.*, 13 Md. 181; *Com. v. Kelley*, 140 Mass. 441; *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270.

<sup>456</sup> *State v. Kittelle*, 110 N. C. 560, 28 Am. St. Rep. 703; *State v. McCance*, 110 Mo. 398.

<sup>457</sup> *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270; *People v. Waldvogel*, 49 Mich. 337; *Banks v. Sullivan*, 78 Ill. App. 298.

<sup>458</sup> *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270; *People v. Blake*, 52 Mich. 566; *People v. Waldvogel*, 49 Mich. 337.

<sup>459</sup> *Police Commissioners v. Cartman* [1896] 1 Q. B. 655; *Waller v. State*, 38 Ark. 656; *Edgar v. State*, 45 Ark. 356; *Mogler v. State*, 47 Ark. 110; *Loeb v. State*, 75 Ga. 258; *Snider v. State*, 81 Ga.

of screens or curtains over the windows of a saloon;<sup>460</sup> or in violation of a statute prohibiting the use of alum in bread, where the principal ordered it put in, though he gave directions for mixing it up in a manner which would have rendered it harmless.<sup>461</sup>

In other cases, however, it is held that the principal is not criminally responsible for the offenses of his agent committed in violation of a statute, as the unlawful sale or keeping for sale of intoxicating liquors, adulterated food, etc., unless he has expressly or impliedly authorized or ordered such offense, or acquiesced in its commission.<sup>462</sup> In accordance with this

753, 12 Am. St. Rep. 350; *Noecker v. People*, 91 Ill. 494; *McCutcheon v. State*, 69 Ill. 601; *Whitton v. State*, 37 Miss. 379; *Riley v. State*, 43 Miss. 397; *State v. Kittelle*, 110 N. C. 560, 28 Am. St. Rep. 698; *State v. Dow*, 21 Vt. 484; *State v. Denoon*, 31 W. Va. 122. But see *Barnes v. State*, 19 Conn. 398; and cases cited in post, note 462.

In *Carroll v. State*, 63 Md. 551, it is held that if, in the conduct of the business of selling liquors, a prohibited sale is made by the agent to a minor, the principal cannot shield himself from liability on the ground that his agent violated his general instructions, and did not inquire or was deceived by the purchaser as to his age; that while deriving profit from the sale, the principal cannot delegate his duty to know that the purchase is a lawful one to the determination of an agent, and be excused by the agent's negligence or error; that intention not being an essential ingredient of the offense, the principal is held bound for the acts of his agent in violation of law while pursuing his ordinary business as such agent; being engaged in business where it is lawful to sell only to such persons as are not excepted by law, it is his duty to know when a sale is made that it is to a properly situated person, and therefore it is his duty to trust nobody to do his work but some one whom he can safely trust to discharge his whole duty, and if he does not do so the law holds him answerable. Compare *Com. v. Stevens*, 153 Mass. 421, 25 Am. St. Rep. 647.

<sup>460</sup> *Com. v. Kelley*, 140 Mass. 441.

<sup>461</sup> *Rex v. Dixon*, 4 Camp. 12.

<sup>462</sup> *Hardcastle v. Bielby* [1892] 1 Q. B. 709; *Barnes v. State*, 19 Conn. 398; *Morse v. State*, 6 Conn. 9; *State v. Hayes*, 67 Iowa, 27, (and see *Elwood v. Price*, 75 Iowa, 228); *State v. Wentworth*, 65 Me. 234; *Com. v. Hayes*, 145 Mass. 289; *Com. v. Stevens*, 153 Mass. 421, 25 Am. St. Rep. 647; *Com. v. Stevens*, 155 Mass. 291; *Com. v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; *Com. v.*



rule it is held that an indictment cannot be maintained against a principal for the selling of spirituous liquor, by his agent without his authority or consent, to an intoxicated person,<sup>463</sup> or to a minor,<sup>464</sup> or for a sale on Sunday;<sup>465</sup> nor against a husband for selling spirituous liquors without a license, where the offense is committed by his wife in his absence, and there is no proof of his having authorized the act.<sup>466</sup>

In some states it is held that the fact that an agent makes an illegal sale of spirituous liquor in his principal's shop and in the course of his business is *prima facie* a sale by the principal, but that the principal may rebut this presumption by showing that the sale was made without his knowledge or consent or contrary to his orders.<sup>467</sup> In such cases, when it is shown that such a sale has been made by an agent, the burden of proof is upon the principal to show that it has been made without his knowledge or consent or contrary to his instructions. But in Massachusetts it is held that such a sale is not *prima facie* a sale by the principal, but is only *prima facie* evidence of a sale by him, which may be sub-

Putnam, 4 Gray (Mass.) 16; *State v. Smith*, 10 R. I. 258; *Galocchio v. State*, 9 Tex. App. 387.

A principal's previous instructions to his agents not to sell liquors to those not entitled thereto is immaterial where the particular sale was made with his knowledge and approval. *State v. Mueller*, 38 Minn. 497.

<sup>463</sup> *Hipp v. State*, 5 Blackf. (Ind.) 149, 33 Am. Dec. 463; *People v. Parks*, 49 Mich. 333. A single sale to an habitual drunkard, made by the clerk of a person authorized to sell spirituous liquors, at his place of business, and in his absence, is not sufficient to raise a presumption that the clerk was authorized by his employer to make such unlawful sale. *State v. Mahoney*, 23 Minn. 181; *Parker v. State*, 4 Ohio St. 563.

<sup>464</sup> *Hanson v. State*, 43 Ind. 550; *Lauer v. State*, 24 Ind. 131; *Thompson v. State*, 45 Ind. 495. Or to a slave. *Patterson v. State*, 21 Ala. 571.

<sup>465</sup> *Rosenbaum v. State*, 24 Ind. App. 510.

<sup>466</sup> *Pennybaker v. State*, 2 Blackf. (Ind.) 484; *Selbert v. State*, 40 Ala. 60.

<sup>467</sup> *State v. Wentworth*, 65 Me. 234; *State v. McCance*, 110 Mo. 398; *State v. Shortell*, 93 Mo. 123; *State v. Heckler*, 81 Mo. 417; *Anderson v. State*, 22 Ohio St. 305.

mitted to the jury; and that although a jury might be warranted in inferring that such a sale was authorized, it would not follow that a court could rule that there is presumption of fact that it was so.<sup>468</sup> As was held in this state, the fact that a man employs an agent to conduct a business expressly authorized by statute, and that the agent makes the unlawful sale in the course of it, do not necessarily overcome the presumption of the principal's innocence merely because the business is liquor selling, and may be carried beyond the statutory limits.<sup>469</sup>

Under a penal statute, in Illinois, "to prevent trespassing by cutting timber," the object of which is to punish the wrongdoer, as well as to recompense the injured party, it is held that in order to punish the principal for an act of his agent, it must appear from the evidence that the agent committed the act under the express directions of his principal, or at least that from the nature of his employment authority to do the act was necessarily implied.<sup>470</sup>

<sup>468</sup> *Com. v. Briant*, 142 Mass. 463, 56 Am. Rep. 707; *Com. v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; *Com. v. Stevenson*, 142 Mass. 466; *Com. v. Holmes*, 119 Mass. 195.

<sup>469</sup> *Com. v. Briant*, 142 Mass. 463, 56 Am. Rep. 707. And see *Com. v. Putnam*, 4 Gray (Mass.) 16; *Com. v. Dunbar*, 9 Gray (Mass.) 298.

<sup>470</sup> *Cushing v. Dill*, 3 Ill. 460; *Satterfield v. Western Union Tel. Co.*, 23 Ill. App. 446; *Cushman v. Oliver*, 81 Ill. 444.



